

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3440

Appeal MA16-230

Thunder Bay Police Services Board

May 16, 2017

Summary: The police received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to occurrence reports relating to incidents involving the requester. The police denied access to portions of the responsive occurrence reports pursuant to the discretionary personal privacy exemptions at sections 38(a) and (b). The requester appealed the police's decision. In this order, the adjudicator upholds the police's decision to withhold portions of the responsive records pursuant to section 38(b).

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"), 14(2)(d), (h), 14(3)(b), (d), and 38(b).

OVERVIEW:

[1] The Thunder Bay Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the following information:

[Named company] [has] indicated to me [that] they have contacted the [police] over allegations I made a threat to a co-worker. This [incident] apparently occurred in Feb. 2016. I would like a copy of the report.

I also request, in addition to the report above, any other reports where I have been investigated or [where] allegations against me were reported to the [police].

Note: I have never been spoken to about this alleged incident. If there are no reports please indicate this in your correspondence.

[2] The police issued a decision refusing to confirm or deny the existence of any responsive records pursuant to sections 8(3) and 14(5) of the *Act*.

[3] The requester, now the appellant, appealed the police's decision.

[4] During mediation, the police issued a revised decision granting the appellant partial access to the responsive records, the existence of which it previously refused to confirm or deny. Access to the withheld records or portions of records was denied pursuant to the discretionary personal privacy exemption at section 38(a), read in conjunction with the law enforcement exemptions at sections 8(1)(a), (b), (c), (d), (e), (h), and (l), and the exemption for information that would result in danger to health or safety at section 13 of the *Act*. Access was also denied pursuant to the discretionary personal privacy exemption at section 38(b), taking into consideration the presumption against disclosure of information compiled as part of an investigation into a possible violation of law at section 14(3)(b) and the presumption for information relating to employment or educational history at section 14(3)(d) of the *Act*.

[5] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sought and received representations from both the police and the appellant, respectively. I shared the non-confidential portions of the police's representations with the appellant in accordance with this office's *Practice Direction Number 7*. I decided that it was not necessary for me to share the appellant's representations with the police.

[6] In this order I find that the exemption at section 38(b) applies to the information at issue and uphold the police's decision not to disclose it.

RECORDS:

[7] The responsive records in this appeal consist of six police occurrence reports. The withheld portions of two of the reports remain at issue.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?

DISCUSSION:

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

[8] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.¹ Where the records contain the requester’s own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

[9] Accordingly, 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) of the *Act*:

“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 or a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

¹ Order M-352.

(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;

[10] 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.² To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.

[11] Section 2(2.1) also relates to the definition of personal information:

(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.

[12] 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.³ 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.⁴

Representations

[13] The police submit that the records at issue contain "both personal and professional information of the appellant and affected parties."

[14] The police submit that they disclosed information relating to the affected parties that they considered to be professional in nature, such as the names of the employees deemed to be acting in their professional capacity and any information relevant to their professional duties. The police submit that it withheld the remaining information as it amounts to the affected parties' personal information relating solely to them in their personal capacity because the incident about which the occurrence reports relate did not arise as a result of their professional duties. The police submit that were the withheld information disclosed, it would identify the affected parties, and that it could not be severed in any way.

[15] The police submit that the personal information of the appellant that could be severed from the personal information of other individuals was disclosed to him.

[16] The police submit generally, that the information that qualifies as "personal information" in the records includes the names, addresses and contact information, as well as the opinions of the affected parties.

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

[17] In his representations, the appellant did not specifically comment on whether the records contain personal information as that term is defined in section 2(1) of the *Act*.

Analysis and findings

[18] Having reviewed the responsive records, I find that all of them contain the personal information of the appellant as well as that of other identifiable individuals. This includes information relating to their race, age, sex or marital or family status (paragraph (a)), their medical, criminal or employment history (paragraph (b)), identifying numbers assigned to them (paragraph (c)), their addresses and telephone numbers (paragraph (d)), the view or opinions of other individuals about them (paragraph (g)), and their names, where they appear with other information about them (paragraph (h)).

[19] Accordingly, I find that the records at issue contain the “personal information” of the appellant and other identifiable individuals within the meaning of the definition of that term at section 2(1) of the *Act*.

[20] Additionally, from my review of the records I also accept the police’s submissions that they have disclosed to the appellant information that can be described as professional information such as that contemplated in section 2(2.1) of the *Act*. I am satisfied that any information that might relate to any of the affected parties that has been withheld does not qualify as their professional information as it would also reveal something of personal nature about these individuals, and therefore constitutes their personal information.

