

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3319

Appeal MA14-420

York Regional Police Services Board

May 31, 2016

Summary: The appellant filed a request under the *Municipal Freedom of Information and Privacy Act* (the *Act*) to the York Regional Police Services Board for records relating to the police's attendance at his residence. The police located responsive records but withheld them in their entirety on the basis that disclosure of the records 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 finds that small portions of the records contain the appellant's personal information and orders the police to disclose these portions of the records to the appellant. However, the adjudicator finds that disclosure of the remaining portions of the records would constitute an unjustified invasion of personal privacy under section 38(b). The police's decision is upheld in part.

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) and 38(b).

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the York Regional Police Services Board (the police) for records relating to the police's attendance at his residence.

[2] The police located a general occurrence report and officer's notes but denied the appellant access, claiming that disclosure would constitute an unjustified invasion of personal privacy under the mandatory exemption under section 14(1).

[3] The appellant appealed the police's decision to this office and a mediator was assigned to the appeal.

[4] During mediation, the mediator raised the possible application of section 38(b) to the records, which would make the police's access decision regarding the application of the personal privacy exemption a discretionary decision under Part II of the *Act*.

[5] Mediation did not resolve the appeal and the file was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry, the parties exchanged representations in accordance with this office's confidentiality criteria.

[6] In this order, I find that small portions of the records contain the personal information of the appellant and his children and order the police to disclose this information to the appellant. However, I find that disclosure of the remaining portions of the records to the appellant would constitute an unjustified invasion of personal privacy of other individual under section 38(b).

RECORDS:

[7] The records at issue in this appeal consists of a computer generated report and copies of the notebook entries of two officers.(15 pages).

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Would disclosure of the records constitute an unjustified invasion of personal privacy under section 38(b)?
- C. Did the police properly exercise their discretion in applying section 38(b)?

DISCUSSION:

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

[8] 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.

[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.¹

[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.²

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

[12] The police submit that the records contain the personal information of the appellant along with other individuals.

[13] I have reviewed the records and I find that the records contain the personal information of the appellant and other identifiable individuals, including minors. The records were created as a result of the police responding to an incident which occurred at the appellant's residence. By the time the police attended, the alleged offender had left. The police subsequently interviewed one of the affected parties and gathered information relating to this individual's name, address, telephone number, date of birth and sex along with the information of other individuals who reside at the premises, including the appellant and his children. The police also interviewed the alleged offender and gathered the same type of information for all adults and children residing with the alleged offender. In their representations, the police state:

It is the practice of the police when investigating [these types of complaints] to obtain the personal identifiers of all persons living at the residence, whether or not those individuals were ever involved in the incident or spoken to by police.

[14] I find that the records contain the personal information of the appellant and other individuals. This includes information relating to their age, sex, marital or family status (paragraph (a) of the definition of "personal information" at section 2(1)); address and telephone number (paragraph (d)) and this information where it appears along with their names (paragraph (h)).

[15] As I have found that the records contain the "personal information" of the appellant along with other identifiable individuals, I will determine whether disclosure of the records to the appellant would constitute an unjustified invasion of personal privacy under section 38(b).

B. Would disclosure of the records constitute an unjustified invasion of personal privacy under section 38(b)?

[16] Section 38(b) states:

¹ Orders P-257, P-427, P-1142, 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.).

A head may refuse to disclose to the individual to whom the information relates personal information,

if disclosure would constitute an unjustified invasion of another individual's personal privacy.

[17] 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

[18] 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.

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

[20] 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.

[21] 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). The police take the position that none of these paragraphs apply. The appellant submits that the paragraph (b) could apply. Paragraph (b) of section 14(1) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates

[22] The appellant submits that the alleged offender, one of the affected parties, has made repeated threats to "confront, both me and my children". The appellant also advises that several months after the police attended his home, the alleged offender was arrested and charged for assault.

⁴ Order M-352.

[23] For paragraph (b) of section 14(1) to apply to the circumstances of this appeal the appellant's evidence must demonstrate that there are compelling circumstances affecting the health and/or safety of himself and/or children. In my view, the appellant's evidence falls short of meeting this threshold. I have reviewed the record and am satisfied that it does not contain information which demonstrates that there are compelling circumstances that would affect the health and/or safety of the appellant and his children.

[24] Given that the affected parties have not consented to the release of their information as contemplated under paragraph (a) of section 14(1), I am satisfied that none of the paragraphs (a) to (e) apply in the circumstances of this appeal.

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

[25] The police take the position that the records were compiled and are identifiable as part of an investigation into a possible violation of law and that disclosure would constitute an unjustified invasion of personal privacy taking into consideration the presumption at section 14(3)(b). This section 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.

[26] The police submit that the information at issue was obtained as a result of their investigation into a possible violation of law. In support of this position, the police state:

Releasing the personal information of the affected parties to the appellant would be an unjustified invasion of personal privacy as the personal information of the affected parties, was obtained as part of an investigation into a possible violation of law. The appellant ... was not made aware by the police of the reason for their attendance. His personal information and that of the children who live at the residence was obtained by the police from the affected party.

