

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3594

Appeal MA17-11

Peel Regional Police Services Board

April 23, 2018

Summary: The appellant submitted a request for 911 call recordings for a specified date. The police withheld one of the recordings claiming that disclosure would constitute an unjustified invasion of personal privacy under section 38(b) taking into consideration the presumption at section 14(3)(b) and factor favouring privacy protection at section 14(2)(f). This order upholds the police's decision to withhold the record but finds that the presumption at section 14(3)(b) does not apply.

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)(f), 14(3)(b) and 38(b).

Cases Considered: Order MO-3465

OVERVIEW:

[1] The appellant filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to Peel Regional Police Services (the police) for 911 calls relating to a specified time period. The police disclosed 2 audio recordings, identified as track 1 and 2 to the appellant. The police withheld in full the audio recording identified as track 3 and claimed that disclosure would constitute an unjustified invasion of personal privacy under section 38(b), taking into consideration the presumption at section 14(3)(b).

[2] The appellant appealed the police's decision to this office and a mediator

explored settlement with the parties.

[3] During mediation, the appellant confirmed that she continued to pursue access to the withheld recording. Mediation was not successful and the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry.

[4] During the inquiry process, the parties had an opportunity to provide their written submissions to this office. In its representations, the police raised the possible application of the factor in favour of privacy protection at section 14(2)(f).

[5] In this order, I find that the presumption at section 14(3)(b) does not apply. However, I find that disclosure of the withheld recording would constitute an unjustified invasion of personal privacy under section 38(b), taking into consideration the factor at section 14(2)(f). As a result, the police's decision to withhold the record is upheld.

RECORDS:

[6] The record at issue is the audio recording, identified as track 3.

ISSUES:

- A. Does the record contain personal information as defined in section 2(1)? Would disclosure of the record constitute an unjustified invasion of personal privacy under section 38(b)?
- B. Did the police properly exercise its discretion in denying the record under section 38(b)?

DISCUSSION:

A. Does the record contain personal information as defined in section 2(1)? Would disclosure of the record constitute an unjustified invasion of personal privacy under section 38(b)?

[7] The parties agree that the records contain the personal information of the appellant as defined in section 2(1). The police advise that it located three 911 calls responsive to the appellant's request. The calls made from the appellant herself and an individual acting in their professional capacity was released to her. The police submit that the withheld 911 call was placed by individuals acting in their personal capacity.

[8] I have reviewed the record and am satisfied that it contains the personal information of the appellant along with information pertaining to other individuals, such as their name, address, views and opinions as defined in paragraphs (a), (c), (d), (e), (g) and (h) of section 2(1).

[9] As the records contain the personal information of the appellant, I will determine whether disclosure of the recording to her would constitute an unjustified invasion of personal privacy under section 38(b). Section 38(b) recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institution's the power to grant requesters access to their own information.

[10] Section 38(b) states:

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

if the disclosure would constitute an unjustified invasion of another individual's personal privacy

[11] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the requester's personal information.

[12] In other words, where a record contains personal information of both the requester and another individual, and the disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[13] In the circumstances of this appeal, I must determine whether disclosing to the appellant the information the other individuals provided the police would constitute an unjustified invasion of their personal privacy under section 38(b).

[14] 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).

[15] 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.¹ 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).

[16] 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. 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).²

¹ Order MO-2954.

² Order P-239.

[17] The parties have not claimed that any of the exceptions in section 14(1) or exclusions in section 14(4) apply and I find that none apply.

[18] The police submits that the presumption at section 14(3)(b) and the factor favouring privacy protection at section 14(2)(f) apply in this appeal. The appellant's submissions did not raise the applicability of any of the factors favouring disclosure in section 14(2). However, I find that the appellant's reasons for seeking access to the withheld records should be considered as an unlisted factor favouring disclosure.

14(3)(b): investigation into violation of law

[19] 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.³ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁴

[20] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.⁵

[21] The presumption can apply to a variety of investigations, including those relating to by-law enforcement⁶ and violations of environmental laws or occupational health and safety laws.⁷

[22] In support of its position that the presumption at section 14(3)(b) applies in the circumstance of this appeal, the police state:

The record in question pertains to a voice recording of a 911 call made to police in relation to the investigation of the Appellant under the Mental Health Act. Releasing the personal information of the [other individuals] to the Appellant would be an unjustified invasion of personal privacy as the information was compiled as part of an investigation into a possible violation of law.

[23] The appellant's submissions did not specifically address this issue.

[24] Previous decisions from this office have found that the requirements of section 14(3)(b) are not met when the police exercise their authority under the *Mental Health Act*.⁸ In Order MO-3465 Adjudicator Hamish Flanagan found that the presumption at section 14(3)(b) did not apply as there was insufficient evidence to establish that the police's involvement was related to an investigation into a possible violation of law. In that order, Adjudicator Flanagan reviewed previous decisions from this office and

³ Orders P-242 and MO-2235.

⁴ Orders MO-2213, PO-1849 and PO-2608.

⁵ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

⁶ Order MO-2147.

⁷ Orders PO-1706 and PO-2716.

