

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3371

Appeal MA15-547

Guelph Police Services Board

October 31, 2016

Summary: The appellant sought access to all police records related to him during a specified period. The police located records responsive to the request and granted the appellant partial access to them, relying on the discretionary exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(c) (reveal investigative techniques and procedures), and section 38(b) (personal privacy) to withhold some information. The appellant asserted that additional responsive records should exist and appealed the decision. The police's decision under section 38(b) is upheld, but sections 38(a) and 8(1)(c) are found not to apply to the records. The police's search for records is upheld as 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", 8(1)(c), 14(2)(f), 14(2)(h), 14(3)(b), 38(a) and 38(b).

Cases Considered: *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

[1] The appellant submitted a request to the Guelph Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all police records created within a specified date range that contain his personal information. The police located one occurrence report that was responsive

to the request and issued a decision granting the appellant partial access to it. The police relied on the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(c) (reveal investigative techniques and procedures), and section 38(b) (personal privacy) to withhold some information from the occurrence report.

[2] Following communications with the appellant, the police conducted additional searches for responsive records and located two sets of handwritten notebook entries from two police constables who were present during the police occurrence involving the appellant. The police issued decisions granting the appellant partial access to the two handwritten notebook entries, relying on the discretionary exemptions in sections 38(a), in conjunction with section 8(1)(c), and 38(b) to withhold certain portions.

[3] The appellant was not satisfied with the police's partial disclosure decisions and appealed them to this office. During the mediation stage of the appeal, the appellant asserted that additional responsive records exist, thus raising the reasonableness of the police's search for responsive records as an issue in this appeal. Also during mediation, this office notified an individual whose interests could be affected by disclosure of the records (the affected party) of the appeal and sought her position on disclosure. The appellant agreed to be identified to the affected party and was. The affected party also agreed to be identified to the appellant and was; however, she did not consent to the disclosure of the withheld information in the records that pertained to her.

[4] As a mediated resolution was not possible, the appeal was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*. During my inquiry, I invited representations from the police, the affected party and the appellant on the issues set out below. The police and the appellant submitted representations. The affected party did not submit representations and advised that she did not want to participate in the appeal.

[5] In this order, I partially uphold the decision of the police and order them to disclose the information withheld under sections 38(a) and 8(1)(c).

RECORDS:

[6] The records at issue are the withheld portions of an occurrence report and handwritten notebook entries of two police constables all relating to one police occurrence involving the appellant and the affected party.

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 withheld under it?
- C. Does the discretionary exemption at section 38(a), in conjunction with section 8(1)(c), apply to the remaining withheld information?
- D. Did the police properly exercise their discretion under section 38(b)?
- E. Did the police conduct a reasonable search for records?

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) 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;

[8] 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.¹

[9] The police submit that the records contain the personal information of both the appellant and the affected party, who were both present at the time of the police occurrence described in the records. The appellant does not address this issue in his representations.

[10] I find that the records contain the personal information of both the appellant and the affected party including the parties' names, dates of birth, marital status, personal views and statements they provided to the police during the occurrence that is the subject of the occurrence report, and handwritten police officers' notes. This information qualifies as personal information as defined in paragraphs (a), (e), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*. The records also contain information relating to one party that qualifies as personal information under paragraph (b) of the definition.

[11] Having found that the records contain the personal information of the appellant and the affected party, I will consider the appellant's right to access the withheld information under sections 38(a) and (b) of the *Act*.

B. DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(B) APPLY TO THE INFORMATION WITHHELD UNDER IT?

[12] Section 38 provides a number of exemptions from the general right of access individuals have under section 36(1) of the *Act* 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

¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v Pascoe*, [2002] OJ No 4300 (CA).

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.

[13] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information 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). There is no suggestion that any of paragraphs (a) to (e) of section 14(1) applies in this appeal and I find that none does.

[14] In determining whether 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.² 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 submit that the presumption in section 14(3)(b) applies in this appeal.

[15] Sections 38(b) and 14(3)(b) state:

38.(b) 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

14.(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[.]

[16] All that is required for section 14(3)(b) to apply is that there be an investigation into a possible violation of law³ at the time that the records were created.⁴

Representations

² Order MO-2954.

³ Orders P-242 and MO-2235.

