

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3754

Appeal MA17-438

London Police Services Board

April 17, 2019

Summary: The police received a three-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to noise complaints at a specified address. The police granted partial access, and relied on the discretionary exemptions at section 8(1)(l) (facilitate commission of an unlawful act) and section 38(b) (personal privacy) of the *Act* to withhold disclosure. During mediation, the police added the mandatory exemption at section 14(1) (personal privacy) and the discretionary exemption at section 8(1)(d) (confidential source of information), and the appellant chose not to pursue access to the information withheld under section 8(1)(l). In this order, the adjudicator upholds the police's decision relating to section 38(b), in part. She finds that some small portions of one police occurrence report and some portions of the search result record do not qualify for exemption, and orders them disclosed.

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"), 8(1)(d), 14(1), 38(a) and 38(b).

BACKGROUND:

[1] The London Police Services Board (the police) received a three-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to noise complaints for a specified address, specifically:

1. Incident report [a specified report] of [named officer] May 10, 2017 at 2:31 a.m.
2. Any further reports when officers attended our address for noise complaints.

3. How many complaints have been made?

[2] The police located officer's notes, occurrence reports and a search result record.¹ They issued a decision granting partial access to the records, and relied on sections 8(1)(l) (facilitate commission of an unlawful act) and 38(b) (personal privacy) of the *Act* to withhold disclosure. They noted that the appellants was not interested in other individuals' personal information. As such, information pertaining to other individuals was removed from the reports.

[3] The requesters, now the appellants, appealed the police's decision to this office.

[4] During mediation, the appellants clarified that, in fact, they did want access to information relating to other individuals. As such, the affected parties were contacted but they did not consent to the release of their personal information.

[5] Subsequently, the police issued a revised decision, in which they claimed additional exemptions, sections 8(1)(d) and 14(1).

[6] The appellants advised the mediator that they were not interested in obtaining police code information withheld pursuant to section 8(1)(l) of the *Act*. As well, the appellants advised that they were not interested in obtaining information that was withheld as not responsive to the request. As such, pages 9, 11, 15 and 16 of the records and two small portions contained in the search result record are no longer at issue in this appeal.

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

[8] During the inquiry, I sought and received representations from the police and the appellants. Pursuant to section 7 of this office's *Code of Procedure and Practice Direction Number 7*, a non-confidential copy of the police's representations was shared with the appellants.²

[9] In this order, I uphold the police's decision, in part, finding some information should be withheld under section 38(b). I find that some small portions of one police occurrence report and some portions of the search result record do not contain personal information or qualify for exemption under section 8(1)(d), and order them disclosed.

¹ The records in total consist of 21 pages.

² Some portions of the police's representations were withheld as they met the criteria for withholding representations found in this office's *Practice Direction Number 7: Sharing of representations*.

RECORDS:

[10] The records remaining at issue are:

- two occurrence reports
- a handwritten officer's note for incident[#1]
- a handwritten officer's note for incident [#2]
- a search result dated May 16, 2017³

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 mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the personal information that has been withheld?
- C. Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(d) exemption apply to the information at issue?
- D. Did the police exercise their discretion under sections 38(a) and/or (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?

[11] In order to determine whether the personal privacy exemption at section 14(1) or 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. Also, if the records contain the appellants' personal information then section 38(a) must be considered.

[12] Relevant paragraphs of the definition of "personal information" are the following:

³ The police conducted the original search result on Tuesday, May 16, 2017, in response to part 3 of the appellants' request. Due to my request, the police provided an unmarked copy of the search result, which is dated March 26, 2019. This copy is marked as page 21 in the revised index of records.

“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,

(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,

(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;

[13] 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.⁴

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

[15] In their representations, the police submit that the records contain personal information. They submit that the records contain information such as addresses, telephone numbers, dates of birth, gender, and statements from the affected parties.

[16] Although the appellants provided representations, their representations do not address this issue.

[17] Based on my review of the records at issue, I find that they contain “personal information” as defined by the *Act*. The two occurrence reports contain the personal information of identifiable individuals while the two handwritten officer’s notes and the search result record contain the personal information of the appellants and other identifiable individuals. Specifically, the records at issue contain information that would fall within paragraphs (a), (d), (e), (g) and (h) of the definition of “personal information” in section 2(1) of the *Act*.

⁴ Order 11

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

[18] As the two occurrence reports only contain the personal information of other individuals and not the appellants, Part I of the *Act* applies and I must consider whether the withheld portions are exempt pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*.

[19] As the two handwritten officer's notes and the search result record contain personal information of both the appellants and other individuals, Part II of the *Act* applies and I must consider whether the withheld portions at issue are exempt pursuant to the discretionary exemptions at sections 38(a) and/or (b) of the *Act*.

