

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3457

Appeal MA16-646

Toronto Police Services Board

May 16, 2017

Summary: The Toronto Police Services Board (the police) received a two-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The police located and partially disclosed a record pertaining to part 2 of the request, relying on the discretionary personal privacy exemption at section 38(b) of the *Act* to withhold the remaining portions. During the appeal, the police conducted additional searches and located a record pertaining to part 1 and two further records pertaining to part 2, and granted partial access to some of these records. In this order, the adjudicator upholds the police's decision in part.

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(1), 38(b) and 17.

Orders and Investigation Reports Considered: Orders MO-3370 and MO-3400.

BACKGROUND:

[1] The Toronto Police Services Board (the police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

1. December of 2015. I called [non] emergency line [specified number] about [dentist] did violence operation was part of harassment.
2. August 27, 2016 the building securities call 911 twice at morning and the night.

[2] The police located records relating to the August 27, 2016 incident (part 2 of the request) only, and could not locate records relating to a December 2015 incident (part 1 of the request). It issued a decision granting partial access to the responsive records, but withheld information pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. The police also noted that certain information was withheld as it was deemed not responsive to the request.

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

[4] During the course of mediation, the appellant advised the mediator that she believes that further records responsive to her request exist. The police proceeded to conduct another search for responsive records. At the conclusion of the search, the police located an I/CAD Event Details report relating to an incident pertaining to part 1 of the request and issued a revised decision granting partial access to that record, withholding information which was not responsive to the request.

[5] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process in which an adjudicator conducts a written inquiry under the *Act*.

[6] During the inquiry, the police issued a supplemental decision letter confirming the existence of an I/CAD Event Details Report and an occurrence report relating to an evening incident on August 27, 2016 (part 2 of the request). Initially, the police took the position that these records were not responsive to the appellant's request. After further consideration, the police confirmed that the records were responsive but denied access to them pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*. Accordingly, I removed the issue of responsiveness of records from this appeal as the police confirmed that all records are responsive to the request.

[7] Pursuant to the IPC's *Code of Procedure and Practice Direction Number 7*, a non-confidential copy of the police's representations was provided to the appellant. Subsequently, the appellant provided representations.

[8] In this order, I uphold the police's decision in part.

RECORDS:

[9] The records at issue in this appeal are two general occurrence reports and two I/CAD Event Details Reports. The only record relating to part 1 of the request is one of the I/CAD Event Details Reports.

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 mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information that has been withheld?
- C. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?
- D. Did the institution conduct a reasonable search for records?

DISCUSSION:

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

[10] In order to determine whether sections 14(1) and/or 38(b) of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[11] Personal information is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[12] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

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

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

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

[14] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

[15] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

¹ Order 11.

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

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

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

[17] In its representations, the police submit that a record responsive to part 2 of the request (the morning incident) contains personal information of three individuals besides the appellant – the person of interest and two other individuals. The police submit that the personal information of the person of interest is his home address while the personal information of the second individual is his name, date of birth and ethnicity. The third individual's personal information is his name and phone number.

[18] The police acknowledge that the record responsive to part 1 of the request contains only personal information of the appellant.

[19] Although the appellant provided representations, her representations did not directly address whether the withheld information is personal information.

Analysis and findings

Part 1

[20] With respect to part 1 of the request, I find that the information contained in this record constitutes the personal information of the appellant. I note that the police have not withheld the appellant's personal information, but have withheld other portions of this record. Based on my review, this information is not personal information and subject to the personal privacy exemption in sections 14(1) or 38(b). As the police have not claimed any discretionary exemptions for this information and the mandatory exemptions do not apply, I will order this information disclosed.

Part 2

[21] With respect to part 2 of the request, there are three records at issue, specifically a morning general occurrence report, an evening general occurrence report, and an I/CAD Event Details Report.

[22] With regards to the morning general occurrence report, I find that it contains the personal information of the person of interest, specifically his home address at pages 2 and 4, and the personal information about the second individual, specifically his name, telephone number, date of birth and ethnicity at page 2, as defined by section 2(1) of the *Act*. With respect to the third individual, I find that his name and phone number constitute personal information as defined by section 2(1) of the *Act*.

[23] I note that the police have withheld portions of this report under the rationale that they are not responsive to the request, but has not provided an explanation for why it would be considered to be not responsive. Regardless, I find a small portion at the top and the bottom portion of page 1, bottom portion of pages 2, 3, 4, and 6 and the top and bottom portions of page 5 are non responsive as they include information

about a statistical centre and print dates.⁵

[24] With regards to the evening general occurrence report, I find that the withheld portions in which the police have not stated the reason are not responsive to the request as the information withheld are print dates. Moreover, I find the remaining report to be information about a named individual, specifically the name, date of birth, home address and ethnicity. This information falls under the definition of "personal information" as defined in section 2(1) of the *Act*.