⁸ Orders MO-1384, MO-1428, MO-3063, and MO-3465.

stated:

Order MO-3063 adopted the reasoning in Orders MO-1428 and MO-1384 to find that the requirements of section 14(3)(b) were not met when police apprehended an individual under the *Mental Health Act*. In Order MO-1384, Assistant Commissioner Tom Mitchinson stated:

Section 17 of the Mental Health Act does not create an offence for the actions of individuals which may justify the involvement of the Police. The Police have provided no evidence to suggest the appellant's behaviour harmed or threatened to harm any other person. Rather, it would appear that the Police decided to approach the appellant on the basis of possible harm she might inflict on herself. In my view, absent evidence to the contrary, the actions taken by the Police, under the apparent authority of the Mental Health Act, do not fall within the scope of section 14(3)(b) because, while involving police officers, the actions do not involve or relate to "a possible violation of law". This situation can be distinguished from investigations undertaken by police services in situations involving a suspicious death, where possible foul play may have occurred. In those circumstances, it is often reasonable for a police service to conclude that there may have been "a possible violation of law", specifically the Criminal Code of Canada.

In Order MO-1428, Adjudicator Dora Nipp found that the principles articulated in Order MO-1384 were applicable in the appeal before her. She stated:

To satisfy the requirements of section 14(3)(b), the information at issue must have been compiled as part of an investigation into a possible violation of law. Although the police have stated that an investigation was initiated to locate the appellant, they have not persuaded me that the appellant was engaged in any potential criminal activity or that the "investigation" undertaken by the police, after a Form 9 was issued, was related to a possible breach of the Criminal Code or any other law.

[25] Adjudicator Flanagan concluded that the police's involvement in the circumstances of Order MO-3465 was focused on their decision to exercise their authority under the *Mental Health Act* as opposed to investigating any possible violation of law.

[26] I adopt the reasoning in Order MO-3465 and find that the police's response to the 911 call at issue in this appeal was not to investigate a possible violation of law. In making my decision, I considered the police's representations and the record at issue and find that there is insufficient evidence to support a position that the appellant was

engaged in any potential violation of law which required the police's investigation. In addition, the 911 calls released to the appellant support my finding that the purpose of police's involvement was to check on the appellant's wellbeing and determine whether there was a need to exercise their authority under the *Mental Health Act*.

[27] As a result of my finding, I find that the presumption at section 14(3)(b) does not apply to the circumstances of this appeal.

Section 14(2) factors

[28] 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.⁹

[29] The police claim that the factor favouring privacy protection at section 14(2)(f) applies in the circumstance of this appeal. Section 14(2)(f) states:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive;

[30] The police submit that previous decisions from this office have held that 911 calls to the police for assistance can be highly sensitive.¹⁰

[31] In this appeal, for the 911 call in question to be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹¹

[32] I have reviewed the 911 recording and am satisfied based on its contents that there is a reasonable expectation that significant personal distress to the individuals who spoke to the police would occur if the recording was disclosed to the appellant.

[33] Accordingly, I find that the factor favouring privacy protection under section 14(2) (f) applies in the circumstance of this appeal and give it significant weight.

Unlisted Factor

[34] As noted above, the appellant's submissions did not specifically raise the application of any of the factors listed in section 14(2). However, the list of factors in section 14(2) are not exhaustive. Accordingly, any circumstances that are relevant, even if they are not listed under section 14(2) must be considered when the record contains the personal information of the appellant.

⁹ Order P-239.

¹⁰ See for example Orders MO-3229, PO-1764 and PO-3093.

¹¹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[35] In my view, a relevant factor in this appeal is the appellant's reason for seeking access to the 911 recording. In her request form, the appellant indicates that she requires a copy of the 911 recording to determine why the police took her into custody. She advises that as a result of the call, the police took her to a hospital for examination. The appellant advises that she was subsequently hospitalized and has had difficulty resuming her daily activities since her discharge. The appellant submits that she continues to seek answers about why the police were called and who called them.

[36] Having reviewed the appellant's submissions, I am satisfied that her pursuit to obtain access to the 911 recording is motivated by a genuine desire to find out more information about what occurred the day the police took her into custody. Accordingly, I find that the appellant's desire to learn more about this event is a relevant consideration in determining whether disclosure would be an unjustified invasion of personal privacy and attribute moderate weight to it.

Summary

[37] I found that the presumption at section 14(3)(b) can not apply to the circumstances of this appeal as there is no evidence before me that the police was engaged in an investigation of a possible violation of law when it responded to the 911 call. However, I found that the factor at section 14(2)(f), which weighs in favour of privacy protection, applies in the circumstances of this appeal. Though I found that the appellant raised a relevant factor weighing in favour of disclosure, I attributed less weight to this factor.

[38] Accordingly, I find that disclosure of the 911 recording to the appellant would constitute an unjustified invasion of personal privacy of the callers under section 38(b).

B. Did the police properly exercise its discretion in denying the record under section 38(b)?

[39] 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.

[40] 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.

[41] In either case this office may send the matter back to the institution for an

exercise of discretion based on proper considerations.¹² This office may not, however, substitute its own discretion for that of the institution.¹³

[42] The police submits that it properly exercised its discretion and balanced the appellant's right to access with the sensitive nature of the information.

[43] Having reviewed the file, I am satisfied that the police took into account relevant factors such as the purpose of the privacy protection exemption and the sensitive nature of the information in applying section 38(b) to withhold the information at issue from the appellant. Taking into account the materials the police already disclosed to the appellant, I am also satisfied that the police took into account the principle that individuals should have a right to access their own information. However, in my view, the sensitive nature of the information at issue outweighs this principle.

[44] Accordingly, I find that the police properly exercised its discretion to withhold the personal information I found exempt under section 38(b).

ORDER:

The police's decision to withhold track 3 is upheld and the appeal is dismissed.

Original signed by _____

Jennifer James
Adjudicator

April 23, 2018

¹² Order MO-1573.

¹³ Section 43(2).