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

[20] 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.

[21] Under section 38(b), where a record contains personal information of both the requesters 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 requesters. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requesters.⁶

[22] In contrast, under section 14(1), where a record contains personal information of another individual but *not* the requesters, 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)].

[23] Under section 38(b), if any of the exceptions in 14(1)(a) to (e) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[24] 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(2) to (4) also provide guidance.

[25] The factors and presumptions at sections 14(2) and (3) help in determining

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

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 the information is not exempt under either section 14(1) or section 38(b). None of the circumstances listed in section 14(4) is present here.

Sections 14(2) and (3)

[26] 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.

[27] 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 None of the section 14(4) exceptions is relevant here and the public interest has not been raised.

[28] 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

[29] 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 would be an unjustified invasion of personal privacy.⁹

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

Occurrence reports

[30] I will first consider the application of the mandatory personal privacy exemption to the withheld information contained in these records as they contain personal information of other individuals and not the appellants. As stated earlier, the police are prohibited from disclosing the withheld information in these records unless one of the circumstances listed in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)]. In this case, sections 14(1)(a) to (e) do not apply to these records.

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

⁸ Order P-239.

⁹ Order MO-2954.

[31] To determine whether disclosure of the withheld information in these records is an unjustified invasion of personal privacy, I need to consider whether any of the presumptions in section 14(3) applies. If so, the disclosure of the withheld information is presumed to be an unjustified invasion of personal privacy.

[32] The police submit that the presumption under section 14(3)(b) applies as they compiled the personal information about the individuals as part of an investigation into a possible violation of law. The police submit that, therefore, the release of such information would constitute an unjustified invasion of personal privacy. The police also submit that section 14(3)(b) applies even when criminal proceedings are not commenced, as there only has to be an investigation into a 'possible' violation of law.

[33] I agree with the police that the presumption in section 14(3)(b) applies as the personal information in these records was compiled and is identifiable as part of investigations into possible violations of the city by-laws. As such, I find that disclosure of the withheld information (excluding some small portions contained in the first occurrence report) in these records is presumed to be an unjustified invasion of the individual's privacy and is exempt from disclosure under the mandatory privacy exemption at section 14(1) of the *Act*.¹⁰

[34] With respect to the small portions contained in the first occurrence report, I find that the absurd result principle applies to them. This principle states that where the appellants originally supplied the information, or the appellants are otherwise aware of it, the information may not be exempt under section 14(1), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.¹¹

[35] In their representations, the appellants provided me with a copy of an occurrence report and a copy of an officer's notes (not the records at issue in this appeal), which had been disclosed to them, setting out the details of the occurrence.

[36] In this case, I find that withholding the small portions contained in the first occurrence report would be absurd because the appellants are aware of the withheld information at issue. They are in possession of an occurrence report and officer's notes detailing the information at issue. As such, I find that it would be absurd to withhold this information from them. Accordingly, I find that the small portions contained in this police occurrence report are not exempt from disclosure under the mandatory privacy exemption at section 14(1) of the *Act*.

Handwritten officer's notes and search result

[37] As stated earlier, these records contain the personal information of the

¹⁰ *John Doe*, cited above.

¹¹ Orders M-444 and MO-1323.

appellants and other individuals. As such, I must weigh the presumptions and factors in sections 14(3) and 14(2) and balance the interests of the parties in determining whether the disclosure of the personal information in these records would be an unjustified invasion of personal privacy.

[38] In this case, I agree with the police that the presumption at section 14(3)(b) also applies to the two handwritten officer's notes and the search result record. The personal information contained in the officer's notes was compiled and is identifiable as part of an investigation into possible violations of the city by-laws, 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 Section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld information in the officer's notes.

[39] With respect to the search result record, I note that it was created in response to the appellants' access request, specifically to part 3 of the appellants' request. However, the personal information in it was compiled and is identifiable as part of an investigation into a possible violation of the city by-laws. As such, I find that section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld information in this record.

[40] With respect to the factors in section 14(2), the police rely on section 14(2)(h) – the personal information has been supplied by the individual to whom the information relates in confidence – for not disclosing the withheld information. It states:

It is submitted that a reasonable assumption by any individual involved/interviewed by the police is that the information they supply to the police in relation to a complaint/investigation is supplied in confidence and will not be disclosed. Members of the public expect the police will act responsibly in the manner in which it deals with the recorded personal information. The [police] must be able to maintain the trust bestowed upon it by the public to protect personal information we obtain from them during investigations.

