Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2979

Appeal MA12-510

City of Kawartha Lakes Police Services Board

November 15, 2013

Summary: The appellant submitted a request to the City of Kawartha Lakes Police Services Board for access to a previously partially disclosed occurrence report, which had been the subject of an earlier access request, as well as a copy of another specified occurrence report. Relying on section 38(b) (personal privacy) of the *Act*, the police denied access to the records that they identified as responsive to the request. In this order, the adjudicator finds that, given that the appellant already has a severed version of two of the records at issue, the appeal is moot with respect to the unsevered information in those two records. The adjudicator further finds that the records at issue contain the personal information of the appellant and other identifiable individuals, but that a portion of the withheld information relates to the appellant only. He orders that the appellant's personal information be disclosed and that it would be an absurd result to withhold certain other information from the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 14(3)(b) and 38(b).

Orders Considered: Orders MO-2049-F, MO-2525, MO-2571, MO-2728, MO-2954, P-1295, PO-2756 and PO-3057-I.

Cases Considered: *Borowski v. The Attorney General of Canada*, (1989) 57 D.L.R. (4th) 231 (SCC).

BACKGROUND:

[1] The City of Kawartha Lakes Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to a previously partially-disclosed occurrence report, which had been the subject of an earlier access request, as well as a copy of another specified occurrence report.

[2] Relying on the discretionary exemption at section 38(b) (personal privacy) of the *Act*, the police denied access in full to the requested information.

[3] The appellant appealed the decision. His appeal form provides:

> I made a request to re-issue a copy of a previous report [specified occurrence number] to see what type of favouritism is being applied. This was also denied citing the same provisions meanwhile I still have a copy of the original "attached" from June 2011. It is perfectly fine to be released at that time but not now. …

[4] The appellant's appeal form was accompanied by partially severed versions of two of the records at issue in this appeal.

[5] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act.*

[6] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the police and an affected party. No responding representations were received. I then sent a Notice of Inquiry to the appellant. The appellant provided representations in response to the Notice.

RECORDS:

[7] The records at issue in the appeal consist of certain identified responsive records in the custody and control of the police, including Occurrence Summary Reports.

ISSUES:

A. Is the appeal moot with respect to the partially severed versions of two records that the appellant received as a result of an earlier access request?

B. Do the records contain personal information?

C. Does the discretionary exemption at section 38(b) apply to the personal information in the records?

D. Would it be absurd to withhold certain information from the appellant?

DISCUSSION:

A. Is the appeal moot with respect to the two records that the appellant received from another source?

[8] The issue of mootness arises in appeals where the record has previously been disclosed by the institution, or was disclosed to the requester in some other context. The issue before me, therefore, is whether the appeal is moot with respect to the unsevered information in two of the records at issue because they are already in the appellant's possession. Should I nonetheless proceed to a determination of the exemptions claimed for the unsevered portions of the records? For the reasons that follow, I conclude that I should not proceed with such a determination.

[9] In Order P-1295, former Assistant Commissioner Irwin Glasberg considered the question of when an appeal under the *Act* could be considered moot. He stated:

> The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision of *Borowski v. The Attorney General of Canada* [(1989), 57 D.L.R. (4th) 231]. There, the court commented on the topic of mootness as follows:
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> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...
>
> In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has

> disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

[10] The approach taken by former Assistant Commissioner Glasberg, which was to apply the test set out in *Borowski*, has been adopted in several subsequent orders of this office. In particular, adjudicators declined to make a determination in regard to exemptions claimed for records where the requester already had obtained access to the record at issue, rendering the appeal moot. This determination is made where there is not sufficient public interest or importance to decide if the exemptions apply nonetheless.[1]

[11] Based on the test for mootness referred to in *Borowski*, I find that the first part of the test has been met as the live controversy, which might have been said to exist between the parties relating to the unsevered portions of the two records, is now at an end because that information has already been disclosed to the appellant.

[12] Under the second part of the test, I have considered whether the question of access to the unsevered portion of the two records is of sufficient public interest or importance to merit reviewing them regardless of their mootness. While the appellant states that he made the request to "see what type of favoritism is applied", I find that he has not provided me with sufficiently cogent evidence that the disclosure of the unsevered information contained in the two records is in the public interest or has some other public importance. Accordingly, I have concluded that no useful purpose would be served by proceeding with my inquiry regarding the application of section 38(b) to the unsevered portion of the two records.

