

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3034

Appeal MA10-70-2

London Police Services Board

April 14, 2014

Summary: The appellant sought access to records relating to him. The police granted access to portions of an occurrence report, and denied access to the remaining portions on the basis of the exemptions in sections 38(a) (discretion to deny access to requester's own information), 8(1)(d) (law enforcement) and 38(b) (personal privacy). In this order, the decision of the police to deny access to some information on the basis of the exemption in section 38(b) is upheld. This order also finds that some withheld information does not qualify for exemption, and ought to be disclosed.

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"), 8(1)(d), 14(2)(d), 14(3)(b), 38(a) and 38(b).

Orders and Investigation Reports Considered: Order PO-1764.

OVERVIEW:

[1] The London Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all information concerning the requester in the possession of the police.

[2] In response to the request, the police issued a decision stating that partial access was granted to the records requested. The police advised the requester that access to some of the records was denied on the basis of a number of exemptions in the *Act*, and

that certain records were removed from the scope of the *Act* on the basis of the exclusionary provision in section 52(3) (employment-related matters) of the *Act*.

[3] The appellant appealed that decision, and appeal MA10-70 was opened by this office. That appeal resulted in Order MO-2556, issued on October 18, 2010, in which the police were ordered to provide the appellant with a decision letter respecting access to pages 13-21 of the responsive records.

[4] The police issued a decision regarding pages 13-21 of the records and granted partial access to the records. Access was denied to the withheld portions of the records on the basis of the exemptions in sections 8(1)(d) and (l) (law enforcement), 38(a) (discretion to deny requester's own information) and 14(1) and 38(b) (personal privacy).

[5] The appellant appealed the police's decision regarding pages 13-21, and this appeal (MA10-70-2) was opened.

[6] During mediation, the parties confirmed that the only records remaining at issue were the withheld portions of pages 17 and 19.

[7] Also during mediation, the appellant advised that he was not pursuing access to the names, dates of birth or contact information of any of the individuals named in the records. As a result, this information is no longer at issue.

[8] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the police, initially, and they provided representations in response. I then sent the Notice of Inquiry, along with a copy of the non-confidential representations of the police, to the appellant, who also provided representations in response.

[9] In this appeal, I find that some of the withheld information contains the personal information of certain affected parties, and I uphold the decision of the police to deny access to it. I also find that some of the withheld information on the bottom of page 17 does not contain the personal information of any identifiable individuals other than the appellant, and does not qualify for exemption under either section 38(a) or 38(b).

RECORDS:

[10] The records remaining at issue are the withheld portions of pages 17 and 19 (portions of a general occurrence report), except for the names of any individuals (which were removed from the scope of this appeal).

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 38(b) apply to the information?
- C. Does the discretionary exemption at section 38(a), in conjunction with section 8(1)(d) of the *Act*, apply to the information?

DISCUSSION:

Issue A. Do the records contain "personal information" as defined in section 2(1)?

[11] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "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,

- (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,
- (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,
- (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;

[12] 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.¹ Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.²

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[14] As noted above, the withheld pages are part of a general occurrence report. The records relate to certain allegations made against the appellant in connection with his actions involving the University of Western Ontario (UWO).

[15] The police take the position that the records contain information about identifiable individuals other than the appellant. By raising section 38(b), the police also acknowledge that the records contain the personal information of the appellant.

[16] The appellant confirms his position that the term "personal information" is defined to mean "information about an identifiable individual."⁴

[17] On my review of the records (the withheld portions of pages 17 and 19), I note that they form part of a three-page narrative contained in the general occurrence report. This narrative reviews the actions of the appellant and the allegations made against him, as well as the actions taken by the police (including contact with the appellant). Most of the narrative (including all of page 18) has been disclosed to the appellant. The appellant also stated that he is not seeking access to the names of any individuals, and these names have been severed from the narrative and are not at issue.

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁴ The appellant refers to the case of *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62.

[18] The only portions of the records remaining at issue consist of a number of withheld sentences on page 17, and one withheld sentence on page 19.

[19] Because the records relate to the appellant's actions and his involvement with the police, I find that they contain the appellant's personal information, and consist of his name, along with other personal information relating to him (paragraph (h) of the definition).

