

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3271

Appeal MA14-522

Hamilton Police Services Board

December 18, 2015

Summary: The appellant made an access request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* for an occurrence report relating to him. The police withheld the occurrence report pursuant to 38(b) of the *Act* on the basis that its disclosure would be an unjustified invasion of the personal privacy of another individual. In addition, the police relied on their discretion to refuse access to the appellant's own personal information at section 38(a) of the *Act*, in conjunction with the law enforcement exemptions at sections 8(1)(e) and 8(1)(l). In this order, the adjudicator upholds the decision of the police, in part, but orders the police to sever and disclose some of the information in the record pursuant to section 4(2) of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(2), 8(1), 38(a) and 38(b).

Orders and Investigation Reports Considered: Orders P-312, M-781, PO-1665 and MO-2065.

OVERVIEW:

[1] The issue in this appeal is whether the appellant is entitled, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), to a copy of a police occurrence report relating to him. The appellant submitted the following request under the *Act* to the Hamilton Police Services Board (the police):

I want [a] copy of the police report of Aug 26-14 [approximately] 7 pm by [named police officer and badge number] and the reason he arrived with a paddy wagon to pick me up to put me in jail without explanation.

[2] As will become evident from the discussion below, the police did not, in fact, have any contact with the appellant on August 26, 2014. The appellant later learned through a neighbour that the police had attended near his residence on August 26, 2014.

[3] Following some initial confusion around the identification of the correct record,¹ the police located the responsive record, an occurrence report, but denied access to it, relying on discretionary personal privacy exemption at section 38(b) of the *Act*, as well as its discretion to refuse access to the appellant's own personal information at section 38(a), in conjunction with the law enforcement exemptions at sections 8(1)(e) and 8(1)(l). The police stated in their decision:

Even though some of the information may pertain to you, disclosure of the information would constitute an unjustified invasion of another individual's personal privacy as consent for disclosure was not obtained. Our records indicate that you did not call the police to initiate this report and were never spoken to by the police.

[4] The appellant advised the mediator that he wished to pursue access to the occurrence report, as it pertains to him. As no further mediation was possible, the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. To begin my inquiry, I invited and received representations from the police and an affected party, who objected to the disclosure of the record to the appellant. In accordance with section 7 of the IPC's Code of Procedure and *Practice Direction 7: sharing of representations*, redacted versions of their representations were then provided to the appellant with a Notice of Inquiry. Certain portions of the representations were withheld as they met the criteria for withholding representations set out in *Practice Direction 7*. The appellant then provided representations.

[5] In this order, I uphold the police's decision in part. I find that the occurrence report is exempt from disclosure, in part, pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. I find, further, that some information is exempt pursuant to the discretionary exemption at section 38(a) in conjunction with the law enforcement exemption at section 8(1). Pursuant to section 4(2), I order the police to sever and disclose to the appellant information that is not exempt.

¹ Because of a mistake in the occurrence report number provided by the appellant, the police initially located an occurrence report unrelated to him. Once the police located the correct occurrence report, the appeal related to the incorrect occurrence report was closed.

RECORD:

[6] The record in issue is an occurrence report.

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 personal privacy exemption at section 38(b) apply to the information at issue?
- C. Does the discretionary exemption at section 38(a) in conjunction with the law enforcement exemption at section 8(1) apply to the information at issue?
- D. Did the institution exercise its discretion under sections 38(a)/8(1) and 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[7] 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), in part, 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,
- (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,
- (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.²

[9] 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.³

[10] 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.⁴

Representations, analysis and findings

[11] The police submit that the occurrence report contains the personal information of both the appellant and the affected party. Neither the affected party nor the appellant made representations specifically relating to whether the information in the occurrence report constitutes their personal information.

[12] I have reviewed the occurrence report, and I find that it contains the personal information of both the appellant and the affected party.

[13] The appellant's personal information appearing in the record includes:

- His name, date of birth, and address (paragraphs (a) and (d) of the definition)
- The matter to which the occurrence report relates, which is a matter involving the appellant. This is the appellant's personal information under the introductory wording of the definition (recorded information about an identifiable individual).

