

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3297

Appeal MA14-576

Hamilton Police Services Board

March 14, 2016

Summary: The appellant filed a request for a copy of a police report relating to a complaint made against her by a family member. The police granted the appellant partial access to the police report. The police claim that disclosure of the withheld portions would constitute an unjustified invasion of personal privacy under section 38(b). The appellant appealed the police's decision to this office. In this order, the adjudicator upholds the police's decision to deny the appellant access to the withheld information. The appeal is dismissed.

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", 14(2)(d), 14(2)(f), 14(3)(b) and 38(b).

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to Hamilton Police Services Board (the police) for a copy of a police report. The police report relates to a complaint the appellant's sibling made about her and another sibling. The police investigated the complaint but decided that charges were not warranted.

[2] The police located a police report and granted the appellant partial access. The police submits that the police code information withheld in the report qualifies for exemption under the law enforcement provisions of the *Act* (sections 8(1)(e) and 8(1)(l)). The police also claim that disclosure of the remaining withheld information would constitute an unjustified invasion of personal privacy under section 38(b).

[3] The appellant appealed the police's decision to this office and a mediator was assigned to the appeal. During mediation, the appellant confirmed that she was not pursuing access to the information withheld under the law enforcement provisions under the *Act* or the names of individuals listed under the heading "Involved Persons". Accordingly, these portions of the report are no longer at issue in this appeal.

[4] At the end of mediation, the appellant confirmed that she continues to seek access to the portions of the report which contain the complainant's statements to the police. The file was then transferred to adjudication where an adjudicator conducts an inquiry.

[5] During the inquiry stage, the police and the appellant were given an opportunity to submit representations to this office. The non-confidential portions of the police's representations were provided to the appellant who submitted representations in response. A copy of the appellant's representations and attachments, most of which provides a historical background of the circumstances leading up to the police's investigation into a family dispute, was not shared with the police or any other party, as it was not necessary to seek further representations. This order summarizes the non-confidential portions of the appellant's representations which address the issues relevant to the determination of this appeal.

[6] In this order, I find that disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy under section 38(b) and uphold the police's access decision.

RECORDS:

The information at issue in this appeal is the withheld portions of the police report found on pages 2 to 8, 10 and 11.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Would disclosure of the withheld "personal information" constitute an unjustified invasion of personal privacy under section 38(b)?
- C. Did the police properly exercise their discretion under section 38(b)?

DISCUSSION:

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

[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.

[8] 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

[9] 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

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

[11] The police concede that the record contains the personal information of the appellant. However, the police submit that the record also contains the personal information of another identifiable individual and this individual’s consent has not been obtained. The police indicate that they released the information relating to two other individuals who consented to the release of their information to the appellant.

[12] Though the appellant provided extensive representations to this office, her submissions did not specifically address this issue.

[13] I have carefully reviewed the record and find that the information at issue contains the personal information of an identifiable individual within the meaning of the definition of that term in section 2(1). This information relates to the individuals’ opinions and views of other individuals, including the appellant, along with the individual’s name. I find that this information falls within the ambit of the definition of “personal information” in paragraphs (e) and (h) of the definition of that term in section 2(1). I also am satisfied that the record contains the personal information of the appellant.

[14] As the record contains the personal information of the appellant along with that of another identifiable individual, I will determine whether disclosure of the withheld information to the appellant would constitute an unjustified invasion of personal privacy under section 38(b).

B. Would disclosure of the withheld “personal information” constitute an unjustified invasion of personal privacy under section 38(b)?

[15] Section 38(b) 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

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.).

requesters access to their 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.

[16] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the requester's personal information.⁴

[17] In other words, where a record contains personal information of both the requester and another individual, and the 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.

[18] In the circumstances of this appeal, I must determine whether disclosing the personal information of the other individual would constitute an unjustified invasion of their personal privacy under section 38(b).

[19] Sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of 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. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

[20] 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). Given that the affected individual has not consented to the release of her information, I am satisfied that none of these paragraphs apply.

[21] If the information at issue falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise their discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her personal information against the other individual's right to protection of their privacy.

14(3)(b): investigation into violation of law

[22] The police submit that the presumption at section 14(3)(b) applies in the circumstances of this appeal. Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information was

⁴ Order M-352.

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

[23] In support of their position, the police state:

Section 14(3)(b) was applied to these records due to the fact that an investigation into a possible violation of law (Theft Over) commenced when these records were originally generated. The fact that no charges were ever laid and the incident was cleared as unsolved is not relevant in the use of this exemption as the presumption only requires that there be an investigation into a possible violation of law.

[24] The appellant's representations did not specifically address the issue of whether the presumption at section 14(3)(b) applies. However, her evidence does not dispute that the police investigated a possible violation of the *Criminal Code*.

