

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3164

Appeal MA14-310

Barrie Police Services Board

February 24, 2015

Summary: The police received a request for records relating to a complaint filed with them against the requester. The police granted partial access to the records, denying access to portions of them pursuant to the discretionary personal privacy exemption at section 38(b), read in conjunction with the presumption at section 14(3)(b) (compiled as part of an investigation into a possible violation of law). The appellant appealed the police's decision not to disclose the name of an affected party. In this order, the adjudicator finds that the records contain the personal information of the appellant and another identifiable individual (the affected party) and that the discretionary exemption at section 38(b) applies to the affected party's personal information, including his or her name. The adjudicator finds that the police's exercise of discretion to deny access to this information was reasonable. As a result, the adjudicator upholds the police's decision and dismisses the appeal.

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

OVERVIEW:

[1] The Barrie Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records:

Incident Report #BA 1402 7218, June 12/2014.
Approximate time 9:45 pm at [named address].
Concerning a false report of dogs barking incessantly.
Officer responding is/was apparently named [officer's name],
(He did not identify himself when requested to).

[2] The police issued a decision granting partial access to the responsive records. The police denied access to portions of the records pursuant to the discretionary exemption at section 38(b) (personal privacy) of the *Act*, read in conjunction with the presumption at section 14(3)(b) (compiled as part of an investigation into a possible violation of law). The decision further states, “[p]lease be advised that this was a “non-reportable” occurrence and the attending officer did not submit a report for this occurrence.”

[3] The requester, now the appellant, appealed the police’s decision to this office.

[4] During mediation, the police advised that in addition to the portions of the records that were withheld under section 38(b) of the *Act*, other portions were also withheld that were deemed to be not responsive to the request. The decision to deny access to non-responsive information was not, however, communicated through a decision letter, but was conveyed to the appellant by the mediator.

[5] The appellant advised that he was only seeking access to the name of the individual who made the complaint (the affected party). Therefore, the decision to deny access to the affected party’s name pursuant to section 38(b), read in conjunction with section 14(3)(b), is the only issue in dispute in this appeal.

[6] The mediator attempted to obtain consent from the affected party to disclose his name to the appellant. The affected party declined to provide consent.

[7] As a mediated resolution could not be reached, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. I began my inquiry into this appeal by seeking submissions from the police and the affected party. The police provided representations on the exercise of their discretion not to disclose the information at issue. They did not address any of the other issues outlined in the Notice of Inquiry. The affected party provided brief representations, stating only that he or she continued to object to the disclosure of their information.

[8] I then sought representations from the appellant. Given the brevity of the police’s representations I determined that it was sufficient to provide the appellant with a summary of their arguments supporting the decision to exercise their discretion not to disclose the information at issue. The appellant chose not to submit representations.

[9] In this order, I uphold the police's decision to deny access to the affected party's personal information, including their name. In the discussion that follows, I reach the following conclusions:

- the records at issue contain the "personal information" of both the appellant and the affected party within the meaning of the definition of that term in section 2(1) of the *Act*;
- the discretionary exemption at section 38(b) of the *Act* applies to the affected party's personal information, including their name; and
- the police's exercise of discretion to deny access to the affected party's personal information was reasonable.

RECORDS:

[10] There are two pages of records at issue: an occurrence summary and one page of police officer notes. The information that remains at issue is the name of the affected party as it appears on the occurrence summary and in the police officer's notes.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) of the *Act*, and if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) of the *Act* apply to the information at issue?
- C. Did the police exercise their discretion under section 38(b)? If so, should this office uphold their exercise of discretion?

DISCUSSION:

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

[11] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.¹ Where the records contain the requester's own information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the appellant but do not contain the personal information of the appellant, access to the

¹ Order M-352.

records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

[12] Accordingly, in order to determine which sections of the *Act* 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 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;

[13] 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.²

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

[15] The brief representations submitted by the police suggest that they are of the view that the information at issue contains the personal information of the appellant, as well as that of the affected party and that this information falls within the definition of "personal information" in section 2(1) of the *Act*. They do not cite which particular paragraphs of that definition might be relevant, however.

[16] Having reviewed the responsive records, I find that they contain the personal information of the appellant, as well as that of another identifiable individual, the affected party. Specifically, the information includes information relating to age, sex, or marital or family status (paragraph (a)), addresses and telephone numbers (paragraph (d)), personal opinions or views of individuals (paragraph (e)), and the names of individuals together with other personal information about them (paragraph (h)).

[17] Accordingly, I find that the records at issue contain the "personal information" of both the appellant and the affected party, within the meaning of the definition of that term at section 2(1) of the *Act*.

[18] As described above, in circumstances where the appellant's personal information is mixed with that of another identifiable individual, Part II of the *Act* applies and I must consider whether the information is properly exempt pursuant to the discretionary exemptions at section 38.

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

[19] Under section 38(b), 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.

[20] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access

² Order 11.

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

to his or her own personal information against the other individual's right to protection of their privacy.

[21] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. The information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 14(1).

[22] The factors and presumptions in section 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). That section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom it relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[23] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this case, paragraphs (a) to (c) of section 14(4) do not apply.