[14] The affected party's personal information appearing in the record includes:

- The affected party's name, date of birth, and address (paragraphs (a) and (d) of the definition)
- The matter to which the occurrence report relates, which is a matter involving the affected party. This is the affected party's personal information under the

2 Order 11.

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

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

introductory wording of the definition (recorded information about an identifiable individual).

[15] Since the occurrence report contains the appellant's own personal information, as well as that of the affected party, I must now consider the provisions of sections 36(1), 38(a) and 38(b) in order to determine whether to uphold the police's decision to withhold the occurrence report from the appellant.

Issue 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 exemptions from this right.

[17] 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. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁵

[18] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

[19] 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 those paragraphs apply in the circumstances of this appeal.

[20] Also, 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). None of these paragraphs apply to the information at issue in this appeal.

[21] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office considers, and weighs, the factors and presumptions in sections 14(2) and (3) and balances the interests of the parties.⁶

Representations

[22] The police's representations on this issue are brief. The police submit that they

⁵ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

⁶ Order MO-2954.

withheld the record because the appellant was never spoken to by the police and disclosure would constitute an unjustified invasion of the affected party's personal privacy. The police submit that they balanced the appellant's right of access and the protection of the affected party's right to privacy.

[23] The affected party states:

I do not consent to the disclosure of the record... I am concerned that whoever is seeking the information in [this appeal] might try and use the information [the affected party names a particular consequence] or for any other reason that might harm me or my family.

[24] The appellant's representations state:

A neighbour of mine whose name I do not wish to disclose advised me that on August 26, 2014 [a named constable] attended at my residence with another officer at approximately 7:00 p.m. with a "Paddy Wagon" to pick me up and place me in jail.

Prior to this I have had ongoing problems with my neighbour...over fencing issues and both Civil and Criminal Litigation (in my favour) has resulted between us.

As it is of personal importance to me and my family as to why the [police] are attending at my residence to "pick me up" I requested information from the [police]...

In my view any information relating to any potential arrest of me should outweigh any considerations relating to "personal information" and that any "discretionary exemptions" should be applied in my favour, and, if you make a finding that the "personal information" ought to be protected then I submit that the Occurrence report ought to be released to me by the [police] with the "personal information" deleted.

Analysis and findings

[25] As both the police and the appellant alluded to, determining whether disclosure of personal information would be an unjustified invasion of personal privacy requires a balancing of the factors and presumptions favouring non-disclosure against any factors favouring disclosure.

[26] The presumptions listed in paragraphs (a) to (h) of section 14(3), if present, weigh in favour of non-disclosure. If any of them apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b).

[27] The factors at sections 14(2)(e) through (i), if present, weigh in favour of non-

disclosure, while the factors at section 14(2)(a) through (d), if present, weigh in favour of disclosure.

[28] I will begin by addressing whether any of the factors or presumptions favouring non-disclosure listed in sections 14(2) and 14(3) are present, and will then turn to any factors favouring disclosure.

Factors and presumptions weighing in favour of non-disclosure

[29] I find that the presumption at section 14(3)(b) applies in the circumstances of this appeal. That provision 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;

[30] 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

[31] I have reviewed the record and I find that the personal information in it was clearly compiled and is identifiable as part of an investigation into a possible violation of law. Section 14(3)(b) requires only that there be an investigation into a "possible" violation of law, and applies notwithstanding the fact that no proceedings appear to have been commenced against any individuals.

[32] I have also considered whether any of the section 14(2) factors favouring non-disclosure apply. Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁹

[33] As noted above, the affected party is concerned that the appellant might try to use the information for a purpose that might harm the affected party or the affected party's family. I have therefore considered whether the factor at section 14(2)(e) applies. That provision states:

7 Orders P-242 and MO-2235.

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

9 Order P-239.

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 individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

[34] The police also made confidential representations suggesting that disclosure may result in the affected party being unfairly exposed to harm. However, the parties' representations on this point are too vague to satisfy me that the affected party will be exposed unfairly to harm from disclosure. As a result, I find that this is not a relevant factor weighing in favour of non-disclosure.

