Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3387

Appeal MA16-45

Toronto Police Services Board

December 9, 2016

Summary: The appellant requested an occurrence report from the police regarding an incident at a drop-in centre in which he was involved. The police located a record responsive to the request and granted the appellant partial access to it, relying on the discretionary exemption in section 38(b) (personal privacy) to withhold the personal information of affected parties. The appellant appealed claiming he needed access to the personal information of affected parties in the record so that he could bring a court action and to support his human rights complaint, amongst other arguments. In this order, the adjudicator upholds the police's decision to withhold parts of the record.

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)(a), 14(2)(b), 14(2)(d), 14(2)(f), 14(2)(h), 14(3)(b), 16 and 38(b).

Orders and Investigation Reports Considered: MO-2980, MO-3351, PO-2518.

OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the city) for access to a copy of a particular police incident report. The city transferred the request to the Toronto Police Services Board (the police) for a response citing that the police had a greater interest in the requested record.

[2] In response to the access request, the police identified an 8-page occurrence report. The police granted partial access to the record denying access to some portions of the record. The police claim that the disclosure of the withheld portions of the record would constitute an unjustified invasion of personal privacy under section 38(b) with reference to the factors and presumptions in section 14 of the *Act*. The police also denied access to portions of the record on the basis that the information was not responsive to the access request.

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

[4] During mediation, information contained in the records, which was not responsive to the request, was removed from the scope of appeal. The appellant raised the issue of public interest override. The mediator attempted to contact the five individuals whose interests would be affected by the disclosure of the information (affected parties) to determine if they would consent to disclose information contained in the record that relates to them. Four affected parties did not consent to the disclosure of any information contained in the record that relates to them. The mediator did not receive a response from one of the affected parties.

[5] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry under the *Act*. During my inquiry, I sought and received representations from the appellant and the police. I also sought representations from the five affected parties and received representations from two. Representations 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 parts of the record.

RECORDS:

[7] The remaining portions of an occurrence report.

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 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. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 38(b) exemption?

DISCUSSION:

A: Does the record 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. That term is defined in section 2(1) 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,
> >
> > (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,
> >
> > (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;

[9] 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]

[10] In their representations, the police state the record contains personal information as defined in section 2(1) and noted paragraphs (a), (c), (d) and (e) as applicable. The police were called for assistance after a fight erupted between three guests at a drop-in centre. The police submit that the record contains the personal information of the

[1] Order 11.

appellant and five affected parties, including their names, addresses, ages and personal opinions. The police state that not only is it reasonable to expect that other parties may be identified if the redacted portions of the record were disclosed but that its release would constitute an unjustified invasion of personal privacy of the affected parties.

[11] Of the five affected parties mentioned in the record, two provided representations in this appeal. The affected parties state that the record contains their personal information with one noting that the record contains their full name, home address, home phone number, cell phone number, gender, ethnicity, occupation and date of birth. These affected parties do not consent to releasing their personal information to the appellant.

[12] The appellant, in his representations, notes that he is specifically looking for the personal information of the affected parties in the record. He states that some of the affected parties were eye witnesses to an assault where he was the victim and their personal information is required given that he has filed a human rights complaint against the drop-in centre which he commenced in June of 2016. He indicates that the personal information found in the record should be disclosed to him so that he will have the contact information of those involved in the incident and those who witnessed the incident to support his complaint against the drop-in centre. The appellant also states that he should have the right to face his transgressor stating that he was the victim of an assault by one of the parties whose personal information appears in the record.

Finding

[13] A review of the record shows that it contains the personal information of the appellant and the affected parties. The record contains the personal information of three individuals involved in an incident at a drop in centre which includes the personal information of the appellant. The record also contains the personal information of witnesses to the incident which includes names, phone numbers, addresses, dates of birth and ethnicity. In addition, the record also contains a synopsis of the incident and the redacted parts of this synopsis contain the views or opinions of the parties about the incident. After a review of the record, I find that the redacted portions qualify as personal information under the *Act*.

