Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2699

Appeal MA10-38

Toronto Police Services Board

February 29, 2012

Summary: The appellant sought access to an audio cassette recording of 911 calls made by an individual to the Toronto Police Services Board regarding a complaint of assault by the individual against the appellant. The appellant was subsequently convicted of criminal harassment. The police denied access to the record in its entirety pursuant to section 38(b) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act*. This order upholds the decision of the police. The information in the record contains both the appellant's and the individual's personal information; all of the information in the record is exempt under section 38(b). The presumption under section 14(3)(b) (investigation into violation of law) applies as do the factors in sections 14(2)(f) (highly sensitive) and (h) (supplied in confidence). The absurd result principle does not apply. The police properly exercised their discretion under section 38(b).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of "personal information"), 14(1)(f), 14(2)(f) and (h), 14(3)(b), 38(b).

Orders and Investigation Reports Considered: MO-2321, PO-2285, MO-1378, M-757.

OVERVIEW:

[1] This appeal concerns a request submitted by the appellant to the Toronto Police Services Board (the police), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for "the audiotapes of various calls that were made

in connection with the charges against [the requester] on which he has already been tried." Along with the request, the appellant enclosed a list of the "audiotapes" that he wishes to access.

[2] By way of background, in June 2005 an individual (the affected party) made two 911 calls to police regarding a complaint of assault against the appellant. These calls were transferred to Emergency Medical Services (EMS). An audio cassette recording (the audio recording) was created by the police in connection with their investigation into the affected party's complaint. The appellant was charged with criminal harassment and assault causing bodily harm as a result of the incident. The appellant was, subsequently, convicted in September 2007 of criminal harassment and placed on two years probation. It is the audio recording that was created by the police in June 2005 that is the record at issue in this appeal.

[3] The police issued an access decision, denying access in full to the audio recording, pursuant to the discretionary exemption in section 38(b), read with section 14(1) (access to one's personal information/personal privacy). In support of its exemption claim the police cited the application of the presumption in section 14(3)(b) (investigation into violation of law) of the *Act*.

[4] The appellant appealed the police's decision.

[5] The parties were unable to resolve the appeal during the mediation stage of the appeal process and the file was transferred to the adjudication stage for an inquiry, in which the parties were invited to submit written representations on the unresolved issues in response to a Notice of Inquiry. I sought and received representations from the police and shared the non-confidential portions with the appellant. The appellant responded with representations, which I shared, in their entirety, with the police. I invited reply representations from the police, who chose not to submit further representations.

[6] In the discussion that follows, I reach the following conclusions:

- the record contains the personal information of the appellant, the affected party and other identifiable individuals;
- the record qualifies for exemption under section 38(b);
- the absurd result principle does not apply to overcome the application of section 38(b); and
- the police properly exercised their discretion in denying access to the record under section 38(b).

RECORD:

[7] There is one record at issue, comprised of the audio recording of two 911 telephone calls made to police and transferred to EMS.

ISSUES:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the discretionary exemption at section 38(b) apply to the information at issue?

C. Does the absurd result principle apply in the circumstances of this case?

D. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[8] In order to decide whether the disclosure of the record would constitute an unjustified invasion of personal privacy under section 38(b) of the *Act,* it is necessary to decide first whether the record contains "personal information" and, if so, to whom it relates.

[9] The definition of personal information is found in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to

> financial transactions in which the individual has been involved,
>
> …
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> …
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[10] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[1]

[11] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[2] In addition, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[12] The police state that the record contains "the names, addresses, telephone numbers , dates of birth and other identifying information" about the appellant, the affected party and other identifiable individuals.

[13] On my review of the record, I am satisfied that it contains the appellant's personal information, including information relating to his national origin, age and sex [paragraph (a)], his address [paragraph (d)] and the views or opinions of the affected party about the appellant [paragraph (g)].

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225.
[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

[14] I also find that the record contains the personal information of the affected party, including her sex, age and family status [paragraph (a)], her medical status [paragraph (b)], her address and telephone number [paragraph (d)], her personal views about her condition [paragraph (e)] and her name together with other information about her [paragraph (h)].

[15] Finally, I also find that the record contains personal information about other identifiable individuals, including the affected party's views or opinions about these individuals [paragraph (g)].

