

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3038

Appeal MA12-463

The Greater Sudbury Police Services Board

April 17, 2014

Summary: The appellants sought access under the *Act* to police records relating to an incident which involved the appellants and other individuals. The police denied access to portions of the records on the basis that disclosure would be an unjustified invasion of personal privacy, relying on the exemption in section 38(b), in conjunction with section 14(3)(b) (information compiled as part of police investigation) of the *Act*. This order substantially upholds the access decision of the police, but orders disclosure of certain portions which contain the personal information of the appellants only.

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

OVERVIEW:

[1] The Greater Sudbury Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to police records pertaining to a complaint. Specifically, the requesters asked to be provided with a copy of the full police report concerning a complaint made against them on a given date, including the names of all complainants.

[2] The police issued a decision granting partial access to the records. The police withheld the remaining parts of the records pursuant to the law enforcement and

personal privacy exemptions in sections 8(2)(a), 38(a) and 38(b) of the *Act*. The requesters (now the appellants) appealed the police's decision.

[3] During mediation, the police clarified that they were only relying on the personal privacy exemption in section 38(b) in support of their decision to withhold the relevant portions of the records. As no further mediation was possible, the file was transferred to adjudication.

[4] I sent a Notice of Inquiry to the police, the appellants, and other individuals who may have an interest in the records (the affected parties). The police, the appellants and one of the affected parties provided representations. The affected party objected to disclosure of his/her personal information in the records.

[5] In this order, I find that the records contain the personal information of the appellants and several other identifiable individuals. Some of the portions that have been withheld contain the information of the appellants only. As no exemptions apply to this information, I order disclosure of these portions. I uphold the police's application of the discretionary personal privacy exemption in section 38(b) to the remaining information.

RECORDS:

[6] The records remaining at issue consist of a one-page occurrence summary and a two-page general occurrence report.

ISSUES:

- A: Do the records 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: Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[7] In order to decide whether the personal privacy exemption applies to the withheld information, I must first determine whether the records contain "personal

information”, and if so, to whom it relates. Section 2(1) of the *Act* defines “personal information” 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 if 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;

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

[9] In their representations, the police state that the records contain the personal information of identifiable individuals/witnesses/complainants within the meaning of section 2(1) of the *Act*, including their names, addresses, phone numbers and date(s) of birth. The appellants do not dispute that this information constitutes personal information for the purpose of the *Act*. The affected party remains silent on this point.

Finding

[10] I am satisfied that the records contain the personal information of the appellants, including their address, telephone number, and personal opinions about an ongoing dispute.

[11] In addition, I find that certain portions of the records also contain the personal information of the affected parties including their names, telephone numbers and addresses, as well as other information about them such as their observations, views and opinions. Although this information also constitutes the personal information of the appellants, it is so intertwined with the information of the affected parties that disclosure would also reveal the personal information of the affected parties. The information of the appellants cannot be reasonably severed from the information of the affected parties and, below, I will review the application of section 38(b) to this information.

[12] However, certain portions of the withheld information, including views expressed about the appellants and information that describes conduct attributed to the appellants, only contain the appellants' personal information, and not that of the affected parties. I find that disclosure of this information would not disclose the personal information of any identifiable individual. As these portions contain only the personal information of the appellants, they are not covered by the personal privacy exemption in section 38(b). Since no other exemption applies, I will order this information to be disclosed.

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

[13] 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 exemptions from this right. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Section 38(b) involves weighing a requester's right of access to his or her own personal information against the right of other identifiable individuals to protection of their privacy.

[14] In this case, if release of the information would constitute an “unjustified invasion” of the other individuals’ personal privacy, then section 38(b) gives the police the discretion to deny access to the appellants’ personal information.

[15] Under section 38(b), sections 14(1) to (4) provide guidance in determining whether the threshold for an unjustified invasion of personal privacy under section 38(b) is met. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). None of these paragraphs apply in this appeal. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy but, again, this section is not relevant in this appeal.

[16] Section 14(2) provides a list of factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy, while section 14(3) lists types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy.

[17] In their representations, in support of their view that section 38(b) applies, the police rely on the presumption in section 14(3)(b) 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;

[18] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply.¹ The presumption only requires that there be an investigation into a possible violation of law.²

[19] The police here assert that the personal information in question was compiled as part of an investigation into a violation of the law. The police state in their representations that while there is insufficient proof to proceed further with this investigation “at this time”, it is an investigation with a possible suspect.