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

[14] Since I found that the record contains the personal information of both the appellant and the affected parties, section 36(1) applies to this appeal. 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 exemptions from this right.

[15] 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 appellant.[2]

[16] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[17] In making this determination, this office will consider, and weigh, the factors and presumptions in 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). If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[18] 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.[4] Some of the factors listed in section 14(2), if present, weigh in factor of disclosure, while others weigh in favour of non-disclosure. 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).[5]

[19] The police submit that the presumption at section 14(3)(b) of the *Act* applies to the information from disclosure and also rely on the factors at sections 14(2)(f) and 14(2)(h).

[20] The appellant's representations specifically raise the factor at section 14(2)(d) (fair determination of rights).

[21] The relevant sections of section 14 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,
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> > (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
> >
> > (b) access to the personal information may promote public health and safety;

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[2] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).
[3] Order MO-2954.
[4] Order P-239.
[5] Order P-99.

> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
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> (f) the personal information is highly sensitive;
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> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(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;

[22] 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]

[23] For the reasons that follow, I find that the factors and presumptions in section 14(2) and (3) support the application of the exemption at section 38(b) to the withheld portions of the record.

Section 14(3) presumption

[24] The police submit, and I accept, that the presumption at section 14(3)(b) applies in these circumstances. The record is an occurrence report concerning an incident that occurred at a drop-in centre. The record includes the personal information of those involved in the incident as well as those who witnessed it. The record was compiled as part of a police investigation into a possible violation of the *Criminal Code of Canada*, which did not result in charges being laid. Although no charges were laid, there need only have been an investigation into a possible violation of law for the presumption at section 14(3)(b) to apply.[7] Section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld portions of the record.

Section 14(2) factors

[25] The parties' representations raise the possible application of paragraphs 14(2)(a), (b), (d), (f) and (h). The factors at section 14(2)(a), (b) and (d) if they apply, would weigh in favour of disclosure, while the factors at section 14(2)(f) and (h) would weigh in favour of non-disclosure.

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[6] Orders P-242 and MO-2235.
[7] Orders P-242 and MO-2235

Section 14(2)(a): public scrutiny

[26] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(a) requires the police to consider whether releasing the personal information is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

[27] In his representations, the appellant states that the police are a public institution and branch of government supported by tax dollars and they have "to meet certain standards that serve the interest in whom they are paid by [to] be transparent and support public interests."

[28] The police submit that section 14(2)(a) is not applicable in this appeal.

[29] The objective of section 14(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. After reviewing the appellant's representations along with the withheld portion of the record, I conclude that disclosing the subject matter of the withheld personal information contained in the occurrence report would not result in greater scrutiny of the police. Additionally, I find that the subject matter of the information sought does not suggest a public scrutiny interest.[7]

Section 14(2)(b): public health and safety

[30] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(b) requires the police to consider whether disclosure of the personal information may promote public heath and safety.

[31] The appellant's representations refer to a section of 14(1) that does not appear to apply. Based on his representations, it appears the appellant is relying on section 14(2). The appellant notes that the incident involved a "dangerous offender who frequents the drop inn centre and is Racist and violent, committing assaults often."

[32] In their representations, the police noted that section 14(2)(b) did not apply in this appeal.

[33] In MO-2980, Adjudicator Colin Bhattacharjee gave moderate weight to section 14(2)(b) because he found by disclosing a dog owner's name in a dog bite case so that a court action could be commenced, may lead to "a possible court order with public safety ramifications."

[34] In this instance, I find that a civil action against the "transgressor" would not potentially promote public health and safety and therefore this factor does not apply in this appeal.

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

[35] In determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(d) requires the police to consider whether the personal information is relevant to a fair determination of rights affecting the person who made the request.