B. Does the discretionary exemption at section 38(b) apply to the information at issue?

[16] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the police must look at the information and weigh the appellant's right of access to his own personal information against the affected party's right to the protection of her privacy. If the police determine that release of the information would constitute an unjustified invasion of the affected party's personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information.

[17] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected party's personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b). The information at issue in this appeal does not fit within paragraphs (a) to (e) of section 14(1).

[18] Therefore, in this case, I will consider paragraph (f) of section 14(1) and determine whether disclosure of the information in the record at issue "does not constitute an unjustified invasion of personal privacy."

[19] None of the section 14(4) exceptions apply in the circumstances of this appeal. Similarly, the "public interest override" in section 16 has not been raised or argued in this appeal and would not apply, in any event. Accordingly, my analysis will be based

on the application of the presumptions in section 14(3), the factors in section 14(2) and any unlisted factors.

[20] The police claim that the presumption against disclosure in section 14(3)(b) applies to the record at issue. This section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[21] The police state that the record was created as a "direct result" of the criminal offences (criminal harassment and assault causing bodily harm) committed by the appellant under the *Criminal Code*. The police submit that record forms part of their investigation into the offences committed by the appellant against the affected party.

[22] The appellant submits that section 14(3)(b) is "clearly inapplicable", but does not provide any substantive basis for this argument. The main thrust of the appellant's argument is that the audio recording was played in open court during his criminal trial and is now a matter of public record. Accordingly, to withhold disclosure now under the circumstances would be absurd.

[23] I address the application of the absurd result principle below. However, I now deal with the application of the presumption in section 14(3)(b). Having listened to the audio recording and reviewed the parties representations, and having found that the audio recording contains the personal information of the appellant, the affected party and other identifiable individuals, I am satisfied that this record was compiled as part of a police investigation into an alleged assault of the affected party by the appellant. The fact that the appellant was subsequently charged, tried and convicted of a criminal offence as a result of this incident, and that the audio recording may have been played in open court during the appellant's trial is irrelevant to a consideration of the application of the section 14(3)(b) presumption.

[24] However, a finding that the section 14(3)(b) presumption applies does not conclude my analysis. I must also consider the extent to which the factors in section 14(2), as well as any other unlisted factors, weigh for or against disclosure.

[25] In my view, the factors in sections 14(2)(f) and (h) may be relevant in the circumstances of this case. These sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> …
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

[26] While the police do not specifically mention the application of these factors in their representations, statements made in their representations are, in my view, relevant to a consideration of these factors. The police state that the affected party called 911 in order to receive assistance from the police and EMS after being "brutally attacked and left on the street." The police indicate that they did not seek the affected party's consent to the release of the contents of the record because in the circumstances of this incident they did not feel that it would be provided. The police suggest that disclosing the information at issue in this case may having a chilling effect on the willingness of others in similar circumstances to come forward to the police with their complaints. On this point, the police state:

> If this record is released victims may hesitate or be deterred from calling the very institutions that have been set up to protect them, if they realize their information may be potentially released to their accused, this could cause a huge setback to the criminal justice system and the victim's own recovery process. The victim will, in a sense, be re-victimized by the release of this record. The accused, if given the record, would then possibly be able to gain pleasure by listening repeatedly to the pain and fear inflicted on the victim.

[27] The appellant does not comment directly on the application of the factors in sections 14(2)(f) and (h) in his representations. However, he states that the record contains information that relates specifically to the appellant and there was "no expectation or promise of privacy when the telephone call was made." The appellant adds that any expectation of privacy was waived when the decision was made to rely on the record at the appellant's trial. The appellant submits that it was "foreseeable" that information would become "a matter of public record" and that disclosure is "consistent with fundamental principles of freedom of information." The appellant states that the audio recording was played in open court and while the court maintains a transcript of the record, it is not a transcript of the actual audio recording.

[28] Having carefully reviewed the parties' representations and the contents of the record at issue, as well as the circumstances surrounding the incident that is at the core

of the appellant's request, I find that the factors favouring privacy protection [sections 14(2)(f) and (h)] far outweigh any factors weighing in favour of disclosure. I am satisfied that the record contains highly sensitive personal information that the affected party assumed she was providing in confidence. As well, in my view, when an individual comes forward to the police with a complaint of assault that individual is doing so in confidence. Accordingly, I concur with the police that if complainants knew that this type of information would be readily available under the *Act* to their perpetrators, it is reasonable to suggest that this may have a significant chilling effect on the willingness of victims to come forward with similar complaints in the future.