Factors weighing in favour of disclosure

[35] As noted above, the factors listed at section 14(2)(a) through (d), if present, weigh in favour of disclosure. However, the list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹⁰

[36] The appellant argues that it is of personal importance to him and his family why the police attended at his residence. He characterizes the record as one being related to his potential arrest. In this regard, the appellant appears to be raising the possible application of the factor listed at section 14(2)(d), which reads as follows:

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;

[37] In Order P-312, the former Assistant Commissioner Tom Mitchinson held that, in order for section 14(2)(d) to be a relevant consideration, it must be established that:

- The right in question is a legal right based on the concepts of common law or statute and not a non-legal right based on morality or ethics;
- The right relates to an existing or contemplated proceeding, not one that has been completed;
- The personal information being sought has some significance to the determination of the right; and

¹⁰ Order P-99.

- The personal information is necessary for the individual in question to prepare for the proceeding or to ensure an impartial hearing.

[38] Applying this test, I find that the factor at section 14(2)(d) is not relevant to the circumstances in the appeal before me. The police did not speak to the appellant, did not arrest the appellant, and there is nothing before me to suggest that there is any ongoing legal proceeding resulting from the events detailed in the occurrence report. The appellant does not state that there is any contemplated proceeding for which he requires the occurrence report.

[39] I have, however, considered the appellant's general concern about the police's presence in the vicinity of his residence and the resulting occurrence report relating to him. It is natural that the appellant may wish to know why the police attended near his residence and created an occurrence report containing his personal information. This is an unlisted factor favouring disclosure.

Balancing the factors and presumptions

[40] I have found above that the presumption in favour of non-disclosure at section 14(3)(b) (investigation into a possible violation of law) applies. I find that this presumption weighs strongly in favour of privacy protection. In my view, in listing this as a presumption under section 14(3) instead of a factor under section 14(2), the legislature has recognized the inherent sensitivity of such information and has signalled an intention that considerable weight be attached to this presumption.

[41] In the context of a request for records containing the requester's own personal information, however, a section 14(3) presumption may, in some circumstances, be overcome by one or more factors favouring disclosure at section 14(2).¹¹

[42] In this appeal, however, the only favour favouring disclosure is the appellant's desire to know why the police attended near his home, an event that he characterizes as his potential arrest. However, there is no evidence before me that he has since been arrested or charged in connection with the incident described in the occurrence report. In these circumstances, and balancing the interests of the parties, I find that the section 14(3)(b) presumption outweighs the factor raised by the appellant, and I conclude that disclosure of the occurrence report would result in an unjustified invasion of the affected party's personal privacy. Subject to my findings on the police's exercise of discretion, therefore, I find that the affected party's personal information appearing in the occurrence report is exempt from disclosure pursuant to section 38(b).

[43] I have also considered whether any of the record can be severed and disclosed without revealing personal information of the affected party. Section 4(2) of the *Act* provides that a head shall disclose as much of a record as can be reasonably severed

¹¹ See Order MO-2954.

without disclosing information that falls under one of the exemptions. The appellant submits that I should order the release of the occurrence report with the affected party's personal information removed.

[44] From my examination of the report, I conclude that much of it cannot be reasonably severed without disclosing information that I have found to be exempt under section 38(b). For example, even if the affected party's name and address were severed, the record would still contain exempt information, because the affected party is identifiable from the description of the occurrence to which the report relates. In that description, the appellant's personal information is closely intertwined with that of the affected party and cannot be reasonably severed under section 4(2).

[45] However, certain portions of the record that do not contain the affected party's personal information can be reasonably severed and disclosed. Subject to my consideration of the law enforcement exemptions raised by the police (see Issue C below), I will order disclosure of that information.

Issue C: Does the discretionary exemption at section 38(a) in conjunction with the law enforcement exemption at section 8(1) apply to the information at issue?