[20] On my review of the withheld portions of pages 17 and 19, I find that a number of them contain the personal information of identifiable individuals other than the appellant. Although all names have been removed from the record, the nature of the information contained in a number of the withheld sentences is such that the identities of individuals could easily be determined.

[21] Specifically, I find that the disclosure of the first five withheld sentences on page 17, the first part of the sixth sentence on page 17, an identifier in the last sentence on page 17, and the withheld sentence on page 19, would disclose the personal information of identifiable individuals, as disclosure would reveal statements made by them. I am also satisfied that if these statements or this information is disclosed, the identities of the individuals making the statements would be revealed. Accordingly, these portions of the records contain the personal information of identifiable individuals other than the appellant, and fit within the definition of "personal information" in section 2(1).

[22] However, portions of the withheld information on the bottom of page 17 simply describe certain very public actions taken by the appellant. In my view, these portions of page 17 do not contain the personal information of any identifiable individuals other than the appellant and cannot qualify for exemption under section 38(b). As a result, I will only review the possible application of section 38(a), in conjunction with section 8(1)(d), to that information.

[23] Having found that some portions of the records contain the personal information of the appellant, as well as that of other identifiable individuals, I will review the possible application of section 38(b) to those portions.

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

[24] 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 persons' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information. 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

[25] 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 person'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 presumption in section 14(3)(b)

[26] In this appeal, the police rely on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act*, which states:

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;

[27] The police refer to the fact that the records in this appeal were created as a result of an investigation into a possible violation of section 264 of the *Criminal Code* (the possibility of criminal harassment charges). The police also acknowledge that, ultimately, no charges were laid.

[28] The appellant does not address the possible application of this presumption.

[29] Section 14(3)(b) applies to personal information that was compiled and is identifiable as part of an investigation into a possible violation of law. An investigation of a possible violation of section 264 of the *Criminal Code* is clearly an investigation into a possible violation of law. In addition, previous orders have consistently held that section 14(3)(b) may still apply even if no proceedings are commenced against any individuals, and that the presumption only requires that there be an investigation into a possible violation of law.⁵ Although the presumption does not apply to information compiled after the completion of an investigation into a possible violation of law,⁶ it does apply to information compiled as part of the investigation.

[30] In the circumstances of this appeal, I am satisfied that the personal information contained in the withheld portions of the records was compiled and is identifiable as part of an investigation into a possible violation of law, and that it fits within the presumption in section 14(3)(b).

The factor in section 14(2)(d)

[31] In his representations, the appellant refers to the factor in 14(2)(d) in support of his position that the records ought to be disclosed to him. That section reads:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[32] For section 14(2)(d) to apply, previous orders have stated the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

⁵ See Orders P-242 and MO-2235.

⁶ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁷

[33] In his representations the appellant argues that section 14(2)(d) applies to the records for three reasons:

- he refers to specific civil litigation involving him and the police which was dismissed, but states that during the litigation the police failed to provide certain information to him and to the courts;
- he refers to other litigation ongoing between him and the UWO, and states that disclosure of the information on pages 17 and 19 will "clearly help him make his case" while non-disclosure will result in further delays; and
- he refers to section 36(2) of the *Act*, which provides him with a right of correction of his personal information. He identifies the concerns he has about the information in the records, and his interest in having inaccurate information corrected.

[34] Based on the evidence provided by the appellant, I make the following findings:

[35] With respect to the appellant's reference to the civil litigation involving himself and the police, based on the appellant's statement that this action was dismissed, I find that any legal right the appellant may have had relates to a proceeding which is not existing or contemplated, but is completed. As a result, the second part of the four-part test set out above is not met.

[36] Regarding the appellant's reference to the civil litigation involving himself and UWO, although the appellant refers generally to this civil litigation which is still ongoing, his reference to this information is general, referring to the "civil litigation" and "something like 12 substantial claims" made by him. He states that the matter is ready to go to trial, but does not identify the right in question that is being determined, nor the reasons why the withheld information has some bearing on or is significant to the determination of the right in question. In these circumstances, I find that the third and fourth parts of the test set out above have not been met.

[37] With respect to the appellant's reference to section 36(2) of the *Act* and his right to correction of the record, without commenting on the validity of this claim given the wording of section 36(2), I note that the appellant's only argument about the application of this factor relates to information which is not contained in the portions of

⁷ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

the records which I find qualify for exemption. Accordingly, I will not consider the possible application of this factor to that specific information.

