

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3296

Appeal MA15-245-2

Toronto Police Services Board

March 14, 2016

Summary: The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for access to various records pertaining to the requester for a certain period of time. The police granted partial access to the records, withholding the personal information of other individuals pursuant to the discretionary personal privacy exemption in section 38(b). In this order, the adjudicator partially upholds the police's claim of section 38(b) and finds that their search for responsive records was reasonable.

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), 38(b), 14(3)(b), 17.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for access to various records pertaining to the requester for a certain period of time.

[2] The police issued a fee estimate, requesting payment of \$6.60. The requester appealed and file MA15-245 was opened. During mediation, the police agreed to waive the fee and issued its decision on access.

[3] The police granted partial access to general occurrence reports, event details

reports and officers' notes, and withheld personal information of other individuals pursuant to the discretionary personal privacy exemption in section 38(b). Some other information was also withheld on the basis that it was not responsive to the request.

[4] The requester, now the appellant, appealed the decision and appeal file MA15-245-2 was opened.

[5] During mediation, the appellant clarified that she wanted access to all the information related to her police record that had been "blacked" out. She did not want access to other people's information or information unrelated to her own matter, i.e. non-responsive information.

[6] The appellant told the mediator that she did not want any witness to be contacted as she was only interested in the police's account of what they said. Access to these witness statements remains an issue.

[7] The appellant raised concern about "missing records," hereby implicitly raising the issue of whether the police's search for records was reasonable. The police provided details of their searches to the mediator who conveyed it to the appellant. However, reasonable search remains an issue in this appeal.

[8] The appellant confirmed that she wanted the police to waive fees for all requests that she may make. The police responded that the decision to waive fees is determined on a case by case basis. As the police waived the fee for the request in this appeal, I have removed the issue of fee waiver from this appeal. This issue would only apply in this appeal if there had been an outstanding fee.

[9] As mediation did not resolve this appeal, the file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I sought representations as to the information remaining at issue in the records in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[10] In this order, I partially uphold the police's decision and also find that their search for responsive records was reasonable.

RECORDS:

At issue in this appeal is the withheld information from two pages, pages 22 and 23, which contain the information that the appellant is interested in receiving access to, namely the police's account of what the witnesses said.

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. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?
- D. Did the institution conduct a reasonable search for records?

DISCUSSION:

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

[11] 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) 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;

[12] 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

[13] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) 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.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[14] 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.²

[15] 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.³

[16] To qualify as personal information, it must be reasonable to expect that an

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

individual may be identified if the information is disclosed.⁴

[17] The police state that the record was created in connection to a police response to the appellant's call to them and contain information that could be characterized as the personal information of several identifiable individuals (the affected persons), including their names, addresses, and dates of birth.

[18] The appellant states that she has emphasized many times to the mediator that she is not requesting personal information and that the police could block the names and addresses of the witnesses, but not the contents of the record.

Analysis/Findings

[19] As stated above, at issue are pages 22 and 23 of the records. These pages are an excerpt from a General Occurrence report and contain a police officer's account of the incident which the appellant was involved in. Other pages of the record are not at issue as the appellant has indicated that she is not interested in receiving this information which consists of the names, addresses, phone numbers, and other biographical data of the affected persons.

[20] The police have partially disclosed the two pages at issue in the record that contain the personal information of the appellant and other identifiable individuals. The severed information in the two pages at issue includes the names of the affected persons and their personal opinions or views in accordance with paragraphs (e), (g) and (h) of the definition of personal information in section 2(1). In my view, even if the names of the identifiable individuals were removed, their identity would still be apparent from the contents of the record. As this information is personal information of other identifiable individuals, I will consider the application of the personal privacy exemption in section 38(b) to this information.

[21] Pages 22 and 23 also contain the name and title of an individual in their business capacity. As this name and title is associated with this individual in a business capacity and is not their personal information, it cannot be subject to the personal privacy exemption in section 38(b). As no other exemptions have been claimed for this information, I will order only the title disclosed, as the appellant is not interested in receiving disclosure of names.

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

[22] 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

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

exemptions from this right.

[23] 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.

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

[25] If the information fits within any of paragraphs (a) to (e) of section 14(1) or within paragraphs (a) to (c) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this appeal, the information at issue does not fit within these paragraphs.

[26] 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 will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁵

[27] 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 under section 38(b). The police rely on the presumption in section 14(3)(b), which reads:

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.

[28] The police state that the appellant had called them to investigate an allegation of a criminal assault and that the information at issue was supplied to the investigating officer in the course of an investigation into a possible law enforcement matter. The police submit that the affected persons supplied their personal information believing there to be a certain degree of confidentiality. In this case, the police believe that disclosure may cause the affected persons further negative attention from the appellant.

[29] The appellant disputes that disclosure of the information at issue would be an unjustified invasion of the affected persons’ personal privacy.

⁵ Order MO-2954.

Analysis/Findings

[30] I find that the presumption in section 14(3)(b) applies to the information at issue in the records. This section reads:

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;

[31] I agree with the police that pages 22 and 23 were compiled and are identifiable as part of an investigation into a possible violation of law, namely an incident of assault under the *Criminal Code of Canada*.