[36] The appellant submits that the "transgressor's" name is relevant to a fair determination of his rights. He submits that he has a right to face his "transgressor" and notes that he had to attend the hospital following the incident. He also notes that he is bringing a civil action against the drop-in centre and needs the personal information in the record so he can access the pertinent affected parties' statements. He included the file number for his human rights complaint in his representations.

[37] The police suggest that section 14(2)(d) has no application in this appeal.

[38] Previous orders of this office have found that, for the factor at 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;

2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

3. the personal information to which the appellant is seeking access has some bearing on or is significant to the determination of the right in question;

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[8]

[39] The appellant has indicated a desire to start a civil action and has provided the file number for his human rights claim. Therefore, I find that he has satisfied the first two requirements. In addition, the personal information that he is seeking has some bearing on his right to sue because he needs to identify the defendant to the action as well as any witnesses to his claim. Therefore, I find all of the requirements have been met.

[40] In prior orders, this office has found that the existence of disclosure processes available to parties under the *Rules of Civil Procedure*, or rules of a Tribunal, for that

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[8] 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.).

matter, reduces the weight that should be given to the section 14(2)(d) factor.[9] As Adjudicator Bhattacharjee pointed out in Order MO-2980, an "appellant could commence a civil action against . . . an unnamed defendant, by use of a pseudonym, and then use the Rules of Civil Procedure to obtain the . . . name and address from the police or another body that holds that information."

[41] I agree with prior orders that find that the existence of other possible methods of access reduces the weight that should be accorded to the section 14(2)(d) factor. I agree with Adjudicator Gillian Shaw in Order MO-3351 that a judge or an arbitrator would have "the power to order production and would be much better placed than I am to determine whether production is necessary in the interests of justice."

[42] Further, based on information received from one affected party in their representations, the appellant may already be aware of information that would provide him with the ability to contact some of the affected parties in the event he needs to call them as witnesses.

[43] Since there are other avenues available to the appellant to get the information he seeks from the record, I only give this factor little weight.

Section 14(2)(f): highly sensitive

[44] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(f) requires the police to consider whether the personal information is highly sensitive.

[45] The police submit that section 14(2)(f) may apply in this circumstance as some of the parties who provided their personal information as a result of the incident did so within their professional capacity as employees of the drop-in centre. Since the information involves their full names, home addresses, phone numbers and dates of birth, the police submit this information is highly sensitive.

[46] In order PO-2518, Senior Adjudicator John Higgins set out an interpretation of section 21(2)(f) (highly sensitive), a section which mirrors section 14(2)(f) in *Freedom of Information and Protection of Privacy Act*, as "a reasonable expectation of 'significant' personal distress," in order to assess whether or not information qualifies as "highly sensitive." This has subsequently been followed by IPC adjudicators.

[47] In the circumstances of this appeal, the police conducted an investigation and concluded that the incident was a matter that should not be addressed in a criminal context as no charges were laid. This reduces the sensitivity of the personal information in the withheld portions of the records. However, given that the personal information was given in the context of a police investigation as a result of an assault and noting

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[9] R.R.O. 1990, Reg. 194.

the affected parties' representations if the appellant receives their personal information, I find that the record is highly sensitive and give this factor moderate weight.

Section 14(2)(h): supplied in confidence

[48] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(h) requires the police to consider whether the personal information was supplied in confidence.

[49] In their representations, the police state that in light of the occurrence arising from acts of aggression (both physical and verbal), those who were involved in the incident as well as the staff would have provided their personal information with a reasonable expectation of confidentiality.

[50] The affected parties who made representations in this appeal each refer to the fact that they were under no obligation to provide the police with a statement or their contact information. One affected party indicated that they provided their personal information with an expectation of confidentiality and they would be hesitant to provide this information in the future if their personal information was disclosed to the appellant.

