

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3710

Appeal MA17-420

Kingston Police Services Board

December 19, 2018

Summary: The Kingston Police Services Board (the police) received a request under *MFIPPA* for access to a police occurrence report related to an alleged motor vehicle accident. The police granted partial access to a responsive record, but withheld the personal information of an affected party under the discretionary personal privacy exemption in section 38(b). In this order, the adjudicator finds that disclosure of the withheld information would constitute an unjustified invasion of the affected party's personal privacy. She finds that the police exercised their discretion properly in withholding this information and upholds the police's decision.

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

Orders Considered: Order MO-1323.

OVERVIEW:

[1] This appeal addresses a decision by the Kingston Police Services Board (the police) in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to an alleged motor vehicle accident involving the requester as a pedestrian. The requester sought access to the following information:

- Driver's full name;
- Driver's street address;

- Driver's license number, jurisdiction of issuance and expiry date;
- Particulars of automobile insurance (named insured, insurer and policy number) for subject vehicle as at incident date; and
- Subject vehicle's make/model/plate number/registered ownership particulars as at incident date.

[2] The police located a responsive record and issued a decision releasing the record to the requester in part, but withholding information relating to the driver. The police denied access to the redacted portions of the record pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*.

[3] The requester, now the appellant, appealed the police's decision to this office and mediation was commenced. During mediation, the mediator contacted the affected party in an effort to gain consent to disclose the requested information. The affected party did not consent to disclosure of the information, and further mediation was not possible. The appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry.

[4] In beginning the inquiry, the adjudicator assigned to the appeal invited representations from the police and the affected party. The appeal was then transferred to me. I received representations from the police and the affected party. The affected party did not consent to the disclosure of her personal information. I issued a Notice of Inquiry in which I shared the police's representations with the appellant and solicited the appellant's representations. The appellant did not make any representations, despite invitations and follow-up by this office.

[5] In this order, I find that the records contain the appellant's personal information, as well as the personal information of the affected party, and that disclosure of the affected party's personal information would constitute an unjustified invasion of that individual's personal privacy. I also find that the police properly exercised their discretion in withholding this information under section 38(b), and I uphold the police's decision.

RECORD:

[6] The record in this appeal is a police occurrence report. The information remaining at issue is contained in the severed portions of the report that the police withheld.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1)?

- B. Would disclosure of the record constitute an unjustified invasion of personal privacy under section 38(b)?
- C. Should the police's exercise of discretion under section 38(b) be upheld?

DISCUSSION:

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

[7] 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,
- (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.

[8] 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.¹

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

Representations

[10] The police submit that the record was created in connection to a complaint made by the appellant in which he alleged that he had been struck by a motor vehicle while crossing the street.

[11] The police state that the withheld information includes the name, address, telephone number and license plate number of the affected party, and that this is her personal information as defined by the *Act*.

Finding

[12] I have reviewed the record and find that it contains the personal information of the appellant and another identifiable individual. With respect to the appellant, I find that the record contains information that qualifies as his personal information within the meaning of paragraphs (a), (d) and (h) of section 2(1).

[13] I also find that the information withheld from the record contains information about the affected party that qualifies as her personal information within the meaning of paragraphs (a), (c), (d), (e) and (h).

[14] In addition to the affected party's name, address, telephone number and biographical details, the withheld portions of the record contain this individual's license plate number. Previous orders of this office have held, and I find in this appeal, that a license plate number that belongs to an identifiable individual can be considered to be the personal information of that individual because it constitutes an "identifying number" that is "assigned to the individual" under paragraph (c) of the definition of personal information in section 2(1).³ I also note that the record contains the affected party's driver's license number. As with the license plate number, I find that the affected party's driver's license number is an identifying number associated with that individual. I am satisfied that it is reasonable to expect that the affected party will be identified if any of this information is disclosed.