[29] While I appreciate the appellant's interest in obtaining his personal information, I note that the majority of the personal information in the record is about the affected party, with only a limited amount of the personal information about the appellant. The appellant has provided no reasonable basis for seeking the information in the record, other than to suggest that the court process relating to this incident has concluded and the information in the record is in the public domain. However, assuming that the court process has concluded, I see no factors weighing in favour of disclosure. While portions of the record may have been introduced into evidence at the trial of the appellant, by extension I cannot conclude that the record itself is now in the public domain. If the appellant wishes to gain access to the information that formed part of the court process then there are other avenues available to him through which to pursue this information.

[30] To summarize, I find that the presumption in section 14(3)(b) applies in this case and that the factors in section 14(2)(f) and (h) also weigh heavily in favour of privacy. Absent any other factors weighing in favour of disclosure, I conclude that disclosure of the audio recording would constitute an unjustified invasion of the affected party's personal privacy under section 38(b) of the *Act*, subject to my review of the application of the absurd result principle, which has been raised by the appellant in this case.

C. Does the absurd result principle apply in the circumstances of this case?

[31] Whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where a requester originally supplied the information, or that requester is otherwise aware of it, the information may be found not exempt under either section 38(b) or section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[4]

[32] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[5]

[4] Orders M-444, MO-1323.
[5] Orders M-444, M-451.

- the requester was present when the information was provided to the institution[6]

- the information is clearly within the requester's knowledge[7]

[33] The police take the position that the absurd result principle should not be given effect in the circumstances of this appeal. They argue that the information provided was neither given by the appellant nor was he present when the information was provided by the affected party. The police add that there is no evidence that the audio recording was ever heard by the appellant during the court process.

[34] The police rely on the analysis of Adjudicator Daphne Loukidelis in Order MO-2321. In that case, Adjudicator Loukidelis found that the absurd result principle did not apply to overcome the application of section 38(b) to videotaped statements provided to the police by an affected party who was involved in an incident with the requester.

[35] The appellant responds that the audio recording in this case has "already been made a matter of public record in a public court proceeding and privacy is not an issue." In the appellant's view, it would be "absurd to withhold information in these circumstances."

[36] I concur with the police and find that the absurd result principle does not apply in this case. In reaching this conclusion, I rely on the analysis of Adjudicator Loukidelis in Order MO-2321.

[37] In my view, the circumstances in Order MO-2321 are virtually identical to those in the case before me. In Order MO-2321, the requester sought access to videotaped statements provided to the Durham Regional Police by the victim of a criminal offence in which the requester was the perpetrator of the offence. As in the case before me, the requester was charged and tried criminally for the offence and then sought access to the recordings after the court process had concluded. The only notable difference is that the records in Order MO-2321 were videotaped statements provided by the victim rather than an audio recording.

[38] I find the following excerpt from Adjudicator Loukidelis' decision in Order MO-2321 instructive:

> I agree with the Police that the absurd result principle does not apply in the circumstances of this appeal. Even though the videotaped statements at issue may have formed part of the Crown's case for prosecuting the

[6] Orders M-444, P-1414.
[7] Orders MO-1196, PO-1679, MO-1755.

appellant and may have been viewed by him in court, I find that disclosure of the records would be inconsistent with the purpose of the exemption in section 14(3)(b).

In Order PO-2285, former Senior Adjudicator David Goodis reviewed the issue of disclosure and consistency with the purpose of the section 14(3)(b) exemption. He stated:

> Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester. In my view, this situation is similar to that in my Order MO-1378, in which the requester sought access to photographs showing the injuries of a person he was alleged to have assaulted.

The former Senior Adjudicator then proceeded to review the following excerpt from Order MO-1378:

> The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.
>
> In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:
>
> > Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the *Act*.
>
> In my view, **this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals** [see section 1(b)]**, as well as the particular sensitivity inherent in records compiled in a law enforcement context.** The appellant has not persuaded me that

> I should depart from this approach in the circumstances of this case [emphasis added].

I agree with the approach taken by the former Senior Adjudicator with respect to the absurd result principle in Orders MO-1378 and PO-2285, as well as by Inquiry Officer Fineberg in Order M-757, and adopt it for the purposes of the present appeal. From this perspective, whether or not the appellant has had access to the information contained in the records through the court process, the section 14(3)(b) presumption may still apply.

