

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3498

Appeal MA16-723

Durham Regional Police Services Board

September 26, 2017

Summary: The police received an access request for notes and reports about the appellant. They disclosed some portions of the records, but withheld other portions under the discretionary personal privacy exemption at section 38(b) of the *Act*. They also withheld some portions as not responsive to the request. At mediation, the appellant raised the issues of reasonable search and responsiveness. In this order, the adjudicator upholds the police's decision to withhold the personal information at issue under section 38(b) of the *Act*. She also upholds the police's decision to withhold certain portions of the records as not responsive. The adjudicator further finds that the police conducted a reasonable search.

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"), 38(b), and 17.

Orders and Investigation Reports Considered: Orders MO-3475 and MO-3472.

BACKGROUND:

[1] The Durham Regional Police Services Board (the police) received a 15-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a number of records, including the following:

Copies of all notes taken by Durham Regional Police and other police agencies during above-listed police operations.

[2] The police issued a decision indicating, in part, as follows:

With respect to numbers 1-14 of your request, please be advised that a thorough search of the Durham Regional Police Service's records was completed with negative results. Therefore, with respect to these portions of your request, no records exist.

[3] With respect to number 15 of the request, the police located a number of general occurrence reports and police officer notes. The police denied access to portions of these records pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*.

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

[5] During mediation, the police confirmed that some information was removed from the police officer's notes as it was not responsive (NR) to the request. As the appellant advised the mediator that he requires full access to the requested records, reasonable search and non-responsiveness were added to this appeal.

[6] As no further mediation was possible, it was moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

[7] I sought and received representations from the police and the appellant. Pursuant to the IPC's *Code of Procedure* and *Practice Direction Number 7*, a complete copy of the police's representations was shared with the appellant.

[8] In this order, I uphold the police's decision to withhold the personal information at issue under section 38(b) of the *Act*. I also uphold the police's decision to withhold certain portions of the records as not responsive. I further find that the police conducted a reasonable search.

RECORDS:

[9] The records at issue in this appeal are summarized in the following chart, which is based on my review of the records:

Description of record	Police's decision	Exemption claimed	# of Pages
General Occurrence Report #1	Withheld in part	s. 38(b)	8
Notes of police officer #A	Withheld in part	N/R	2
Notes of police officer #B	Withheld in part	N/R	3
General Occurrence Report#2	Withheld in part	s. 38(b)	7

Notes of police officer #C	Withheld in part	s. 38(b)	2
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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 at issue?
- 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?
- E. What records are responsive to the request?

DISCUSSION:

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

[10] 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.

[11] 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) 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,

¹ Order M-352.

- (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.²

[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

² Order 11.

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

[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.⁴

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[17] In their representations, the police submit that the occurrence reports contain the personal information of four individuals, including the appellant. The personal information consists of the names, dates of birth, addresses, home telephone numbers, name of employers, and driver's licence number, which falls under the section 2(1) definition of "personal information."

[18] In his representations, the appellant submits that the records at issue do not contain personal information. He points out that the *Act* does not consider information about an individual in a professional, official or business capacity to be "personal information." As such, he asserts that the information the police are referring to as "personal information" is not personal information as the information is about doctors, other medical professionals and police officers. The appellant, therefore, submits that the redacted information should be disclosed to him.

Analysis and findings

[19] Having reviewed the responsive records, I find that the general occurrence reports contain information about the appellant as well as that of other identifiable individuals. Specifically, the records contain their names, together with other personal information about them within the meaning of paragraphs (a), (d) and (h) of the definition of personal information in section 2(1) of the *Act*.

[20] The appellant is correct that the general rule is that information associated with an individual in a professional, official or business capacity will not be considered to be 'about' the individual, and thus is not considered to be personal information. However, in this case, the information here is *not* about individuals in their professional, official or business capacity. In the circumstances of this appeal, I find that the information about these individuals in the records would reveal something of a personal nature about them, thereby qualifying as their personal information for the purposes of the *Act*.

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

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[21] Accordingly, I find that the general occurrence reports contain the “personal information” of the appellant and other identifiable individuals within the meaning of that term.

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

[22] Since I found that the general occurrence reports contain the personal information of the appellant and other individuals, section 36(1) of the *Act* applies to the appellant’s access request.

[23] 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.

[24] 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 requester.⁶

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

[26] 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.⁷ However, if the information fits within any of paragraphs (a) to (e) of section 14(1) or within 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[27] 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. Also, 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.⁸ Some of the factors listed in section 14(2), if present, weigh in favour 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).⁹

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

⁷ Order MO-2954.

⁸ Order P-239.

⁹ Order P-99.