[51] Given the context within which the personal information was supplied, I find that the affected parties had an expectation that their information was supplied in confidence. Accordingly, having considered the presumptions and factors in section 14, I find that disclosure of the withheld information would be an unjustified invasion of personal privacy. Accordingly, I find that section 38(b) applies, subject to my finding on the exercise of discretion.

Finding

[52] I find that two factors favour non-disclosure of the withheld portions of the record while one factor favours disclosure. In my assessment, I gave the factor at section 14(2)(d) little weight while giving the two factors that favour non-disclosure moderate and significant weight. In addition, since this record was created in the course of an investigation into a possible violation of law, section 14(3)(b) presumes that disclosure is an unjustified invasion of personal privacy. I therefore find that the records are exempt under section 38(b).

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

[53] 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.

[54] In this case, I am satisfied that the police exercised their discretion in choosing to withhold part of the record that contained the affected parties' personal information under section 38(b). The representations of the police demonstrate that they took relevant factors into account when exercising their discretion and did not consider irrelevant factors. The police indicate that in making their decision on access, they took into account considerations including the appellant's right of access to his own information, that the information was collected in the course of an investigation into a possible law enforcement matter, the belief of the affected parties that they were giving their personal information with an expectation of confidentiality and that any release of the affected parties' personal information could expose them to further negative attention from the appellant (this was supported by affected parties who made representations in this appeal). In addition, of the affected parties that the police were successfully able to contact, none of them consented to the release of their personal information.

[55] I have upheld the police's claim of section 38(b) in this appeal and I also uphold their exercise of discretion.

D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 38(b) exemption?

[56] In his representations, the appellant submits that the public interest override at section 16 applies to the record. Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[57] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[58] The discretionary exemption in section 38(b) of the Act is not listed as one of the exemptions that can be overridden by section 16. However, the IPC has found that if an institution has properly exercised its discretion under section 38(b) of the Act, relying on the application of sections 14(2) and/or (3), an appellant should be able to raise the application of section 16.[10]

[59] In his representations, the appellant relies on prior orders to support his position that there is a public interest in releasing the withheld portions of the record. He states that he relied on the police to charge the man who assaulted him. He states that the police failed in charging the man and now the appellant cannot call witnesses to testify in pursuit of fundamental justice. He states that he should have the right to face his

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[10] Order P-541.

transgressor whose actions should have met the threshold of a hate crime and should have to face justice for his crimes.

[60] The appellant states that the police have "overtly lied and rushed [him] to give a hastened account of the assault and diminished [his] head and neck injuries, not to mention the promise that the man whom is still unnamed was to be arrested and charges to be laid which did not occur." The appellant argues that "we have to hold our Public institutions accountable by the public that they serve and should be scrutinized for not following procedural law and therefore making it an abuse of process in which there is no punishment."

[61] In their representations, the police state that the appellant was one of the individuals cautioned in the assault occurrence and was subsequently banned from the drop-in centre and assert that the appellant's interest is private rather than public.

[62] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the Act's central purpose of shedding light on the operations of government. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

[63] A public interest does not exist where the interests being advanced are essentially private in nature.[11] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[12]

[64] I find that the appellant has not established that there is a compelling public interest in disclosure of the withheld portions of the record at issue in this appeal. I am not convinced that there is a strong relationship between this record and the *Act*'s central purpose of shedding light on the operations of government. In addition, I find that the appellant has a private, not a public, interest in obtaining the record at issue, and disclosing the withheld portion would not raise issues of a more general application.

[65] Although the appellant may have a compelling private interest in seeking access to some of the withheld information in the record, I find that there is no compelling public interest in disclosure, as required by section 16. Therefore, I find that the public interest override in section 16 does not apply to the withheld portion of the record.

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[11] Orders P-12, P-347, and P-1439.
[12] Order MO-1564.

ORDER:

I uphold the police's decision to withhold the personal information of the affected parties under section 38(b).

Original Signed by: December 9, 2016

Alec Fadel
Adjudicator