[21] As described above, in circumstances where the records contain the personal information of the appellant, together with that of other identifiable individuals, Part II of the *Act* applies. Therefore, in this case, I must consider whether the information is exempt under any of the discretionary personal privacy exemptions at section 38 of the *Act*.

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

[22] Section 36(1) 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.

[23] Under section 38(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of another 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.⁵

[24] Sections 14(1) to (4) are considered in determining whether the unjustified invasion of personal privacy threshold in section 38(b) is met.

[25] 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. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 14(4) identifies information whose disclosure is not an unjustified invasion of personal privacy. None of the paragraphs in section 14(4) are applicable in the circumstances of this appeal.

Absurd result

[26] 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.⁶

Representations

[27] The police submit that the discretionary exemption at section 38(b) applies because the information at issue contains the personal information of both the appellant and other identifiable individuals. The police further submit that the presumptions against disclosure at section 14(3)(b) and (d) apply to the information as the information was compiled and is identifiable as part of an investigation into a possible violation of law and also relates to the appellant's employment.

[28] The police submit that the records relate to police investigations that were undertaken to investigate whether violations of law occurred. The police submit that the incident reports were compiled and have been maintained "in the event that these matters proceed to a prosecution or for a continuance of either investigation." They police submit that both investigations relate to possible violations of law under the *Criminal Code of Canada*.

[29] The police also submit that one of the occurrence reports relates to "employment matters of the institution where the appellant was employed."

[30] With respect to the possible application of any of the factors listed in section 14(2), the police submit that, on their review, they found that none of the factors weighing in favour of disclosure in sections 14(2)(a) to (c) were relevant in the circumstances.

[31] Finally, in their representations the police submit that the absurd result principle does not apply in this case. They submit that from the request itself it is clear that the

⁶ Orders M-444 and MO-1323.

appellant was not aware of the information held by the police. It further submits that appellant would not have any knowledge of any of the information contained in the records.

[32] In his representations, the appellant submits that the incident and allegations that gave rise to one of the investigations detailed in an occurrence report are false and that the reason why charges were not laid was because there was no evidence to support them. He argues that the matter should not be considered an ongoing investigation as it is based on false allegations.

[33] With respect to the second investigation detailed in the second occurrence report at issue, the appellant submits that it arose from a false report that he threatened two co-workers who he alleges harassed him. He submits that this matter is under labour arbitration.

[34] The appellant concludes his representations by reiterating that the allegations upon which the investigations are based are both false and in Order M-586 Adjudicator Holly Big Canoe stated: "Fairness demands that the appellant be made aware of the allegations made against him which appear to have had an impact on his employment." The appellant submits that this order should be followed.

Analysis and finding

[35] The police have claimed that the discretionary exemption at section 38(b) applies to all of the personal information that is at issue and has been severed from the records. I accept the police's position that its disclosure would amount to an unjustified invasion of the personal privacy of identifiable individuals under section 38(b).

Presumptions Against Disclosure: sections 14(3)(b) and (d)

[36] As noted above, section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The police submit that the presumptions at sections 14(3)(b) and (d) are relevant in the circumstances of this appeal.

[37] Under section 14(3)(b), disclosure of personal information is presumed to amount to an unjustified invasion of the personal privacy to whom the information relates if it has been compiled as part of an investigation into a possible violation of law.

[38] 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.⁷ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁸

[39] From my review of the records at issue, and considering the information that has

⁷ Orders P-242 and MO-2235.

⁸ Orders MO-2213, PO-1849 and PO-2608.

been severed from them, I accept that the occurrence reports were clearly compiled by the police in the course of their investigation into incidents that were reported to them. Based on its nature and content, in my view, this information at issue was clearly compiled as part of an investigation into a possible violation of law. As previously noted, the fact that no charges were laid is not a bar to the application of the presumption. Accordingly, I find that all of the personal information that has been severed from the records falls under section 14(3)(b) of the *Act* and its disclosure constitutes a presumed unjustified invasion of the personal privacy of individuals other than the appellant.

[40] The police also claim that the presumption against disclosure at section 14(3)(d) applies. Section 14(3)(d) presumes that disclosure of personal information constitutes an unjustified invasion of personal privacy if the personal information relates to employment or educational history. The police's specific representations on the application of this presumption to the information at issue states that the information "also relates to employment matters of the institution where the appellant was employed." From my review of the information at issue, I do not accept that any of the information can specifically be described as relating to "employment history." Accordingly, I do not accept that the presumption against disclosure at section 14(3)(d) applies in the circumstances of this appeal.