[41] I accept the police's submissions on the application of this factor. I find the factor in section 14(2)(h) is relevant with respect to the personal information contained in the two handwritten officer's notes. However, I do not find that it is relevant to the search result record because the personal information contained in that record was not supplied by an individual to whom the information relates in confidence.

[42] In addition, I have reviewed the remainder of the factors in section 14(2), including those in favour of disclosure, and find that section 14(2)(f) (highly sensitive)

¹² Orders P-242 and MO-2235.

applies to the personal information in these records. I note that the appellants provided representations, but their representations did not address this issue. Consequently, having considered and found that the presumption in section 14(3)(b) and the factor in section 14(2)(f) apply to the two handwritten officer's notes and the search result record while the factor in section 14(2)(h) applies to the two handwritten officer's notes, I find the personal information qualifies for exemption under section 38(b) of the *Act*, subject to my finding on the police's exercise of discretion below.

C: Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(d) exemption apply to the information at issue?

[43] The police claim that section 38(a) in conjunction with the section 8(1)(d) exemption applies to the remaining withheld portions of the search result.

[44] As noted above, section 36(1) gives individuals a general right of access to their own personal information held by an institution, and section 38 provides a number of exemptions from this right.

[45] Section 38(a) reads:

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

if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[46] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.¹³

[47] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[48] Section 8(1)(d) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

¹³ Order M-352.

[49] The police must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.¹⁴

[50] While the police claimed the application of this exemption, they did not provide representations on its application to the withheld information contained in the search result record.

[51] In this case, I find that the police have not established a reasonable expectation that the remaining withheld portions of the search result record could disclose the identity of a confidential source or disclose information furnished only by the confidential source. Accordingly, I am not satisfied that section 38(a) applies to the remaining withheld portions of the search result record and I will order them disclosed.

D: Did the police exercise their discretion under sections 38(b)? If so, should the office uphold the exercise of discretion?

[52] Where a record falls within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the records, regardless of the fact that it qualifies for exemption. The personal privacy exemption in section 38(b) is discretionary, which means the police could choose to disclose the information, despite the fact that it may be withheld under the *Act*.

[53] In applying the exemption, the police were required to exercise their discretion. On appeal, this office may determine whether the police failed to do so. In addition, this office may find that the police erred in exercising their discretion where, they took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the police for an exercise of discretion based on proper considerations.¹⁵ However, I may not substitute my own discretion for that of the police.¹⁶

Relevant considerations

[54] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁷

- the purposes of the *Act*, including the principles that:

¹⁴ Order MO-1416.

¹⁵ Order MO-1573.

¹⁶ Section 43(2).

¹⁷ Orders P-344 and MO-1573.

- information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - 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 or her 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
 - the historic practice of the institution with respect to similar information.

[55] As I upheld the police's decision to apply section 38(b) to personal information contained in the two handwritten officer's notes and the search result record, I must review their exercise of discretion in choosing to withhold these portions pursuant to that section.

[56] In their representations, the police submit that they properly exercised their discretion under section 38(b). They submit that they considered the appellants' right of access and the withheld information but determined that the personal privacy rights of individuals outweigh the appellants' right of access. The police also submit:

... Such access could hinder police operations and the confidence of the public in assisting in police investigations if the information was disclosed.

[57] As well, the police submit that they considered that the withheld information contain the personal information of both the appellants and the other individuals involved. Finally, they submit that they considered that the information was obtained in confidence.

[58] In their representations, the appellants state the following considerations: We

feel as homeowners we have the obligation to seek an explanation as to what the ongoing issue was (or is), and how many times our home was attended to by the police. We would also like to know what they found on their visits to our home, as we were only there on one occasion.

[59] I have considered the circumstances of this appeal and the parties' representations. I find the police considered the wording of the exemption and the interests it seeks to protect; whether the appellants had a sympathetic or compelling need to receive the information; and whether disclosure will increase public confidence in the operation of the institution. I am satisfied that the police have not erred in their exercise of discretion with respect to its application of section 38(b) of the *Act*. I am also satisfied that they did not exercise their discretion in bad faith or for an improper purpose. Accordingly, I find that the police took relevant factors into account and I uphold their exercise of discretion on this appeal.

ORDER:

1. I uphold the police's decision, in part, finding some information should be withheld under section 38(b). I order the police to disclose information to the appellants in accordance with the highlighted record I have enclosed with the police's copy of the order. To be clear, the highlighted information should be disclosed to the appellants.
2. I order that the police make the disclosure referred to in provision 1 of this order by **May 27, 2019** but not before **May 17, 2019**.
3. I reserve the right to require the police to provide me with a copy of the information disclosed to the appellants.

Original signed by _____

Lan An
Adjudicator

April 17, 2019 _____