Sections 14(2) and (3)

[24] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[25] For records claimed to be exempt under section 14(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.⁴

[26] If the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.⁵

[27] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁶

⁴ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

⁵ Order P-239.

⁶ Order MO-2954.

Section 14(3)(b)- compiled as part of an investigation into a possible violation of law

[28] The only presumption in section 14(3) that appears to be applicable in the circumstances of this appeal is section 14(3)(b) which relates to records compiled as part of an investigation into a possible violation of law.

[29] 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.⁷ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁸

[30] From my review of the records at issue, they were clearly compiled by the police in the course of their investigation into a complaint involving the appellant and the affected party. The information at issue consists of an occurrence summary and police memorandum book notes detailing the complaint and the police's investigation into that incident. In my view, these records are clearly compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, I find that all of the information in the records at issue falls under section 14(3)(b) of the *Act* and its disclosure constitutes a presumed unjustified invasion of the personal privacy of individuals other than the appellant, in this case, the affected party, under section 38(b).

Section 14(2)(h) – factor weighing against disclosure: information supplied in confidence

[31] Section 14(2) provides some factors for the police to consider in making a determination on whether the disclosure of personal information would result in an unjustified invasion of the affected parties' personal privacy. The list of factors under section 14(2) is not exhaustive. The police must also consider any circumstances that are relevant, even if they are not listed under section 14(2).⁹ Some of these criteria weigh in favour of disclosure, while others weigh in favour of privacy protection.

[32] None of the parties have specifically raised the possible application of any of the factors listed at section 14(2) or any other relevant factors. However, on my review of the information at issue, the consideration weighing against disclosure listed at section 14(2)(h) might be relevant. That section reads:

⁷ Orders P-242 and MO-2235.

⁸ Orders MO-2213, PO-1849 and PO-2608.

⁹ Order P-99.

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 has been supplied by the individual to whom it relates in confidence;

[33] The factor at section 14(2)(h) weighs in favour of privacy protection. For it to apply, both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁰

[34] In my view, the context and surrounding circumstances of this matter are such that a reasonable person would expect that the information supplied by them to the police would be subject to a degree of confidentiality. Accordingly, in this appeal, I find that the factor in section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the affected party and withholding his or her personal information.

Summary

[35] In conclusion, I have found that the presumption at section 14(3)(b) applies to the personal information at issue, the affected party's name, because it consists of personal information that was compiled as part of an investigation into a possible violation of law. Accordingly, I find that disclosure of the affected party's name is presumed to result in an unjustified invasion of the personal privacy of an individual other than the appellant.

[36] Even if it can be argued that some of the information is not covered by a presumption, there is no evidence to support a conclusion that any of the criteria in section 14(2) which favour disclosure apply in the circumstances. However, I have found that the factor weighing in favour of privacy protection and against disclosure at section 14(2)(h) is a relevant consideration as the information was, in my view, supplied to the police by the individuals to whom it relates in confidence.

[37] As a result, I find that the disclosure of the affected party's personal information would constitute an unjustified invasion of personal privacy and the discretionary exemption at section 38(b) applies to it. Accordingly, subject to my discussion below on the police's exercise of discretion, I will uphold their decision not to disclose it.

¹⁰ Order PO-1670.

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

[38] The exemption at section 38(b) 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.

[39] 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
- it fails to take into account relevant considerations.

[40] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution.¹²

Relevant considerations

[41] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹³

- 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
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect

¹¹ Order MO-1573.

¹² Section 43(2).

¹³ Orders P-344 and MO-1573.

- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- 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
- the age of the information
- the historic practice of the institution with respect to similar information.

[42] The police submit that they treat each access request on a case by case basis. In responding to the request at issue in the current appeal, the police submit they weighed the potential benefits of disclosing the affected party's name to the appellant against the potential harm of disclosure of this personal information. The police submit that they considered the fact that since the affected party and the appellant live proximately and need to continue to co-exist in their neighbourhood in a peaceful manner, they felt it was necessary to protect the identity of the affected party. The police submit that in reaching their decision to exercise their discretion in favour of privacy protection and not disclosing the information, they were careful to release as much other information as possible to the appellant. The police also submit that they considered the fact that the affected party confirmed that he did not wish his or her name and personal information to be disclosed to the appellant.

[43] Based on my review of the information at issue and the representations submitted by the police, I accept that the police exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. Specifically, I accept that in exercising their discretion to deny access to the affected party's personal information they considered the following factors:

- the lack of consent from the affected party to whom the personal information relates;
- the privacy rights of the affected party whose personal information is at issue;

- the exemptions at section 38(b), the presumption at section 14(3)(b) that serves to protect the privacy rights of the identifiable individuals and the factor at section 14(2)(h) weighing against disclosure; and
- the appellant's right of access.

[44] Accordingly, I uphold the police's exercise of discretion as reasonable and find that the information which is subject to section 38(b), the affected party's personal information, including his or her name, is properly exempt under that discretionary exemption.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original signed by: _____
Catherine Corban
Adjudicator

_____ February 24, 2015