[46] As noted above, section 38 provides a number of exemptions from the general right of access to one's own personal information under section 36(1).

[47] Section 38(a) reads:

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.

[48] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.¹² Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[49] In this case, the police argue that the exemptions at sections 8(1) (e) and (l) apply "to the law enforcement portions" of the record. They submit that these exemptions are routinely used when dealing with law enforcement records and that this information does not personally pertain to the appellant.

¹² Order M-352.

[50] Section 8(1) (e) and (l) provide as follows:

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

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(l) facilitate the commission of an unlawful act or hamper the control of crime.

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

“law enforcement” means,

(a) policing,

[52] A police investigation into a possible violation of the *Criminal Code* is included in the meaning of “law enforcement”.¹³

[53] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁴

[54] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.¹⁵ The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁶

Representations

[55] The police submit that the law enforcement exemptions are routinely used when dealing with law enforcement records and that this information does not personally pertain to the appellant.

13 Orders M-202 and PO-2085.

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

15 Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

16 *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[56] As noted above, the affected party's representations assert that whoever is seeking the information might try to use it to harm the affected party or the affected party's family.

[57] The appellant's representations do not address the application of the law enforcement exemptions to the record.

Analysis and findings

[58] The record contains information about police codes and police patrol zone information. Previous orders of this office have found that this type of information is exempt under section 8(1)(l) because its disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.¹⁷ Applying the reasoning in those orders to the record before me, I will order that this information be withheld.

[59] The representations of the police and the affected party do not satisfy me that any of the remaining information in the record satisfies the requirements of sections 8(1)(e) or (l). Other than the police codes and patrol zone information, any information in the record that could arguably be exempt under those sections is information that I have already found to be exempt under section 38(b). What remains, and what I will order disclosed, is the appellant's contact information, the identity of the involved police officers, and some general information relating to the occurrence including the date of the occurrence and the police's concluding remarks. None of this information identifies the affected party and none of it, if disclosed, could reasonably be expected to result in the harms identified in section 8(1)(e) or (l).

Issue D: Did the institution exercise its discretion under sections 38(a)/8(1), and 38(b)? If so, should this office uphold the exercise of discretion?

[60] The sections 38(a) and 38(b) exemptions are discretionary, and permit 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.

[61] 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, takes into account irrelevant considerations, or fails to take into account relevant considerations.

[62] If an institution fails to exercise its discretion, or errs in its exercise of discretion, this office may send the matter back to the institution for an exercise of discretion

¹⁷ See, for example, Orders M-781, PO-1665 and MO-2065.

based on proper considerations.¹⁸ This office may not, however, substitute its own discretion for that of the institution.¹⁹

Representations, analysis and findings

[63] The police submit that they balanced the appellant's right to his own personal information against the affected party's right to personal privacy in determining that the occurrence report should be withheld. They submit that the decision to withhold was arrived at in good faith, taking into account relevant considerations. In the confidential portion of its representations, the police list specific factors that they considered in exercising their discretion in favour of withholding the record.

[64] The affected party did not provide representations on this issue, while the appellant argues that the police should exercise their discretion in favour of disclosing the record to him.

[65] I see no basis upon which to interfere with the police's discretion. The police took into account relevant considerations and there is no evidence that they acted in bad faith or for an improper purpose. The police balanced the interests of the parties and decided to exercise their discretion in favour of non-disclosure. This office cannot substitute its own discretion for that of an institution. Therefore, I uphold the police's exercise of discretion.

ORDER:

1. I uphold the police's decision to withhold the record at issue, in part.
2. I order the police to disclose to the appellant the portions of the record that I have not highlighted in yellow on the copy of the record being sent with the police's copy of this order. To be clear, the **portions highlighted in yellow are to be withheld** and the remainder of the record is to be disclosed to the appellant. This disclosure is to take place by **January 29, 2016** but not before **January 22, 2016**.

Original Signed by: _____

Gillian Shaw
Adjudicator

December 18, 2015 _____

18 Order MO-1573.

19 Section 43(2).