[13] In conclusion, I find that the appeal is moot with respect to the unsevered portions of two of the records at issue in the appeal and I will not be making a determination on the exemptions claimed by the police with respect to them. Accordingly, I will not address that information any further in this order. I will address the severed portions of the two records in the section 38(b) analysis below.

B. Do the records contain personal information?

[14] The discretionary personal privacy exemption in section 38(b) of *MFIPPA* applies to "personal information". Consequently, it is necessary to determine whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,

[1] See Orders MO-2049-F, MO-2525, MO-2571, MO-2728, PO-2756 and PO-3057-I.

> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (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.

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

[16] Having carefully reviewed the records at issue and the representations, I conclude that they contain the appellant's personal information within the meaning of the definition of personal information at section 2(1) of the *Act*, including his name, and the views of other individuals about him. Some of the records also contain the personal information of other identifiable individuals which was collected in the course of a criminal investigation.

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[2] Order 11.

[17] That said, I find that some information in the records pertains only to the appellant and qualifies as his personal information alone. I have highlighted this information in green on a copy of the records that I have provided to the police along with a copy of this order.

C. Does the discretionary exemption at section 38(b) apply to the personal information in the records?

[18] Section 38(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[19] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in the records which also contain the requester's personal information.[3]

[20] In other words, where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[21] As certain information contained in the records pertains only to the appellant and qualifies as his personal information alone, disclosing this information to him would not constitute an "unjustified invasion" of another individual's personal privacy under section 38(b). Accordingly, I will order that this information, which I have highlighted in green on a copy of the records provided to the police along with this order, be disclosed to the appellant. I will now address the balance of the withheld information sought by the appellant.

[22] In determining whether the exemption in section 38(b) applies,[4] 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 another individual'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

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[3] Order M-352.

[4] See in this regard the extensive analysis conducted by Adjudicator Laurel Cropley in Order MO-2954.

paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

[23] In their decision letter the police relied on the discretionary exemption at section 38(b) of the *Act*, with particular emphasis on the presumption at section 14(3)(b) to deny access to the requested information.

[24] Section 14(3)(b) reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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.

[25] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[5] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[6]

[26] I have reviewed the records and it is clear from the circumstances that the personal information in them was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely the *Criminal Code* of Canada.

[27] Accordingly, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law, and falls within the presumption in section 14(3)(b). Accordingly, the disclosure of the personal information is presumed to constitute an unjustified invasion of personal privacy of other identifiable individuals.

Conclusion

[28] Given the application of the presumption in section 14(3)(b), I am satisfied that the disclosure of the remaining personal information in the records, including that which is contained within the severed portions of the records that were partially disclosed to the appellant, would constitute an unjustified invasion of another individual's personal privacy. Accordingly, I find that this information is exempt from disclosure under section 38(b) of the *Act*.

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[5] Orders P-242 and MO-2235.
[6] Orders MO-2213 and PO-1849.

D. Would it be absurd to withhold certain information from the appellant?

[29] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[7]

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

- the requester sought access to his or her own written witness statement[8]
- the requester was present when the information was provided to the institution[9]
- the information is clearly within the requester's knowledge.[10]

[31] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[11]

[32] I have carefully reviewed the withheld information and find that it would be absurd to withhold certain information contained in the records which I have found to be exempt under section 38(b) because it was provided by the appellant, or which is clearly within his knowledge. I have highlighted this information in yellow on a copy of the pages of the records that I have provided to the police along with a copy of this order and will order that it be disclosed.

ORDER:

1. I order the police to disclose to the appellant the portions of the records that I have highlighted on a copy of the pages of the records that I have enclosed with this order by sending it to him by **December 23, 2013** but not before **December 16, 2013**.

2. In all other respects, I uphold the decision of the police.

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[7] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.
[8] Order M-444.
[9] Orders M-444, P-1414 and MO-2266.
[10] Orders MO-1196, PO-1679, MO-1755 and MO-2257-I.
[11] Orders MO-1323, PO-2622 and PO-2642.

3. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the pages of the records as disclosed to the appellant.

Original signed by: November 15, 2013
Steven Faughnan
Adjudicator