⁴ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

[17] The police submit that the personal information in the records was compiled and is identifiable as part of their investigation into a possible violation of law. They explain that the records contain information that they gathered when they responded to the appellant's call for service and spoke with him and the affected party. The police submit that the affected party provided the withheld information to them in confidence during the occurrence and they note that she refused to consent to disclosure of her personal information contained in the records. They state that they withheld the affected party's personal information because its disclosure would be an unjustified invasion of her privacy. The police add that the appellant was not aware of the information provided by the affected party during the occurrence and therefore, it is not absurd to withhold this information from him.

[18] The appellant does not address this issue in his representations.

Analysis and findings

[19] The occurrence report and the handwritten police officers' notes at issue in this appeal relate to an occurrence at the appellant's home, which the police attended at the appellant's request to investigate a complaint he made. I am satisfied that the occurrence report and the notes were compiled by the police officers who attended the occurrence and are identifiable as part of these officers' investigation into a possible violation of law. I find that the presumption in section 14(3)(b) of the *Act* applies in this appeal, and I now turn to the factors in section 14(2).

[20] While the police do not refer to any specific factors, their representations allude to the factors in sections 14(2)(f) and (h), which state:

(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,

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence[.]

[21] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.⁵ I am not able to reveal the circumstances of the occurrence without revealing the contents of the withheld information. However, considering the relationship between the affected party and the appellant at the time of the occurrence, the circumstances of the occurrence, the nature of the withheld information and the affected party's refusal to consent to

⁵ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

disclosure, I am satisfied that disclosure of the withheld information would cause the affected party significant personal distress and that it is therefore highly sensitive as contemplated by section 14(2)(f).

[22] The factor in section 14(2)(h) applies in situations where the individual supplying the information and the recipient have an expectation that the information will be treated confidentially, and that expectation is reasonable in the circumstances. In this appeal, the affected party and the appellant were present when the police attended their home and they provided information to the police during the investigation. The police confirm in their representations that the affected party provided information to the police separately from the appellant during the occurrence, and that the appellant is not aware of what she said. I am satisfied that in these circumstances, it was reasonable for the affected party to expect that her statement to the police would be treated confidentially.

[23] I find that the factors in sections 14(2)(f) and (h), which weigh against disclosure of the withheld information, apply in this appeal. No other factors in section 14(2) have been raised by the parties. From my review of the records and the circumstances of the appeal, I find that no other factors apply.

[24] The police submit, and I agree, that the absurd result principle does not apply in this appeal. The absurd result principle arises in situations where the requester originally supplied the information or is otherwise aware of it such that 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.⁶ It has been applied in cases where a requester sought access to her own witness statement⁷, a requester was present when the information was provided to the institution⁸, and where the information is clearly within the requester's knowledge.⁹ None of these situations is present in this appeal and therefore, I find that withholding the information at issue would not produce an absurd result.

[25] Having found that the presumption in section 14(3)(b) and the factors weighing in favour of privacy protection in sections 14(2)(f) and (h) apply, and having found that no factors apply that weigh in favour of disclosure, I am convinced that disclosure of the affected party's personal information in the records would be an unjustified invasion of her personal privacy under section 38(b). I find that the information withheld under

⁶ Orders M-444 and MO-1323.

⁷ Orders M-444 and M-451.

⁸ Orders M-444 and P-1414.

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

section 38(b) of the *Act* is exempt from disclosure, subject to my review of the police's exercise of discretion below.

C. DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(A), IN CONJUNCTION WITH SECTION 8(1)(C), APPLY TO THE REMAINING WITHHELD INFORMATION?

[26] The police submit that section 38(a), in conjunction with section 8(1)(c), applies to the remaining withheld information. These sections of the *Act* read:

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

(a) 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.

8.(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement[.]

[27] 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.¹⁰

[28] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)[.]

[29] The term "law enforcement" applies to a police investigation into a possible

¹⁰ Order M-352.

violation of the *Criminal Code*.¹¹

[30] In order to meet the “investigative technique or procedure” test, the police must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.¹² The techniques or procedures must be “investigative”. The exemption will not apply to “enforcement” techniques or procedures.¹³

[31] The police submit that they relied on section 8(1)(c) to withhold police-related coding information in the records. They explain that coding information includes numerical codes used to classify police responses within their records management system and communication codes that officers use to communicate with their dispatch centre. The police assert that these codes are information not generally known to the public.

[32] The appellant does not address this issue in his representations.