[25] With regards to the I/CAD Event Details Report for the evening, I find that this record contains the personal information of an unnamed individual as defined in paragraphs (a), (b), and (d) of the definition of "personal information" section 2(1) of the *Act*.

[26] In sum, I find that the records responsive to part 2 of the request contains personal information of six individuals, including the appellant. With respect to the morning general occurrence report, it contains the home address of the person of interest, and the name, telephone number, ethnicity and date of birth of the second individual, along with the appellant's personal information. It also contains the name and telephone number of a third individual. As such, Part II of the *Act* applies and I must consider whether the withheld portions are exempt pursuant to the discretionary exemption at section 38(b) of the *Act*.

[27] With respect to the evening general occurrence report and the I/CAD Event Details Report, they contain the personal information of a named individual and unnamed individual. As it does not contain the appellant's personal information, Part I of the *Act* applies and I must consider whether the withheld portions are exempt pursuant to the mandatory exemption at section 14(1) of the *Act*.

B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information that has been withheld?

[28] 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.

[29] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the

⁵ To be considered responsive to the request, records must "reasonably relate" to the request. See Orders P-880 and PO-2661.

requester.⁶

[30] In contrast, under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)].

[31] In determining whether the disclosure of the personal information in the records *would not* be an unjustified invasion of personal privacy under section 14(1)(f) or *would* be an unjustified invasion of personal privacy under section 38(b), sections 14(1) to (4) provide guidance. The withheld information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 14(1) of the *Act*.

[32] The factors and presumptions at sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and is not exempt under either section 14(1) or 38(b). Section 14(4) does not apply in this case.

Sections 14(2) and (3)

[33] 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.

[34] For records claimed to be exempt under section 14(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 of the *Act* applies.⁷ In this case, neither section 14(4) nor section 16 apply.

[35] If the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.⁸

[36] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's own personal information), this office will consider, and weigh, the factors and presumptions in both sections 14(2) and (3) and balance the interest of the parties in determining whether the disclosure of the personal information in the records

⁶ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

⁷ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13. O.R. (3d) 767.

⁸ Order P-239.

would be an unjustified invasion of personal privacy.⁹

Representations

[37] The police's representations, on the application of the personal privacy exemptions, simply address whether section 38(b) applies to the personal information in the morning general occurrence report (part 2 of the request). The police submit that the presumptions at sections 14(3)(b) and 14(3)(h) apply. The police point out that section 14(3)(b) applies as it attended and conducted an investigation involving the appellant. During its investigation, the police obtained the personal information of a number of identifiable individuals. The police also point out that 14(3)(h) applies as it obtained the racial origin of the second individual.

[38] Although the appellant provided representations, her representations did not directly address this issue.

Analysis and findings re sections 14(1) and 38(b)

[39] I will first consider the application of the presumption at section 14(3)(b) to the records responsive to part 2 of the request. Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁰ Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.¹¹

[40] In the circumstances of this appeal, I accept that all of the personal information contained in the records for part 2 of the request was compiled and is identifiable as part of an investigation into a possible violation of law as contemplated by the presumption at section 14(3)(b). The records clearly identify that the police were investigating a possible violation of the *Criminal Code of Canada*, which did not appear to 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.¹² Accordingly, I find that the presumption at section 14(3)(b) applies to the personal information contained in the records at issue.

[41] With respect to the evening general occurrence report and the I/CAD Event Details Report for the same evening incident (part 2 of the request) that contain only the personal information of two individuals and not that of the appellant, I have found that the disclosure of the personal information in these reports is presumed to be an unjustified invasion of the personal privacy of these individuals. As neither of section

⁹ Order MO-2954.

¹⁰ Orders MO-2213, PO-1849 and PO-2608.

¹¹ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

¹² Orders P-242 and MO-2235.

14(4) nor section 16 apply in the circumstances of this appeal, my analysis ends here; the mandatory personal privacy exemption at section 14(1) of the *Act* applies to exempt this information from disclosure.

[42] With respect to the morning general occurrence report (which contains both the personal information of the appellant and that of other identifiable individuals), I must consider the presumption against disclosure at section 14(3)(b) along with other relevant factors listed in section 14(2).

[43] For section 38(b) to apply, the factors weighing against disclosure must outweigh the factors weighing in favour of disclosure. As no factors favouring disclosure have been established nor do they appear to be relevant, it is not necessary for me to consider the relevance of the factors favouring non-disclosure at section 14(2). Given the application of the presumption at section 14(3) (b), and the fact that no factors favouring disclosure have been established, balancing all the interests I am satisfied that the disclosure of the personal information that remains at issue would constitute an unjustified invasion of the personal privacy of the individuals' to whom that information relates.