[25] Having regard to the submissions of the parties and the record itself. I am satisfied that the personal information at issue was collected as part of an investigation into a possible violation of law, namely a *Criminal Code* offence. Though the investigation did not result in charges or criminal proceedings, section 14(3)(b) may still apply as the presumption only requires that there be an investigation into a possible violation of law.

[26] Accordingly, I find that the presumption at section 14(3)(b) applies in the circumstances of this appeal.

14(2)(d): fair determination of rights

[27] As mentioned above, most of the content of the appellant's submissions provide a historical background of a family dispute which resulted in a complaint to the police. Though the appellant did not specifically raise the possible application of any of the factors favouring disclosure at section 14(2), I am satisfied that her submissions raise the possible application of the factor at section 14(2)(d). Section 14(2)(d) states:

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.

[28] For section 14(2)(d) to apply, 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
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁵

Representations of the appellant

[29] The appellant attached 30 documents in support of her representations, including correspondence from law offices, government offices, court documents and other documents. The court documents consist of a court application along with responding affidavits filed in the Ontario Superior Court of Justice in 2014. The appellant advises that the court action is still pending and that disclosure of the information at issue would impact the civil court matter.

[30] Given the fact that a civil court matter exists which relates to the circumstances which may have given rise to the police's investigation, I am satisfied that the information at issue relates to the appellant's legal rights. I am also satisfied that the appellant's legal right relates to a proceeding which has not been completed. Accordingly, I find that parts 1 and 2 of the section 14(2)(d) test has been met.

[31] However, in order for the factor at section 14(2)(d) to be given any consideration in this appeal, the appellant's evidence must establish that all four parts of the test have been met.

[32] In the confidential portion of her representations, the appellant explains why she believes that disclosure of the personal information at issue would assist her in the civil court matter. I have carefully considered the appellant's submissions but find that the actual personal information at issue has no bearing on or significance to the appellant's legal rights.

[33] In making my decision, I reviewed the court materials provided by the appellant, the portions of the police report disclosed to her along with the withheld portion and am of the opinion that disclosure of the withheld information is not significant to the legal question identified in her submissions or is required for her to prepare for the proceeding or to ensure an impartial hearing. Accordingly, I am not satisfied that parts 3 and 4 of the test at section 14(2)(d) has been met.

As a result of my finding, I find that the factor at section 14(2)(d) does not apply in the circumstances of this appeal.

⁵ 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.).

Section 14(2)(f): highly sensitive

[34] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.⁶

[35] The police submitted confidential representations in support of their position that the personal information at issue is highly sensitive. The appellant's representations did not specifically address this issue.

[36] Having regard to the records themselves, I am satisfied that there is a reasonable expectation of significant personal distress if the personal information at issue is disclosed without the affected individual's consent.

[37] Accordingly, I find that the factor at section 14(2)(f) applies in the circumstances of this appeal and attribute considerable weight to it.

Summary

[38] I find that the presumption at section 14(3)(b) applies, as well as the factor favouring non-disclosure at section 14(2)(f). Given that the factor at section 14(2)(d) does not apply and no other factors favouring disclosure have been established, I find that disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy under section 38(b).

[39] Accordingly, the personal information at issue is exempt from disclosure, subject to my assessment of whether the police exercised their discretion properly.

C. Did the police properly exercise their discretion under section 38(b)?

[40] 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.

[41] In addition, the Commissioner may find that the institution erred in exercising their 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.

[42] 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,

⁶ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

⁷ Order MO-1573.

substitute their own discretion for that of the institution.⁸

[43] The police submit that they properly exercised their discretion to withhold the personal information at issue. In support of their position, the police state that they balanced the appellant's right of access with the affected individual's right to personal privacy.

[44] The appellant's representations did not specifically address the issue of whether the police properly exercised their discretion under section 38(b).

[45] Having regard to the police's evidence and the nature of the personal information at issue, I am satisfied that the police properly exercised their discretion and in doing so took into account relevant considerations. I am also satisfied that the police did not exercise their discretion in bad faith or for an improper purpose, nor is there any evidence that they took into account irrelevant considerations.

[46] In making my decision, I note that the police considered that one of the purposes of the *Act* includes the principle that requesters should have a right of access to their own information. However, in my view, the nature of the personal information at issue and the sensitivity of it outweighs this principle, particularly when I also consider that the police disclosed most of the information in the police report to the appellant.

[47] Having regard to the above, I find that the police properly exercised their discretion to withhold the information I found exempt under section 38(b).

ORDER:

I uphold the police's decision to deny the appellant access to the withheld portions of the record.

Original Signed by: _____
Jennifer James
Adjudicator

_____ March 14, 2016

⁸ Section 43(2).