[32] 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.⁶ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁷

[33] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.⁸

[34] 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

[35] 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 did not raise any factors that weigh in favour of disclosure in her representations. Based on my review of the information at issue, which was compiled during an incident involving the appellant, I find that no factors favouring disclosure of the affected persons' personal information to the appellant apply.

[37] Therefore, I find that the presumption in section 14(3)(b) applies and the withheld portions at issue on pages 22 and 23 are exempt under section 38(b), subject

⁶ Orders P-242 and MO-2235.

⁷ Orders MO-2213, PO-1849 and PO-2608.

⁸ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

⁹ Order P-239.

¹⁰ Order P-99.

to my review of the absurd result principle and the police's exercise of discretion.

Absurd result

[38] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 14(1) or 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.¹¹

[39] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement¹²
- the requester was present when the information was provided to the institution¹³
- the information is clearly within the requester's knowledge¹⁴

[40] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.¹⁵

[41] Based on my review of the two pages at issue and the appellant's representations, I find that certain information in there is clearly within the appellant's knowledge as she was present when the incident happened and knows the parties that were involved.

[42] Accordingly, I find that the absurd result principle applies to certain of the information at issue and I will order the information disclosed that is clearly within the appellant's knowledge. However, as the appellant is not seeking access to the names of other individuals, I will not order disclosure of these names.

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

[43] 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.

¹¹ Orders M-444 and MO-1323.

¹² Orders M-444 and M-451.

¹³ Orders M-444 and P-1414.

¹⁴ Orders MO-1196, PO-1679 and MO-1755.

¹⁵ Orders M-757, MO-1323 and MO-1378.

[44] 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.

[45] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ This office may not, however, substitute its own discretion for that of the institution.¹⁷

[46] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁸

- 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
- 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

¹⁶ Order MO-1573.

¹⁷ Section 43(2).

¹⁸ Orders P-344 and MO-1573.

- the age of the information
- the historic practice of the institution with respect to similar information.

[47] The police state in exercising their discretion to exempt information in favour of protecting the privacy of another person they considered:

- the wording of the personal privacy exemption and the interests it seeks to protect, and
- that the nature of a law enforcement institution is in great part to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police.

[48] The appellant states that the police improperly exercised their discretion and also did not properly sever the record.

Analysis/Findings

[49] I find that in denying access to the information I have found subject to section 38(b), the police exercised their discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations. The information at issue in the records is information gathered in the course of a law enforcement investigation and is sensitive information of other individuals that is not within the appellant's knowledge.

[50] Accordingly, I uphold the police's exercise of discretion and find that the information at issue is exempt under section 38(b).

D. Did the institution conduct a reasonable search for records?

[51] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹⁹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[52] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.²⁰

¹⁹ Orders P-85, P-221 and PO-1954-I.

²⁰ Orders P-624 and PO-2559.

To be responsive, a record must be "reasonably related" to the request.²¹

[53] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.²²

[54] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²³

[55] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.²⁴

[56] The police state that the appellant supplied specific dates and descriptions of the records she was seeking access to and that it was explained prior to and during mediation that many of the requested records, such as calls to the non-emergency numbers and direct contact with a specific police division do not result in a record being created by them. In addition, the police state that incidents must meet specific criteria for on-line reporting, and that the claims the appellant made about harassment do not meet this criterion.

[57] Regarding the search, the police state that the analyst assigned to the appellant's request conducted a thorough search. As well, their Intergraph CAD (Computer-aided Dispatch) system, which contains their call taking and dispatch operations, was searched using the appellant's address and telephone number, and expanding the scope of the search to encompass the entire months specified by the appellant, instead of specific dates. The police further state that it is not possible that responsive records existed but no longer exist as the databases required to search for occurrence and incident reports and the CAD system are still available for 2014 and 2015.

[58] The appellant states that there is responsive information that she has not received.

Analysis/Findings

[59] The appellant maintains that there is additional responsive information that has not been located by the police. I note, however, that although the appellant refers to information which ought to be included in the responsive records, portions of the

²¹ Order PO-2554.

²² Orders M-909, PO-2469 and PO-2592.

²³ Order MO-2185.

²⁴ Order MO-2246.

responsive records have been withheld under the personal privacy exemption in section 38(b).

[60] Based on my review of the parties' representations and the records, I find that the police have provided a detailed explanation about the search they conducted and the possible existence of additional responsive records. Based on my review of the parties' representations and the records already disclosed, I find that the appellant has not provided a reasonable basis for concluding that additional responsive records in the police's custody or control exist. I find that the police have conducted a reasonable search for responsive records as required by section 17; therefore, I uphold their search.

ORDER:

1. I order the police to disclose the title of the individual and the information I have found subject to the absurd result principle on pages 22 and 23 of the records by **April 20, 2016**. For ease of reference, I have provided the police with a copy of pages 22 and 23 severing the information that is not to be disclosed by them.
2. I uphold the police's decision to withhold the remaining information at issue on pages 22 and 23 of the records.
3. I uphold the police's search for records.

Original Signed by: _____
Diane Smith
Adjudicator

_____ March 14, 2016