[28] In their representations, the police assert that the presumption under section 14(3)(b) applies as the personal information in the records were compiled and are identifiable as part of an investigation into a possible violation of law. The police point out that even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply as the presumption only requires that there be an investigation into a possible violation of law. The police assert that, therefore, the release of such information would constitute an unjustified invasion of personal privacy.

[29] Although the appellant provided representations, his representations did not address this issue.

Analysis and findings

[30] I note that the information at issue does not fit within the exceptions set out in section 14(1)(a) to (e) nor section 14(4) of the *Act*. As such, I will turn to discuss whether any of the presumptions under section 14(3) apply and whether any of the section 14(2) factors apply.

[31] 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.¹⁰ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹¹

[32] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.¹²

[33] From my review of the records at issue, and considering the information that has been severed from them, I accept that the presumption at section 14(3)(b) applies in this circumstance. The records concern investigations relating to possible violations of law. The personal information was compiled and is identifiable as part of the police investigation into a possible violation of the *Criminal Code of Canada*, which did not appear to result in charges being laid. As previously noted, the fact that no charges were laid is not a bar to the application of the presumption.¹³ The presumption only requires that there be an investigation into a possible violation of law.¹⁴ Section 14(3)(b) therefore weighs in favour of non-disclosure of the portions containing other individual's personal information.

[34] As mentioned above, the appellant has not made any representations on this issue. As such, given the application of the presumption in section 14(3)(b), and the

¹⁰ Orders P-242 and MO-2235.

¹¹ Orders MO-2213, PO-1849 and PO-2608.

¹² Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

¹³ Orders P-242 and MO-2235.

¹⁴ Orders P-242 and MO-2235.

fact that no factors favouring disclosure in section 14(2) were established, and balancing all the interests, I am satisfied that the disclosure of the individuals' personal information would constitute an unjustified invasion of their personal privacy. Accordingly, I find that their personal information is exempt from disclosure under section 38(b) of the *Act* subject to my finding on the police's exercise of discretion below.

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

[35] 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.

[36] 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.

[37] 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

[38] In their representations, the police assert that they did not exercise their discretion in bad faith or for an improper purpose, but only to protect the privacy of the subjects listed in the records.

[39] As section 38(b) is a discretionary exemption, I have considered whether the police properly exercised their discretion not to disclose the information that they 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 to the appellant against the 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. Accordingly, I uphold the police's exercise of discretion and find that the identifiable individuals' personal information is exempt under section 38(b).

¹⁵ Order MO-1573.

¹⁶ Section 43(2).

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

[40] 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 17.¹⁷ 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.

[41] 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.¹⁸ To be responsive, a record must be "reasonably related" to the request.¹⁹

[42] 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.²⁰

[43] 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.²¹

[44] 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.²²

[45] In their representations, the police submit that they conducted a reasonable search. They point out that an experienced analyst, who had worked in the records department since 2000, searched and gathered all responsive records. The analyst searched for records on the records management system, Versadex, for the requested records. The analyst also sent emails to all involved police officers listed in the general occurrence reports for copies of their notebook entries.

[46] In his representations, the appellant submits that the police did not conduct a reasonable search. He points out that he provided the police, specifically the Freedom of Information Coordinator (the FOIC), with additional details on who within the police force to contact. However, he received no response from the FOIC. He also points out that he understands that the FOIC met with some of the named individuals and named institutions in his request to prepare a response. The appellant further asserts that the FOIC is making false statements to this office.

¹⁷ Orders P-85, P-221 and PO-1954-I.

¹⁸ Orders P-624 and PO-2559.

¹⁹ Order PO-2554.

²⁰ Orders M-909, PO-2469 and PO-2592.

²¹ Order MO-2185.

²² Order MO-2246.

[47] Based on my review of the parties' representations and evidence, 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 they 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.

E: What records are responsive to the request?

[48] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

. . .

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[49] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.²³

[50] To be considered responsive to the request, records must "reasonably relate" to the request.²⁴

[51] In this case, the police are claiming that the redacted notebook entries of the three police officers are not responsive to the appellant's request. I have carefully reviewed these entries. These notebook entries relate to incidents or matters unrelated to the appellant. They are incidents or matters either happening immediately before or after the police officer(s) had contact with the appellant. As such, they do not relate to

²³ Orders P-134 and P-880.

²⁴ Orders P-880 and PO-2661.

his incidents. Accordingly, I find that these redacted notebook entries are not responsive to the appellant's request.

ORDER:

1. I uphold the police's application of section 38(b) to the personal information at issue.
2. I also uphold the police's decision to withhold portions of the records as not responsive to the applicant's request.
3. I further uphold the police's search as reasonable.

Original Signed by: _____

Lan An
Adjudicator

September 26, 2017 _____