[20] I find that the personal information at issue was “compiled and identifiable as part of an investigation into a possible violation of law.” The information was compiled by the police in the course of their investigation into a complaint of a possible violation of law arising out of a neighbourhood dispute. Consistent with previous orders issued

¹ Orders P-242 and MO-2235.

² Orders MO-2213, PO-1849 and PO-2608.

by this office, I find that the information at issue fits within the presumption in section 14(3)(b). As a result, disclosure of the personal information in the records is presumed to constitute an unjustified invasion of the personal privacy of identifiable individuals under section 14(3)(b) of the *Act*.

Factors referenced by the appellants

[21] The appellants refer to a number of reasons why they believe the information in the records ought to be disclosed to them, and I will review each of these reasons.

[22] To begin, the appellants state that they are not asking for the personal information of the persons who made the complaint against them, but are seeking the portion of the report that outlines exactly what they have been accused of. They also state that they have a number of concerns about the accuracy of the report, and believe the complaint was vexatious.

[23] Previous orders of this office have recognized the inherent fairness of providing individuals with information about allegations made against them, so that they may be able to respond to them. Even where the circumstances do not fall under the factor in section 14(2)(d) (fair determination of rights), the concern for fairness may be a relevant consideration weighing in favour of disclosure.³

[24] I have found above that some portions of the report that refer to the conduct of the appellants is information about the appellants only, that it is not the personal information of other individuals, and that it is to be disclosed. I find that disclosure of this information will substantially meet the appellants' interests in knowing the accusations against them. I am satisfied that fairness does not weigh in favour of disclosing the remaining withheld information.

[25] The appellants also refer to section 14(2)(i) (unfair damage to reputation) as a factor favouring disclosure. 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 disclosure may unfairly damage the reputation of any person referred to in the record.

[26] The factor in section 14(2)(i) is concerned with the potential for damage to reputation arising out of disclosure of the information. As such, it is a factor that can

³ See Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

favour non-disclosure.⁴ I find that it is not a relevant factor favouring disclosure in this appeal.

[27] Lastly, the appellants suggest that withholding the information is absurd, and state that the record provided to them, though heavily redacted, still allows them to view some of the information that was intended to be blacked out. In making this argument, the appellants appear to rely on the “absurd result” principle, which has been applied to support disclosure of information otherwise exempt under section 38(b). For example, where a requester himself or herself provided information to an institution, this office has found that withholding the information would be absurd and inconsistent with the purpose of the exemption.⁵ In this appeal, however, the facts described by the appellants do not fall within the very specific circumstances intended to be addressed by that principle, and I find that disclosure of the information remaining at issue would be inconsistent with the purpose of the exemption.⁶

Finding

[28] I have found that the presumption in section 14(3)(b) applies to the information remaining at issue, and that none of the factors referred to by the appellants apply. As a result, the remaining withheld portions of the records containing the personal information of the affected parties are exempt from disclosure under section 38(b) of the *Act*, subject to my review of the police’s exercise of discretion.

[29] Because of this finding, it is not necessary for me to review the factors favouring non-disclosure referred to by the police and the affected party.

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

[30] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[31] In addition, the Commissioner 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

⁴ See, for example, Order P-256 and Order MO-2712.

⁵ Orders M-444 and MO-1323.

⁶ Orders M-757, MO-1323 and MO-1378.

- it fails to take into account relevant considerations.

[32] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁷ This office may not, however, substitute its own discretion for that of the institution.⁸

[33] In addressing the exercise of discretion the police state, among other things, that they seek to provide as much information to requesters as possible, while recognizing the importance of protecting privacy. In this case, they took into account the affected parties' expectations of confidence. Further, they were of the opinion that further release of information would serve to fuel a neighbourhood dispute.

Finding

[34] I find no reason to disturb the manner in which the police exercised their discretion to deny access to the remaining information at issue.

[35] While I appreciate the appellants' interests in obtaining this information, I note that the information I have found exempt under section 38(b), while in some cases containing information about them, is substantially about other individuals and cannot reasonably be severed. I have ordered disclosure of the portions which contain only the personal information of the appellants, which will serve the purpose of informing them about the allegations made against them.

[36] In the circumstances, I am satisfied the police did not err in exercising their discretion to deny access to the affected parties' personal information.

ORDER:

1. I order the police to provide the appellants with those portions of the record which are highlighted in the copy of the records provided to the police along with this order by **May 26, 2014** but not before **May 22, 2014**.
2. I uphold the decision of the police to deny access to the remaining portions of the records at issue.

Original Signed By:
Sherry Liang
Senior Adjudicator

April 17, 2014

⁷ Order MO-1573.

⁸ Section 43(2).