Factors weighing for or against disclosure: sections 14(2)(d) and 14(2)(h)

[41] The police submit that none of the factors in section 14(2) apply in the circumstances of this appeal. From my review however, it appears that the factor weighing against disclosure at section 14(2)(h) might be relevant as the personal information has been supplied by the individual to whom it relates in confidence. While the appellant's representations do not specifically address the possible application of any of the factors in section 14(2), the portion of his representations where he states that he has the right to be made aware of the allegations made against him which have had an impact on his employment and that the matter is in labour arbitration, appear to suggest that the factor weighing in favour of disclosure in section 14(2)(d) might be relevant as the information is relevant to a fair determination of his rights. Those sections read:

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,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

...

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

[42] 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.⁹

[43] In my view, the appellant has not established in his representations that the personal information is relevant or required for a fair determination of his rights, and there is no specific evidence before me to demonstrate that the requirements for the application of section 14(2)(d) have been met. The appellant states that, as a result of the allegations that gave rise to these investigations, his employment was terminated and the matter is in arbitration. He argues that the information at issue should be disclosed to him as he has a right to know the allegations made against him. However, I do not accept that given the information supplied by the appellant in his representations, that he is unaware of the allegations made against him. I also do not accept that, given that information, he has established that he requires the information contained in the police occurrence reports in order to prepare for arbitration or ensure an impartial hearing. Accordingly, I find that the factor favouring disclosure at section 14(2)(d) does not apply in the circumstances of this appeal.

[44] The factor weighing against disclosure at section 14(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁰

[45] In my view, considering the nature, context, and surrounding circumstances of the complaint taken to the police that forms the subject matter of the records, I accept that a reasonable person would expect that the information that the identifiable individuals supplied to the police in the context of a possible law enforcement matter would be subject to a degree of confidentiality. Additionally, from my review the content of the specific information that has been severed it is clear that the individuals who supplied the information to the police expected confidentiality with respect to what was communicated. Accordingly, in this appeal, I find that the factor in section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the

⁹ 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.).

¹⁰ Order PO-1670.

individuals other than the appellants and of withholding their personal information.

Summary Conclusion

[46] As noted above, for records claimed to be exempt 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 in determining whether the disclosure of the personal information in the records would amount to an unjustified invasion of personal privacy.¹¹

[47] In this appeal, I have found that the presumption at section 14(3)(b) and the factor at section 14(2)(h) to be relevant to the circumstances before me. Specifically, I have found that the presumption against disclosure at section 14(3)(b) applies to the personal information that has been withheld as it was compiled as part of an investigation into a possible violation of law. Accordingly, the disclosure of that information is presumed to amount to an unjustified invasion of the personal privacy of identifiable individuals other than the appellant. I have also found that the factor weighing against disclosure at section 14(2)(h) is a relevant consideration as I accept that the individuals who provided that personal information to the police had a reasonably-held expectation of confidence with respect to the disclosure of that information. However, I have been provided with insufficient evidence to support a conclusion that any factors or criteria weighing in favour of the disclosure of the personal information of individuals other than the appellant might apply.

[48] Having considered the factors, presumptions and exceptions set out in sections 14(2), (3) and (4) I conclude that the disclosure of the information that remains at issue would amount to an unjustified invasion of the personal privacy of identifiable individuals other than the appellant. I have also considered the possible application of the absurd result principle and find that there is no evidence before me to suggest that it applies in this appeal.

[49] Finally, as section 38(b) is a discretionary exemption, I have considered whether the police properly exercised its discretion not to disclose the information that it withheld. I have considered the limited amount of specific information that was withheld. I have also considered the police's representations on their exercise of discretion outlining their balancing of the procedural rights available the appellant with respect to the loss of his employment against the sensitive nature of the information provided by the identifiable individuals. Taking all this into consideration, I accept that the police exercised their discretion not to disclose the information they withheld in good faith and not for an improper purpose.

[50] Therefore, I find that the information at issue is properly exempt under section 38(b) of the *Act* and I uphold the police's decision not to disclose it.

[51] As I have found that all of the information at issue is exempt under section

¹¹ Order MO-2954

38(b), it is not necessary for me to consider whether the discretionary exemption at section 38(a), read in conjunction with any of the law enforcement exemptions at section 8 or the health and safety exemption at section 13, applies.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original signed by: _____
Catherine Corban
Adjudicator

_____ May 16, 2017