I have carefully considered the contents of the specific records at issue, and have done so with consideration of the background to the creation of the records, and the nature of the investigation undertaken by the Police. I find that there is a particular and inherent sensitivity to the information in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act* described by former Senior Adjudicator Goodis in Order MO-1378. Accordingly, in consideration of protecting the privacy of individuals, as well as the particular sensitivity inherent in records compiled in a law enforcement context, I find that the absurd result principle does not apply in this appeal.

[39] I concur with the approach taken by Adjudicator Loukidelis in Order MO-2321 along with the analysis she relies upon in Orders PO-2285, MO-1378 and M-757. I have carefully reviewed the contents of the record at issue, with consideration of the background surrounding the creation of the record, and the nature of the incident involving the appellant and the affected party. I find that there is a particular and inherent sensitivity to the information in the record, and that disclosure would not be consistent with the fundamental purpose of the *Act*, as described by former Senior Adjudicator Goodis in Order MO-1378. Accordingly, in consideration of protecting the privacy of individuals, notably the affected party in this case, as well as the particular sensitivity inherent in records compiled in a law enforcement context, I find that the absurd result principle does not apply in this appeal.

D. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[40] In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, this office may review the institution's decision to exercise its discretion to deny access. I will review the exercise of discretion in this appeal since the police *could* have disclosed some of the personal information in the record.

[41] An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so. In addition, this office may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.[8] I may not, however, substitute my own discretion for that of the institution.[9]

[42] Some of the factors considered relevant in the exercise of discretion are listed below. However, the individual circumstances of an appeal may render some of these factors irrelevant, and additional unlisted considerations may be relevant.[10]

[43] Considerations include:

- the purposes of the *Act*, including the principles that:
    - information should be available to the public;
    - individuals should have a right of access to their own personal information;
    - exemptions from the right of access should be limited and specific; and
    - the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- the relationship between the requester and any affected persons;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person; and
- the historic practice of the institution with respect to similar information.

[8] Order MO-1573.
[9] section 43(2).
[10] Orders P-344, MO-1573.

[44] The police state that the information collected was supplied to the police and used during the course of their investigation into a possible law enforcement matter. The police submit that the affected party supplied her personal information "believing there to be a certain degree of confidentiality." The police state that their investigations imply an element of trust that the law enforcement agency will act responsibly when dealing with recorded personal information. The police note that the appellant was convicted of criminal harassment. The police fear that if the contents of the record is released the affected party may be exposed to further negative attention or harassment from the appellant. The police add that given the unique status of law enforcement institutions and the authority they have to collect personal information, they feel that the spirit and intent of the *Act* places a greater responsibility on them to safeguard the privacy interests of individuals. Finally, owing to the nature of the information in the record, the police felt it was not possible to release information to the appellant without violating the privacy of the affected party.

[45] In response, the appellant argues that the police could have disclosed the appellant's personal information while severing the personal information of the affected party and others. Accordingly, the appellant takes issue with the police's exercise of discretion.

[46] Having carefully considered all of the circumstances of this appeal, including the contents of the audio recording and the representations provided, I am satisfied that the police properly exercised their discretion under section 38(b) of the *Act*.

[47] I concur with the police that the nature of the incident, the expectations of the affected party regarding confidentiality and the sensitivity of the information at issue are relevant factors to be considered in the exercise of discretion. In my view, the sensitivity of the information reasonably led to the conclusion that the privacy rights of the affected party are sufficiently significant to outweigh the access rights of the appellant under section 38(b). In addition, after a careful review of the audio recording, I am satisfied that most of the information in the record constitutes the affected party's personal information and that the personal information about the appellant was limited and inextricably intertwined with that of the affected party, making any reasonable severance exercise meaningless. In my view, had the police attempted to sever the appellant's personal information from the affected party's, the appellant would have been left with meaningless disconnected snippets of personal information. Therefore, in the circumstances, I find that the police have properly exercised their discretion to withhold the personal information in the record and I will not interfere with it on appeal.

[48] Accordingly, I uphold the exercise of discretion by the police and find that the records are exempt under section 38(b) of the *Act*.

ORDER:

I uphold the decision of the police to deny access to the record.

Original signed by: February 29, 2012
Bernard Morrow
Adjudicator