[33] The police’s brief representations on section 8(1)(c) do not meet the threshold for its application; they do not identify any investigative technique or procedure, let alone explain how any investigative technique or procedure would be revealed if the withheld information is disclosed. The police have not provided evidence about the potential for harm required to establish that section 8(1)(c) applies. They have not demonstrated that the risk of revelation is well beyond the merely possible or speculative as required for the application of the exemption.¹⁴ I find that section 8(1)(c) does not apply in this appeal. As a result, I further find that the information withheld under section 38(a) is not exempt from disclosure. Since the police have not claimed any other exemption for this information, I will order them to disclose it.

D. DID THE POLICE PROPERLY EXERCISE THEIR DISCRETION UNDER SECTION 38(B)?

[34] 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

¹¹ Orders M-202 and PO-2085.

¹² Orders P-170, P-1487, MO-2347-I and PO-2751.

¹³ Orders PO-2034 and P-1340.

¹⁴ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

institution failed to do so. 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.

[35] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁵ This office may not, however, substitute its own discretion for that of the institution.¹⁶ Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁷

- 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
- 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.

[36] The police submit that they exercised their discretion under section 38(b) in good

¹⁵ Order MO-1573.

¹⁶ Section 43(2).

¹⁷ Orders P-344 and MO-1573.

faith having regard to a number of relevant considerations. They state that they considered the fact that they granted the appellant access to his own personal information. They add that they balanced the appellant's right to access his personal information against their obligation to protect the privacy of the affected party who did not consent to disclosure of her personal information in this appeal. The police continue that in keeping with the principle that exemptions from the right of access should be limited and specific, they withheld very little information from the records and disclosed as much of the responsive records as they could reasonably sever without disclosing information that is exempt.

[37] The appellant does not address this issue in his representations.

[38] I am satisfied that the police exercised their discretion in good faith when they relied on section 38(b) to withhold the affected party's personal information. The representations of the police demonstrate that they took relevant factors into account when exercising their discretion and did not consider irrelevant factors. I have upheld the police's claim of section 38(b) in this appeal and I similarly uphold their exercise of discretion.

E. DID THE POLICE CONDUCT A REASONABLE SEARCH FOR RECORDS?

[39] Because the appellant claims that additional records exist beyond those identified by the police, the final issue I must determine is whether the police's search for responsive records was reasonable as required by section 17 of the *Act*.¹⁸ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the police's decision. If I am not satisfied, I may order further searches.

[40] The *Act* does not require the police to prove with absolute certainty that further records do not exist. However, the police must provide sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records.¹⁹ To be responsive, a record must be "reasonably related" to the request.²⁰

[41] 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.²¹ A further search will be ordered if the institution

¹⁸ Orders P-85, P-221 and PO-1954-I.

¹⁹ Orders P-624 and PO-2559.

²⁰ Order PO-2554.

²¹ Orders M-909, PO-2469 and PO-2592.

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.²²

[42] 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.²³

[43] The police provide the details of their search for responsive records in affidavit form. The affidavit is sworn by their Information and Privacy Legal Assistant, who states she has twelve years of service with the police. She states that upon receiving the appellant's request, she searched the appellant's name in the police's records management system (RMS) and found only one occurrence related to him for the specified time period; she partially disclosed this occurrence to him. She further states that after the appellant contacted her with his concerns that the police report was not complete, she contacted the police officers who were dispatched during the occurrence and obtained their handwritten notes, which she also partially disclosed to the appellant. She states that their RMS does not have any audio, video or photographs of the appellant.

[44] The appellant submits that the police have not provided him with all relevant electronic information, including copies of audio, video, photographs, surveillance information from the police satellite tracking and monitoring station, and information from the police license plate tracking system.

[45] Having reviewed the representations on this issue and the records, I am satisfied that the affidavit from the police provides sufficient evidence to demonstrate that the police made a reasonable effort to identify and locate all of the responsive records within their custody or control. While the appellant claims that various electronic records exist, he provides no reasonable basis for his claim and no information that would lead me to such a conclusion. I find that the police's search, which involved an experienced employee knowledgeable in the subject matter of the request, was reasonable.

ORDER:

1. I uphold the police's decision to withhold the personal information of the affected party under section 38(b) and the police's search for responsive records.
2. I do not uphold the police's decision to withhold information under section 38(a) and I order it to disclose this information to the appellant by **December 6,**

²² Order MO-2185.

²³ Order MO-2246.

2016, but not before **December 1, 2016**, copying me on the correspondence disclosing the information.

Original Signed by: _____

Stella Ball
Adjudicator

_____ October 31, 2016