[27] The appellant takes the position that the police cannot rely on the presumption at section 14(3)(b) on the basis that he was not interviewed by the police. The appellant advises that the police spoke to him outside of his residence. The appellant advises that the police asked him if he was home when the incident occurred, which he advised he was not. The appellant also advises that he "informed them that [he] was aware of the circumstances leading up to the incident".

[28] Having regard to the submissions of the parties and the records, I am satisfied that the personal information at issue was collected as part of the police's investigation

into a possible violation of law, namely a *Criminal Code* offence.

[29] As the presumption only requires that there be an investigation into a possible violation of law, it applies even if no proceedings were commenced against the alleged offender.⁵ It also applies whether or not the appellant was questioned by the police.

[30] Having regard to the above, I find that the presumption at section 14(3)(b) applies in the circumstances of this appeal.

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

[31] 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.

[32] 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.⁶

[33] The appellant submits that the factor favouring disclosure at section 14(2)(d) applies to the circumstances of this appeal for the following reasons:

- The alleged offender's "behaviour falls under section 264 of the *Criminal Code of Canada* known as "criminal harassment";
- There have been several incidents where the alleged offender "harassed" the appellant or his family; and

⁵ Orders P-242 and MO-2235.

⁶ 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.).

- The appellant requires the information at issue to determine if the investigating officers made a particular statement to the alleged offender.

[34] In order for the factor at section 14(2)(d) to be given any consideration in this appeal, the appellant must establish that all four parts of the test have been met. Accordingly, any rights the appellant claims he has to the information must relate to an existing or contemplated proceeding and there must be evidence that disclosure of the information at issue has some bearing on or is significant to the rights in question and is required to prepare for the proceeding or to ensure an impartial hearing. Given that the appellant's evidence failed to demonstrate that there is an existing or contemplated legal proceeding, I find that the section 14(2)(d) has no application in this appeal.

Summary

[35] I find that the presumption at section 14(3)(b) applies in the circumstances of this appeal. 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 of the affected parties to the appellant would constitute an unjustified invasion of personal privacy under section 38(b).

[36] In making my decision, I also considered whether the absurd result principle could apply.

[37] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.⁷

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

- the requester sought access to his or her own witness statement.⁸
- the requester was present when the information was provided to the institution.⁹
- the information is clearly within the requester's knowledge.¹⁰

[39] In his representations, the appellant states that the information contained in the police report and officer's notes is "clearly [within his] knowledge" as a result of his extensive conversations with one of the affected parties.

[40] Despite the appellant's evidence that he spoke to the police, there is insufficient evidence to establish that most of the withheld information is clearly within his knowledge. In making my decision, I reviewed the appellant's submissions along with

⁷ Orders M-444 and MO-1323.

⁸ Orders M-444 and M-451.

⁹ Orders M-444 and P-1414.

¹⁰ Orders MO-1196, PO-1679 and MO-1755.

the records and am satisfied that the absurd result principle has no application to most of the information in the records.

[41] However, I find that the absurd result principle applies to the information in the records about the appellant's and his children's names, address and contact information. Similarly, I find that it applies to the information the appellant provided the police outside the residence. As a result, I will order the police to disclose these portions of the records to the appellant.

[42] I find that the remaining personal information at issue contained in the records is exempt from disclosure under section 38(b), subject to my assessment of whether the police exercised its discretion properly.

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

[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.

[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.¹¹This office may not, however, substitute its own discretion for that of the institution.¹²

[46] The police submit that it properly exercised its discretion and took into consideration the principle that individuals should have access to their information along with the fact that the withheld information is sensitive and was collected as the result of a police investigation. The police state:

Taking all these factors into consideration the police used its discretion not to release the ... affected parties' personal information to the appellant as protecting the privacy of the affected parties outweighed any factor that would convince the police to grant access to the appellant.

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

¹¹ Order MO-1573.

¹² Section 43(2).

[48] I have carefully reviewed the police's submissions and am satisfied that they properly exercised their discretion and in doing so took into account relevant considerations such as the sensitive nature of the personal information at issue. I am also satisfied that the police did not exercise their discretion in bad faith or for an improper purpose.

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

ORDER:

1. I order the police to disclose the portions of the records that do not qualify for exemption under section 38(b) by **July 6, 2016** but not before **June 28, 2016**. For the sake of clarity, in the copy of the records enclosed with the order sent to the police, I have highlighted the portions of the record which **should** be disclosed to the appellant.
2. I uphold the police's decision to withhold the remaining personal information contained in the records I found qualify for exemption under section 38(b).
3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require a copy of the records disclosed by the police to be provided to me.

Original signed by: _____
Jennifer James
Adjudicator

_____ May 31, 2016