

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3623-I

Appeal MA17-136

Kingston Police Services Board

June 15, 2018

Summary: The police received a request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*, for access to all police incident reports relating to the appellant. The police issued a decision granting partial access, relying on the mandatory exemption at section 14(1) (personal privacy) of the *Act* to deny access. During mediation, the mediator raised the possible application of the discretionary exemption at section 38(b) (personal privacy). In this interim order, the adjudicator upholds the police's decision, in part, finding that one of the general occurrence reports is not exempt as it only contains the personal information of the appellant. In addition, she finds that the police did not exercise their discretion pursuant to section 38(b). The police are ordered to disclose one of the general occurrence reports to the appellant and to exercise their discretion regarding the other record.

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") and 38(b).

Orders and Investigation Reports Considered: Orders PO-2370, PO-1772, PO-2916, and MO-3596.

BACKGROUND:

[1] The Kingston Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all police incident reports relating to the requester.

[2] In their decision, the police granted partial access to the records, and denied access to some information pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*.

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

[4] During the course of mediation, the mediator raised the possible application of the discretionary personal privacy exemption at section 38(b) as the records contain information relating to the appellant and other individuals.

[5] As no further mediation was possible, the appeal was moved to the next stage, where an adjudicator conducts an inquiry under the *Act*.

[6] During the inquiry stage, I invited the parties to provide representations. I received representations from the appellant, which were shared with the police in accordance with this office's *Code of Procedure* and *Practice Direction Number 7*. The police declined to submit any representations or reply representations.

[7] In this interim order, I uphold the police's decision, in part, finding that one of the general occurrence reports is not exempt as it only contains the personal information of the appellant. Although I find that section 38(b) applies to the other information, I find that the police did not exercise their discretion in regard to the other report. The police are ordered to disclose one general occurrence report to the appellant and to exercise their discretion to withhold information in the other.

RECORDS:

[8] The records remaining at issue consist of the withheld information in two general occurrence reports, specifically dated August 2015 and September 2015.

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?

DISCUSSION:

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

[9] In order to determine whether section 38(b) of the *Act* applies, it is necessary to decide whether the records contain “personal information” and, if so, to whom it relates.

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

“personal information” means recorded information about an identifiable individual, including,

...

(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;

[11] 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

[12] 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.

[13] 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

[14] 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

¹ Order 11.

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

of a personal nature about the individual.³

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

[16] As stated above, the police did not provide any representations or reply representations.

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

[18] Based on my review of the records, I find that both general occurrence reports contain the personal information of the appellant and other individuals.

[19] With respect to the August 2015 general occurrence report, I find it contains the names of three individuals in their professional or business capacity as contemplated by section 2.1 of the *Act*.⁵ Accordingly, I do not find this information to be personal information, and I will order that it be disclosed.

[20] With respect to the September 2015 general occurrence report, I find it contains the name of an individual. I note that this individual is mentioned in the general occurrence report due to her professional capacity.

[21] In Order PO-2370, then Assistant Commissioner Brian Beamish states the following:

... Exceptions have been made where information involves an evaluation of the individual's performance as an employee or an investigation into his or her conduct as an employee, or as discussed by the Archives, where the information, though appearing in a business context, would reveal something that is inherently personal in nature. These types of information are considered to be the individual's personal information even if they appear in a business context.

[22] I adopt the reasoning in the above-noted order for this appeal.

[23] In this case, there are allegations made about this individual's conduct. As such, these allegations reveal something that is inherently personal in nature to the identifiable individual. Accordingly, I find that the name of the identifiable individual falls within paragraph (h) of section 2(1) of the *Act*.

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.).

⁵ In the alternative, I would have found that the absurd result principle applies as the appellant originally supplied the names of these three individuals to the police.

[24] I will now turn to discuss whether the exemption in section 38(b) applies to the personal information contained in the September 2015 general occurrence report.

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

[25] Since I found that the September 2015 general occurrence report contains the personal information of the appellant and other individuals, section 36(1) of the *Act* applies to the appellant's access request. 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.

[26] 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

[27] 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).

[28] 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).

[29] 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

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

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.

Analysis and findings

[31] I note that the personal 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.

[32] 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

[33] 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

[34] Based on my review, I find that the presumption at section 14(3)(b) applies in this circumstance. The record concerns information about an investigation relating to an identified offence. 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. 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.¹³ Section 14(3)(b) therefore weighs in favour of non-disclosure of the portions containing the other individual's personal information.

[35] As mentioned above, the appellant made representations but they did not address this issue. As such, given the application of the presumption in section 14(3)(b), and the 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 individual's personal information would constitute an unjustified invasion of her personal privacy. Accordingly, I find that the individual's 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?

[36] 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.

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.

[37] 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.

[38] 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

[39] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant and additional unlisted considerations may be relevant:¹⁶

- The purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right to their own personal information, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected;
- The wording of the exemption and the interests it seeks to protect;
- Whether the requester is seeking his own personal information;
- Whether the requester has a sympathetic or compelling need to receive the information;
- Whether the requester is an individual or an organization;
- The relationship between the requester and any affected persons;
- Whether disclosure will increase public confidence in the operation of the institution;
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- The age of the information; and
- The historic practice of the institution with respect to similar information.

¹⁴ Order MO-1573.

¹⁵ Section 43(2).

¹⁶ Orders P-244 and MO-1573.

[40] As mentioned above, the police did not provide representations on this issue.

[41] Given the absence of representations and, hence, any evidence from the police on their exercise of discretion, I am unable to determine whether it properly exercised their discretion under section 38(b). Accordingly, I will order the police to exercise their discretion to claim this exemption.

ORDER:

1. I order the police to disclose the August 2015 general occurrence report, in its entirety, to the appellant by **July 23, 2018** but not before **July 16, 2018**.
2. I order the police to exercise their discretion with respect to the September 2015 general occurrence report and to provide a decision on this exercise of discretion to the appellant and this office within 30 days of the date of this order.
3. I reserve the right to require the police to provide this office with copies of the record it discloses to the appellant.
4. I remain seized of this matter in order to determine whether the police exercised their discretion properly.

Original Signed by: _____
Lan An
Adjudicator

_____ June 15, 2018