[38] In summary, I have found that the presumption in section 14(3)(b) applies to the information at issue. I have also found that the factor favouring disclosure in section 14(2)(d) does not apply. Based on these findings, I am satisfied that the disclosure of the information at issue would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellant. Accordingly, I find that the withheld portions of the record that contain the personal information of other individuals is exempt from disclosure under section 38(b) of the *Act*, subject to my review of the police's exercise of discretion.

Exercise of Discretion

[39] The section 38(b) exemption is discretionary and permits the police to disclose information, despite the fact that it could be withheld. On appeal, this office may review the police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.⁸

[40] In support of its decision to exercise its discretion not to disclose the withheld portions of the record to the appellant, the police refer to a number of factors which they considered, including that the information was provided by identifiable individuals in confidence in the context of an investigation into possible criminal behaviour. The police also state that there is no compelling reason to disclose the remaining information to the appellant.

[41] In the appellant's representations he refers to a number of reasons why he wants access to the records. He also identifies his concern that the police withheld the portions of the records in bad faith in order to prolong civil litigation, and that some of the personal information contained in the records is publically available and, therefore, ought to be disclosed.

[42] I have reviewed the circumstances of this appeal and the records at issue. The police provided the appellant with significant portions of the records. These portions include information relating to the appellant's actions, their interactions with him, and the specific results of the investigation. I also note that some additional information is to be disclosed to the appellant as a result of this order. With respect to the remaining information, I have found that disclosure of this information would constitute an unjustified invasion of the personal information of identifiable individuals, and that it qualifies for exemption under section 38(b). I am also not satisfied that it is publically available. Based on the nature of the information remaining at issue, and on the police's representations, I am satisfied that the police have not erred in exercising their

⁸ Orders PO-2129-F and MO-1629.

discretion not to disclose the remaining information contained in the records to the appellant.

Issue C. Does the discretionary exemption at section 38(a), in conjunction with section 8(1)(d) of the *Act*, apply to the information?

[43] As noted above, I have found that the portions of the records that contain the personal information of the appellant as well as that of other identifiable individuals qualify for exemption under section 38(b) of the *Act*. However, I have also found that some portions of the withheld information on the bottom of page 17 do not contain the personal information of any identifiable individuals other than the appellant, and cannot qualify for exemption under section 38(b). I must now review whether those portions of the record qualify for exemption under section 38(a), in conjunction with section 8(1)(d) of the *Act*.

[44] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Sections 38(a) and (b) of the *Act* provide a number of exemptions to this general right of access. Section 38(a) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information [emphasis added];

[45] Sections 8(1)(d) reads:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

[46] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[47] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁹ Except in the case of section 8(1)(e), where section 8 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.¹⁰

[48] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.¹¹

[49] The police submit that the disclosure of the records would disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

[50] I have found that the portions of the records that contain the personal information of identifiable individuals are exempt under section 38(b) of the *Act*. I have also found that some portions of the withheld information on the bottom of page 17 do not contain the personal information of any identifiable individuals other than the appellant, as they “simply identify very public actions taken by the appellant.” In my view, the disclosure of these portions of page 17, which do not contain the personal information of any identifiable individuals other than the appellant, would not disclose the identity of a confidential source of information in respect of a law enforcement matter under section 8(1)(d). As a result, I find that this information, which relates to the public actions of the appellant, does not qualify for exemption under section 8(1)(d) and/or 38(a), and I will order that it be disclosed.

ORDER:

1. I find that some portions of the withheld information on the bottom of page 17 do not qualify for exemption under sections 38(a) or 38(b), as they do not contain the personal information of any identifiable individuals. As a result, I order the police

⁹ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹⁰ Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

¹¹ Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

to disclose to the appellant by **May 16, 2014** those portions of information on the bottom of page 17 of the records. For greater certainty, I have highlighted in yellow the portions of page 17 which the police are to disclose on the copy of that page sent to the police along with this order.

2. I uphold the decision of the police to withhold the remaining severed portions of the records on the basis of the exemption in section 38(b) of the *Act*.

Original Signed By:
Frank DeVries
Adjudicator

April 14, 2014