

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3283

Appeal MA13-638

Peel Regional Police Services Board

January 28, 2016

Summary: The police received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records related to a specified incident and issued a decision granting the requester partial access. The police relied on the mandatory personal privacy exemption in section 14(1), the presumption in section 14(3)(b) and the discretionary law enforcement exemption in section 8(1)(l) to withhold parts of the records. The requester appealed the decision and the application of the discretionary exemptions in sections 38(a) and 38(b) was added as an issue in the appeal since the records at issue contain the personal information of the requester. The decision of the police to withhold the information at issue is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 8(1)(l), 14(2)(h), 14(3)(b), 38(a) and 38(b).

Orders and Investigation Reports Considered: Orders P-242, PO-1665, MO-2112, MO-1917, MO-1863, MO-2021, MO-2235.

OVERVIEW:

[1] The Peel Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to police officers' notes and records related to a specified incident. The police located records responsive to the request and issued a decision granting the requester partial

access to them. The police relied on the mandatory exemption in section 14(1) (personal privacy) and the presumption in section 14(3)(b) to withhold parts of the records that they determined contained the personal information of other individuals. The police also relied on the discretionary law enforcement exemption in section 8(1)(l) (commission of an unlawful act or control of crime) to withhold other parts of the records. Finally, the police withheld some information in the records on the basis that it is not responsive to the request.

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

[3] During mediation, the appellant confirmed that she does not seek access to the portions of the records that the police withheld as non-responsive. She also confirmed that she seeks access to the remaining withheld information and she consented to the mediator disclosing her identity to the individuals whose personal information was contained in the records. The mediator contacted these individuals whose interests could be affected by disclosure of the records (the affected parties), notified them of the appeal and asked them whether they consented to the disclosure of their personal information in the records. Three of the four affected parties advised the mediator that they did not consent to disclosure of their personal information and the fourth affected party provided no response.

[4] As a mediated resolution of the appeal was not possible, the appeal was moved to the adjudication stage of the appeal process for an inquiry under the *Act*. During my inquiry, I invited representations from the police, the affected parties and the appellant. Because the records contain information about the appellant, Part II of the *Act* applies in this appeal and I invited the police to consider and submit representations on the application of the discretionary exemptions in sections 38(a) and 38(b) to the records. The police submitted representations that I shared with the appellant, and the appellant submitted representations in response. None of the affected parties submitted representations.

[5] In this order I uphold the decision of the police.

RECORDS:

[6] The records at issue consist of the withheld portions of a two-page chronology and eight pages of police officers' notes.

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. Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(l) exemption apply to the information at issue?
- D. Did the institution exercise its discretion under section 38(a) and/or 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 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,

...

(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,

...

(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.¹ Section 2(2.1) also relates to the definition of personal information and states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[9] To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.²

Representations and findings

[10] The police submit that the affected parties' names and contact information contained in the records are the personal information of the affected parties, all of whom are identifiable. The police argue that this personal information does not relate to the affected parties in their professional capacity. The police also acknowledge that the records contain the personal information of the appellant.

[11] The appellant does not directly address this issue in her representations. She does however recount details of the incident in question from her perspective and in doing so, implies that the incident and the records relate to her.

[12] Both the chronology and the police officers' notes contain information about the appellant and the affected parties collected during the investigation of the incident by the police. All of this information qualifies as personal information under the various paragraphs of the definition of that term in section 2(1) of the *Act*, including: the appellant's name and the names of the affected parties along with the statements they provided to the police about the incident (paragraphs (e) and (h) of the definition); their addresses and telephone numbers (paragraph (d)); their ages and dates of birth (paragraph (a)); and the license plate numbers of the vehicles involved in the incident along with a vehicle description (paragraph (c)).³

[13] The records also contain the name and contact information of the bus driver who was involved in the incident, and the names and badge numbers of the officers who attended at the scene. The police have already disclosed the name of the bus driver to the appellant, along with the names and badge numbers of the officers involved. They properly did this on the basis that this information is about these individuals in a

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v Pascoe*, [2002] OJ No 4300 (CA).

³ See Orders MO-1917, MO-1863 and MO-2021.

professional capacity and thus, it does not qualify as personal information under the *Act*. The remaining information relating to the bus driver, including his date of birth, address and phone number, has been withheld as personal information and is at issue in this appeal. I am satisfied that these details about the bus driver qualify as personal information under the *Act*.

[14] Since the records contain the appellant's own personal information, as well as that of the affected parties, I must consider the provisions of sections 36(1), 38(a) and 38(b) of the *Act* in order to determine whether to uphold the police's decision to withhold portions of the records from the appellant.

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

[15] Section 38 of the *Act* provides a number of exemptions from the general right of access individuals have under section 36(1) to their own personal information held by an institution. 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.

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

[17] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3), and balance the interests of the parties.⁴

Representations and findings

[18] The police claim that the presumption at paragraph 14(3)(b) applies to the records at issue in this appeal and accordingly, disclosure of the information is presumed to be an unjustified invasion of personal privacy. The police state that the officers who attended at the scene of the incident were dispatched there to investigate a possible motor vehicle collision resulting in personal injuries. They explain that since

⁴ Order MO-2954.

the investigation involved a possible collision, the officers investigated to determine if there was a possible violation of law. The police state that the records at issue were created during the course of that investigation. The police also claim that the factor in section 14(2)(h) applies because the affected parties implicitly provided their information to the police in confidence. They add that the personal information collected by the police was essential in order for the officers to investigate any possible violation of law.