[44] Accordingly, I find that the personal information that has been withheld in the morning general occurrence report is exempt from disclosure under the discretionary privacy exemption at section 38(b) of the *Act*.

[45] Furthermore, I am also satisfied that the evening general occurrence report and the I/CAD Event Details Report for the same evening incident cannot be reasonably severed, without revealing information that is exempt under section 14(1) or resulting in disconnected snippets of information being revealed.¹³ As such, they are withheld in their entirety.

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

[46] 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.

[47] 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

¹³ See Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[48] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴ This office may not, however, substitute its own discretion for that of the institution.¹⁵

[49] In its submissions, the police submit that it exercised its discretion under section 38(b). It submits that it did not exercise its discretion in bad faith or for an improper purpose. It also submits that it did not take into account any irrelevant considerations, but took into account all relevant considerations.

[50] Although the appellant provided representations, her representations did not directly address this issue.

Analysis and findings

[51] I have considered the circumstances surrounding this appeal and the police's representations which also detail the factors that it considered when determining whether it should exercise its discretion to disclose any portions of the records for which section 38(b) applies. I am satisfied that the police has not erred in its exercise of discretion with respect to its application of section 38(b) of the *Act* regarding the withheld information that will remain undisclosed as a result of this order. I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. The police has considered the purposes of the *Act*, and has given due regard to the nature and sensitivity of the undisclosed information in light of the context of this appeal. Accordingly, I find that the police took relevant factors into account and I uphold its exercise of discretion in this appeal.

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

[52] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹⁶ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[53] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹⁷

¹⁴ Order MO-1573.

¹⁵ Section 43(2).

¹⁶ Orders P-85, P-221 and PO-1954-I.

¹⁷ Orders P-624 and PO-2559.

To be responsive, a record must be "reasonably related" to the request.¹⁸

[54] 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.¹⁹

[55] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²⁰

[56] 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.²¹

[57] In this case, the appellant told the mediator that she believes that records exist for part 1 of the request. The mediator raised this issue with the police. Upon further search, the police located an I/CAD Event Details Report for part 1 of the request, which was partially disclosed to the appellant.

[58] In its representations, the police submit that it conducted a reasonable search for the records responsive to the appellant's request. In support of its representations, the police attached an affidavit sworn by an analyst, whose job includes dealing with requests for information under the *Act*. The affidavit referred to the scope of the appellant's request and noted that on the same day she received the request the analyst conducted a complete search on the Versadex and I/CAD systems. She located one record pertaining to part 2 of the request, but no records for part 1 of the request.

[59] Subsequently, the analyst affirmed that she was informed that an appeal was launched by the appellant with the IPC. The analyst affirmed that the mediator informed her that the appellant believed there were additional responsive records for part 1 of the request. The next day, the analyst conducted another search on the I/CAD system. The analyst located an I/CAD Event Details Report pertaining to part 1 of the request due to using a historical telephone number of the appellant. The analyst provided a severed copy of this record to the appellant, along with a revised decision.

[60] During the inquiry stage, the analyst conducted further searches for records pertaining to part 2 of the request, and located an evening general occurrence report and an I/CAD Event Details Report.

[61] Although the appellant provided representations, her representations did not

¹⁸ Order PO-2554.

¹⁹ Orders M-909, PO-2469 and PO-2592.

²⁰ Order MO-2185.

²¹ Order MO-2246.

directly address this issue.

Analysis and findings

[62] Based on my review of the police's representations and evidence, and in the absence of relevant representations from the appellant, I find that the police have conducted a reasonable search for responsive records. I find that the appellant has not provided me with a reasonable basis for concluding that additional records exist. As stated above, the *Act* does not require the police to prove with absolute certainty that further records do not exist. In the circumstances, I am satisfied that the police provided sufficient evidence to demonstrate that it made a reasonable effort to address the appellant's request and locate all records reasonably related to the request. Therefore, I uphold the police's search for responsive records.

ORDER:

1. I uphold the police's decision in part. I order the police to disclose to the appellant the information that I have found is not personal information, in accordance with the highlighted records I have enclosed with the police's copy of the order. To be clear, the highlighted information should **not** be disclosed to the appellant.
2. I order that the police make the disclosure referred to in paragraph 1 of this order by **July 24, 2017** but not before **July 18, 2017**.
3. I reserve the right to require the police to provide me with a copy of the information disclosed to the appellant.
4. I uphold the police's search for responsive records.

Original Signed by: _____

Lan An
Adjudicator

_____ May 16, 2017