[15] Accordingly, I find that the record contains the appellant's personal information and the personal information of an affected party. I now turn to consideration of the

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

³ Orders PO-3742, MO-1173, MO-1314, MO-1863, MO-1917, MO-2108 and MO-3327.

application of section 38(b) to the withheld personal information.

Issue B: Would disclosure of the records constitute an unjustified invasion of personal privacy under section 38(b)?

[16] 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.

[17] The police rely on section 38(b) to deny access to the withheld portions of the record.

[18] Under section 38(b), where a record contains personal information of both the appellant 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 appellant. This involves a weighing of the appellant’s right of access to his own personal information against the other individual’s right to protection of their privacy.

[19] 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) sets out information whose disclosure is not an unjustified invasion of personal privacy.

[20] 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 be an unjustified invasion of personal privacy.⁴

Representations

[21] The police submit that, as a law enforcement agency, they are responsible for enforcing federal, provincial and municipal laws. They submit that section 38(b), read together with section 14(3)(b) applies to this appeal because the information at issue was compiled as part of an investigation into a possible violation of law after the appellant contacted the police to report an alleged motor vehicle accident. The police argue that because the record was created as a result of that investigation, release of the affected party’s personal information would therefore constitute an unjustified invasion of that individual’s personal privacy.

[22] The police also submit that release of the affected party’s license plate number would act as a gateway to the appellant’s obtaining further personal information that is exempt under the *Act* and would serve to circumvent the *Act’s* privacy protections.

⁴ Order MO-2954.

Analysis and findings

[23] The information that was not disclosed by the police and which remains at issue in this appeal is not the appellant's information but that of the affected party. The affected party has not consented to the release of her personal information.

[24] Under section 14(3)(b), the disclosure of personal information would be an unjustified invasion of personal privacy if the personal information:

...was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation of law or to continue the investigation.

[25] Even if no criminal proceedings were commenced against any individuals, as is the case here, section 14(3)(b) may still apply. The presumption only requires that there be an *investigation* into a possible violation of law.⁵ Based on information the appellant provided to the police about his involvement in a possible motor vehicle accident, the police initiated an investigation. That investigation could have resulted in charges under the *Highway Traffic Act* or the *Criminal Code*.

[26] I have reviewed the record and I find that the personal information in it was compiled and is identifiable as part of an investigation into a possible violation of law. My finding is not altered by the fact that the allegations were determined to have been unfounded and no charges were laid, since the presumption, as noted above, only requires that there be an investigation into a possible violation of law. As a result, disclosure of this personal information is presumed to be an unjustified invasion of personal privacy under section 14(3)(b).

[27] The appellant made no submissions regarding any factors in section 14(2) that might support his claim; nor did he assert that any unlisted factors might apply. I have reviewed the record and find that none of the factors listed in section 14(2)(a) to (d) or any unlisted ones support disclosure of the withheld information. In reaching this conclusion, I specifically considered whether the release of this information might be relevant to a fair determination of the appellant's rights (in the context of a civil claim) as the factor in section 14(2)(d) contemplates. However, the appellant has given me no basis upon which to make such a finding. If it is the appellant's intention to bring a civil claim, he has alternative mechanisms through which the requested information may be obtained within the context of disclosure obligations in a court action under the Rules of Civil Procedure.⁶ In this appeal under the *Act*, however, section 14(2)(d) does not apply.

[28] In summary, I find that the presumption in section 14(3)(b) applies to the information at issue, and that no factors in favour of disclosure apply. I therefore find that disclosure of the withheld information would constitute an unjustified invasion of

⁵ Orders P-242 and MO-2235.

⁶ R.R.O. 1990, Reg. 194. See Orders MO-2980, MO-3351 and MO-3387.

personal privacy under section 38(b).

Absurd result

[29] As stated, the appellant made no representations in support of his appeal. However, he noted in the access request that it was he who initially recorded the driver's license plate number and provided it to the police but can no longer find it. Accordingly, I have also considered the absurd result principle in the circumstances of this case, but I find that it does not apply.

