

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3305

Appeal MA15-35

Toronto Police Services Board

April 21, 2016

Summary: The appellant sought access to 911 call recordings and other records of telephone calls relating to a charge laid against him. At issue in this appeal are records of 911 calls made by two individuals other than the appellant, to which the police denied access, in full, on the basis of section 38(b) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator upholds the police's decision to withhold the records in full.

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(3)(b), 38(b).

OVERVIEW:

[1] The appellant made a request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to call recordings relating to a criminal charge that was laid against him. Specifically, the appellant sought audio recordings of 911 calls made by him and by two other named individuals (the affected parties), recordings of calls made between police staff at a particular division, and a recording of a phone call between an identified police officer and one of the individuals named in his request.

[2] The police issued a decision granting the appellant partial access to the requested records. The police granted full access to three audio recordings of 911 calls made by the appellant. The police denied access, in full, to five audio recordings of 911

calls made by other individuals, citing the discretionary exemption at section 38(b) of the *Act* (denial of access to own information), with reference to the presumption against disclosure at section 14(3)(b) (investigation into possible violation of law).

[3] The police also advised that there exist no audio recordings of conversations held by police staff at the specified division.

[4] The appellant appealed the police's decision to this office. He particularly objected to the police's decision to withhold the 911 audio recordings of other individuals, based on the claim he already possesses transcripts of the calls. The appellant reported that the charge against him was later withdrawn, and that he requires access to the records in order to address a violation of his rights relating to the charge. He also clarified that although he has transcripts of the 911 calls contained in the records, he requires the call recordings in order to verify the accuracy of the transcripts.

[5] As no mediation was possible, this appeal was transferred to the adjudication stage of the appeal process for an inquiry under the *Act*. During my inquiry I sought and received representations from the police and the appellant, which were exchanged in accordance with this office's *Code of Procedure* and *Practice Direction 7*.

[6] In this order, I uphold the police's decision to withhold, in full, the audio recordings of the affected parties' 911 calls.

RECORDS:

[7] At issue in this appeal are five records. Each record contains an audio recording of a 911 call made by one of the two affected parties.

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 records? If so, did the police exercise their discretion under section 38(b)?

DISCUSSION:

[8] The police have withheld the records in full on the basis of section 38(b).

[9] Section 36(1) of the *Act* gives an individual a general right of access to his personal information held by an institution.

[10] Section 38(b) is an exemption from the right of access in section 36(1). 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, an institution may refuse to disclose that information to the requester.

[11] To determine whether section 38(b) applies to the records, it is first necessary to determine whether they contain "personal information" within the meaning of the *Act*, and if so, to determine to whom the personal information belongs.

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

[12] Section 2(1) of the *Act* sets out a definition of "personal information" that reads, in part:

"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,
- (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[.]

[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.¹

[14] The records are audio recordings of 911 calls made by one or the other affected party to report an incident involving the appellant. In these recordings, the affected parties provide their names and addresses, details of their relationships to the

¹ Order 11.

appellant, and their accounts of an incident involving the appellant. All this information is the personal information of the affected parties within the meaning of paragraphs (a), (d) and (e) of the definition of that term in section 2(1). In addition, the call recordings reveal other personal information about the affected parties, including the fact that they made 911 calls, qualifying as their personal information within the meaning of paragraph (h).

[15] The records also contain personal information of the appellant. In making the 911 calls, the affected parties provide the appellant's name, age, and other information about him qualifying as his personal information within the meaning of paragraphs (a), (b), (d) and (h). The affected parties also make allegations about the appellant, which I find qualify as the mixed personal information of the appellant and the affected parties. In particular, I find that the affected parties' allegations about the appellant qualify as the personal information of the appellant within the meaning of paragraph (g). I also find that they reveal something personal about the affected parties, including the substance and the fact of their having made allegations against the appellant, and that this qualifies as the affected parties' personal information within the meaning of paragraph (h).²

[16] As the records contain the personal information of both the appellant and two affected parties, the next question is whether the exemption at section 38(b) applies.

B. Does the discretionary exemption at section 38(b) apply to the records? If so, did the police exercise their discretion under section 38(b)?

[17] In withholding the records under section 38(b), the police assert that their disclosure would be an unjustified invasion of the personal privacy of the affected parties.

[18] Sections 14(1) to (4) of the *Act* provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b). In determining whether section 38(b) applies, this office will consider, and weigh, the factors and presumptions at sections 14(2) and (3) and balance the interests of the parties.³ 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). Section 14(4) also lists situations where disclosure is not an unjustified invasion of personal privacy.

[19] In making the section 38(b) claim, the police rely on the presumption against disclosure at section 14(3)(b). The appellant argues for disclosure of the records on the basis of the absurd result principle, and the application of the factor favouring disclosure at section 14(2)(d).

² Order PO-3458.

³ Order MO-2954.