[19] The appellant's representations do not address this issue directly. The appellant's submissions are a recitation of her experiences during the incident, and of her injuries and ongoing health concerns resulting from the incident.

[20] I have reviewed the records and I find that the personal information in them 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.⁵ I find that the presumption in section 14(3)(b), which weighs strongly in favour of privacy protection, applies in this appeal, as does the factor in section 14(2)(h) relied on by the police. Section 14(2)(h) weighs in favour of privacy protection when personal information has been supplied in confidence by the individual to whom the information relates. I accept that the affected parties, three of whom object to the disclosure of their personal information in this appeal, provided their personal information to the police in confidence during the investigation.

[21] There are no submissions before me on any other factors under section 14(2) that may apply in this appeal.

[22] As noted above, the section 14(3)(b) presumption may be overcome in the context of a request for records containing a requester's own personal information under section 38(b) by one or more factors favouring disclosure under section 14(2). Because the section 14(3)(b) presumption applies and there are no factors favouring disclosure in this appeal, I conclude that disclosure of the information at issue would result in an unjustified invasion of the affected parties' personal privacy. Accordingly, subject to my findings on the police's exercise of discretion, I find that the affected parties' personal information in the records is exempt from disclosure pursuant to section 38(b) of the *Act*.

B. Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(l) exemption apply to the information at issue?

[23] Section 38(a) is another exception to individuals' general right of access to their

⁵ Orders P-242 and MO-2235.

personal information under section 36(1) of the *Act* and it states:

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.

[24] 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.⁶ In denying access under section 38(a), the police must demonstrate that, in exercising their discretion, they considered whether the records should be released to the appellant because they contain her personal information. The police rely on section 38(a) in conjunction with the discretionary exemption in section 8(1)(l), which states:

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

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

Representations and findings

[25] The police assert that the ten codes they have withheld in the records qualify for exemption under sections 38(a) and 8(1)(l). They explain that the ten codes are used to represent common phrases, particularly in radio transmissions and other communications between individuals employed in law enforcement. They add that officers also document their use of ten codes in their note books. The police submit that ten code information could be used by criminals to counter the actions of police personnel responding to a situation and could result in a risk of harm to the police or to members of the public, including victims and witnesses. They assert that criminals armed with ten code information could monitor police radio transmissions to determine the availability of officers and conduct their criminal activity accordingly so as to evade detection; thus, hampering the control of crime.

[26] In numerous orders of this office, ten codes have been found to be exempt from disclosure under section 8(1)(l) on the basis that their disclosure compromises the ability of officers to provide effective policing services by enabling individuals engaged in illegal activities to conduct such activities.⁷ I adopt this approach and find that the ten codes in the records could reasonably be expected to facilitate the commission of

⁶ Order M-352.

⁷ Orders PO-1665 and MO-2112.

an unlawful act or hamper the control of crime. I further find that section 38(a) read in conjunction with section 8(1)(l) applies to this information, subject to my determination below of whether the police properly exercised their discretion under section 38(a) to withhold the information.

D. Did the institution exercise its discretion under section 38(a) and/or (b)? If so, should this office uphold the exercise of discretion?

[27] The section 38(a) and (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.

[28] 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.

[29] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁸ This office may not, however, substitute its own discretion for that of the institution.⁹ Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁰

- 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
- whether the requester is seeking his or her own personal information

⁸ Order MO-1573.

⁹ Section 43(2).

¹⁰ Orders P-344 and MO-1573.

- 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.

[30] The police submit that they exercised their discretion to withhold the information at issue after balancing the appellant's right to access against the affected parties' right to privacy. They state that they exercised their discretion having regard to the nature of the records and the inherently personal context in which the information appears, and to the fact that the affected parties did not consent to the disclosure of their personal information. The police submit that they strive to disclose as much information as they can to requesters under the *Act*, and they did so in this appeal by providing the appellant with information subject to limited and specific portions that they withheld due to the circumstances of the request and the contents of the records. They add that they considered the significance of the presumption in section 14(3)(b) and their view that section 14(2)(h) was the only applicable factor and it weighed in favour of privacy protection.

[31] I find that the police exercised their discretion under both sections 38(a) and 38(b) in denying access to the affected parties' personal information and the ten codes at issue. I have accepted the submissions of the police on the application of the discretionary exemptions to the withheld information as claimed by them. I also note that the police have disclosed all of the appellant's personal information in the records to her. There is no suggestion that the police took irrelevant factors into account in exercising their discretion, or that they did so in bad faith or for an improper purpose. I am thus satisfied that the police took relevant factors into account and exercised their discretion under sections 38(a) and 38(b) appropriately. I uphold the police's exercise of discretion.

ORDER:

I uphold the decision of the police and dismiss this appeal.

Original Signed by: _____
Stella Ball
Adjudicator

January 28, 2016