[30] According to the absurd result principle, where the requester originally supplied the information, or 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. The absurd result principle has been applied where, for example, the requester sought access to his own witness statement, was present when the information was provided to the institution, or where the information is clearly within the requester's knowledge.

[31] In the Notice of Inquiry issued at the start of this appeal, the police were asked to specifically comment on the appellant's assertion that he recorded the vehicle plate number of the driver and provided it to police, but is not able to locate his record of the vehicle plate number. The occurrence report itself indicates that the appellant was able to write down the license plate number. Therefore, although the record does not specifically state this to be the case, I find that it is a reasonable assumption that the appellant shared this information with the investigating officer.

[32] The absurd result principle may have some bearing in this context, but I note that the withheld personal information is entirely the affected party's personal information, not the appellant's personal information. The police submit that it would stretch the definition of personal information to include the notation of a license plate as the view or opinion of the appellant for the purpose of paragraph (e) of the definition in section 2(1). I agree with the police in this regard. Given my finding that disclosure of the withheld information would be a presumed unjustified invasion of personal privacy, and without any representations from the appellant, I find that the affected party has a significantly greater privacy interest in the withheld information and that disclosure under the absurd result principle would not be consistent with the purpose of the section 38(b) exemption.

[33] In summary, I find that, despite the fact that the appellant may have provided the license plate number to the police, this occurred in the course of an investigation into a possible violation of law. I find, therefore, that the information is still subject to the presumption in section 14(3)(b), and that disclosure of the affected party's license plate would, as noted above, be inconsistent with the purpose of the section 38(b) exemption. Accordingly, I find that the absurd result principle does not apply in this appeal.

Issue C: Should the police's exercise of discretion under section 38(b) be upheld?

[34] The section 38(b) exemption is discretionary and permits an institution to disclose information despite the fact that it could withhold it. Where an institution has the discretion to disclose information, the Commissioner may determine whether the institution erred in its exercise of discretion, or did so in bad faith or for an improper purpose, or whether it failed to consider relevant factors and considered irrelevant ones.

[35] While this office may send the matter back to the institution for an exercise of discretion based on proper considerations,⁷ it may not substitute its own discretion for that of the institution.⁸

Relevant considerations

[36] Relevant considerations may include, but are not limited to, those listed below:⁹

- the purposes of the *Act*, including that information should be available to the public
- exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- 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.

Representations

[37] The police submit that the information sought is entirely third party personal information that was collected during a police investigation under circumstances where release of the information would constitute an unjustified invasion of personal privacy.

[38] They submit that they considered the objectives of the *Act*, weighing the right of access and the right of privacy. The police also took the position that, in a case like this one, where the events as reported to them were found to be unsubstantiated, they

⁷ Order MO-1573.

⁸ Section 43(2) of the *Act*.

⁹ Orders P-244 and MO-1573.

consider this to be a private matter between individuals and not an institutional police matter. Finally, the police state that they considered that disclosure of the license plate number to the appellant would allow him to circumvent the privacy protections under the *Act* by gaining access to other personal information of the affected third party.

Finding

[39] Based on the circumstances of this appeal and the police's representations, I find that the police properly exercised their discretion under section 38(b) to withhold the affected party's personal information.

[40] In exercising their discretion to withhold the personal information of another individual, the police considered that the appellant has alternate means to access the requested information. They weighed their obligation to give access to information against the affected party's right to privacy.

[41] I am satisfied that the police did not take into account irrelevant factors in exercising their discretion and there is no evidence before me that the police acted in bad faith. Therefore, I uphold the police's exercise of discretion to withhold the affected party's personal information under section 38(b) of the *Act*.

ORDER:

[42] I uphold the police's decision to deny access to the withheld portions of the record and dismiss this appeal.

Original signed by _____
Jessica Kowalski
Adjudicator

December 19, 2018 _____