[20] The following subsections of section 14 are relevant in this appeal:

- (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
 - (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access[.]
- (2) 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,
 - (d) the personal information is relevant to a fair determination of rights affecting the person who made the request[.]
- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
 - (b) 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[.]

[21] I accept that the presumption at section 14(3)(b) applies to the records. The records are audio recordings of calls made by the affected parties to 911 to report their concerns about the appellant to the police. The appellant says he was arrested by the police as a result of their calls, but that the charges against him were later withdrawn. Nonetheless, I accept that the records were compiled and are identifiable as part of an investigation into a possible violation of law. A number of orders of this office have applied the presumption to audio recordings of 911 calls precipitating police investigations—like the records at issue here—and not only to police records generated in the course of police investigations.⁴ The presumption only requires that there be an investigation into a possible violation of law.⁵ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁶

[22] I do not find applicable the factor favouring disclosure at section 14(2)(d). 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

⁴ M-838, MO-2061, MO-2923 and others.

⁵ Orders P-242 and MO-2235.

⁶ Orders MO-2213, PO-1849 and PO-2608.

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.⁷

[23] I asked the appellant to show how these criteria are met in the circumstances of this appeal. In his representations, the appellant states that the records will assist him in proving that his rights under the Canadian Constitution, including his rights under the *Canadian Charter of Rights and Freedoms*, have been violated. At an earlier stage of the appeal, the appellant alluded to a need to obtain the records in order to verify the accuracy of transcripts of the calls, which he reported having obtained from another source. I have considered both these submissions, and I find that neither establishes the criteria for the application of section 14(2)(d). The appellant's assertions, without more, fail to demonstrate that disclosure of the records is necessary to ensure a fair determination of his legal rights in a proceeding.

[24] I also conclude that none of the exceptions at sections 14(1) or 14(4) applies in these circumstances. With respect to the application of section 14(1)(a), I have not been provided with the consent of the affected parties, and find that this section does not apply.⁸

[25] Finally, the appellant claims it would be absurd to deny him access to the records, as he is already aware of the identities, addresses and telephone numbers of the two affected parties. He asserts, further, that he is fully aware of the contents of the records, because he has obtained transcripts of the records. He encloses with his representations a copy of the document he describes as the transcripts.

[26] The police explain that they do not produce transcripts of 911 audio recordings unless specifically requested by the Crown. In this case, the police deny having produced transcripts of the records, or having released any transcripts to the appellant. The police speculate that the document to which the appellant refers is actually a police record called an I/CAD Event Details Report. The police explain that this report is a document provided as part of the disclosure made to an accused or his representative in criminal court. In fact, I confirm that the document enclosed with the appellant's representations is an I/CAD Event Details Report. While the report sets out the broad details of the nature and general content of the calls, it does not reproduce the calls

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.).

⁸ Although the appellant indicates that he has the full contact information of both affected parties, and that they would consent to disclosure if they were asked, the appellant has not produced the consent of either party to the disclosure of their information to him.

verbatim, or reveal in any other way their full contents. I conclude that the report is not equivalent to a transcript of the records at issue in this appeal.

[27] For this reason, I find the absurd result principle has no application in these circumstances. The absurd result principle has been applied by this office where denying access to information would yield manifestly absurd or unjust results—as, for example, where the withheld information is clearly within the requester’s knowledge.⁹ In this case, while the appellant has produced a report that contains some information about the 911 calls, he has not demonstrated that his knowledge of the records’ contents extends beyond these general details. In any event, I note that the absurd result principle may not apply where disclosure of the information would be inconsistent with the purpose of the exemption claimed to deny access.¹⁰ In this case, in the absence of evidence that the appellant already knows the contents of the records, and in consideration of the purpose of the section 38(b) exemption, I find there is no basis for disclosure of the records on the basis of the absurd result principle.

[28] I therefore uphold the application of section 38(b) to withhold the records in full. I also uphold the police’s exercise of discretion under this section. It is evident from their representations that, in exercising their discretion to withhold the records, the police considered the appellant’s right of access to information about himself, balanced against the privacy interests of the affected parties who made the 911 calls. The police indicate they were mindful of the affected parties’ expectation that the information they supplied to the police would be kept in confidence. The appellant opines that the police acted in bad faith in arresting him based on what he describes as false accusations against him, and in refusing to disclose the records to him. In my view, the actions of the police in acting upon the information provided to them is not evidence of bad faith in their exercise of discretion. On balance, I am satisfied that the police exercised their discretion under section 38(b), and did so appropriately, taking into account relevant factors and not taking into account irrelevant factors.

[29] For all these reasons, I uphold the police’s decision. I dismiss this appeal.

ORDER:

I uphold the police’s decision to withhold the records in full.

Original Signed By: _____
Jenny Ryu
Adjudicator

_____ April 21, 2016

⁹ Orders MO-1196, PO-1679 and MO-1755.

¹⁰ Orders M-757, MO-1323 and MO-1378.