

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-3856

Appeals MA19-00097 and MA19-00156

Peel Regional Police Services Board

October 31, 2019

**Summary:** The Peel Regional Police Services Board (the police) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* for an audio recording made by a neighbour relating to allegations against the requesters of damage to the neighbour's property/tree. The police denied access to the record, citing the discretionary personal privacy exemption in section 38(b).

The adjudicator finds that the record, although subject to section 38(b), should be disclosed to the appellants by reason of the application of the absurd result principle.

**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).

### OVERVIEW:

[1] The Peel Regional Police Services Board (the police) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for an audio recording made by a neighbour relating to allegations against the requesters of damage to the neighbour's property/tree. The requests were from the two individuals whose conversation was being recorded.

[2] After notification to the person who recorded the conversation (the affected person), the police issued decisions denying access to the audio recording, pursuant to the discretionary personal privacy exemption in section 38(b) of the *Act*.

[3] The requesters, now the appellants, appealed the police's decisions.

[4] As mediation did not settle these appeals, the files moved to adjudication where an adjudicator conducts an inquiry. I decided to conduct a joint inquiry into the two appeals because they both involved the same record and the same exemptions being claimed for this record.

[5] Representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] In this order, I find that, although section 38(b) would apply to the record, it should be disclosed to the appellants by reason of the absurd result principle.

## **RECORD:**

[7] At issue is an approximately 40-second audio recording made by the affected person of her conversation with the appellants.

## **ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

## **DISCUSSION**

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

[8] 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;

[9] 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.<sup>1</sup>

[10] 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.<sup>2</sup>

[11] 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.<sup>3</sup>

[12] To qualify as personal information, it must be reasonable to expect that an

---

<sup>1</sup> Order 11.

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

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

individual may be identified if the information is disclosed.<sup>4</sup>

[13] The police submit that the personal information contained in the record pertains to the affected person in a personal capacity, as it relates to an incident that occurred on her personal property. They also state that the record includes personal information about the appellants, as it pertains to and was utilized by officers in an investigation into allegations of mischief and trespass involving the appellants. The police state that the record includes the parties' views of each other's involvement in the incident.

[14] The appellants and the affected person did not address this issue in their representations.

### ***Analysis/Findings***

[15] I agree with the police that the record contains the personal information of the appellants and of the affected person. The appellants and the affected person are neighbours. The record is a recording of their conversation about the cutting down of the affected person's tree by the appellants.

[16] I find that the personal information in the record includes the affected person's and the appellants' personal opinions or views of the incident and each other in accordance with paragraphs (e) and (g) of the definition of personal information in section 2(1).

### **Issue B: Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?**

[17] 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.

[18] 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.

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

---

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[20] If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The information in the record does not fit within these paragraphs.

[21] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b).

[22] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy 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.<sup>5</sup>

[23] 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 under section 38(b).

[24] The police rely on the presumption in section 14(3)(b), which reads:

A disclosure of personal information is presumed to constitute 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 or to continue the investigation.

[25] The police state that the record was created in support of the affected person's allegation that the appellants committed mischief and trespass. They state that the recording relates to an allegation that the appellants cut the trees and bushes located on the affected person's private property. This resulted in criminal charges of mischief and trespass being investigated by the police.

[26] The police further state that the record was, therefore, compiled by them as part of an investigation into a violation of the law.

[27] The affected person provided confidential representations as to why she objects to disclosure of the record.

[28] The appellants discuss the circumstances surrounding the creation of the record and the police's response to the record in their representations.

---

<sup>5</sup> Order MO-2954.

### ***Analysis/Findings***

[29] I find that the presumption in section 14(3)(b) applies as the record was compiled by the police as part of an investigation into a possible violation of law, namely the investigation into the appellants' possible violation of the law of trespass and mischief.

[30] 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.<sup>6</sup>

[31] 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 under section 38(b).<sup>7</sup>

[32] 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).<sup>8</sup>

[33] Based on the information provided to the police, the police submit that the factors in section 14(2) appear to be irrelevant to the matter at hand.

[34] The appellants and the affected person did not address the factors in section 14(2) directly.

[35] Based on my review of the record and the parties' representations, and in the absence of clear evidence that any of the factors favouring disclosure in section 14(2) applies, I find that only the presumption against disclosure in section 14(3)(b) applies. Therefore, I find that the record is exempt under section 38(b), subject to my review of the absurd result principle and the police's exercise of discretion.

### ***Absurd result***

[36] Where the requester originally supplied the information, or the requester 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.<sup>9</sup>

[37] The absurd result principle has been applied where, for example:

---

<sup>6</sup> Orders P-242 and MO-2235.

<sup>7</sup> Order P-239.

<sup>8</sup> Order P-99.

<sup>9</sup> Orders M-444 and MO-1323.

- the requester sought access to his or her own witness statement<sup>10</sup>
- the requester was present when the information was provided to the institution<sup>11</sup>
- the information is clearly within the requester's knowledge<sup>12</sup>

[38] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.<sup>13</sup>

[39] I find that the absurd result principle applies in this situation. The affected person made an audio recording of her conversation with the appellants. The appellants were present and participated in this conversation. The information in the audio recording is clearly within the appellants' knowledge.

[40] I find that the record, the audio recording of the appellants' and the affected person's conversation made by the affected person, is not exempt under section 38(b), because withholding this information would be absurd and inconsistent with the purpose of the section 38(b) discretionary personal privacy exemption.

[41] The record contains the personal information of the appellants, who are the requesters of the information in the record, as well as the personal information of the affected person.

[42] As I have found that the absurd result principle applies, the record is not exempt under the discretionary section 38(b) exemption. As no mandatory exemptions apply to the record and no other discretionary exemptions have been claimed for this record, I will order it disclosed.

[43] In addition, as the record is not exempt under section 38(b), there is no need for me to consider whether the police exercised their discretion in a proper manner in refusing to disclose the record to the appellants.

## **ORDER:**

I order the police to disclose the record to the appellants by **December 6, 2019** but not before **December 2, 2019**.

---

<sup>10</sup> Orders M-444 and M-451.

<sup>11</sup> Orders M-444 and P-1414.

<sup>12</sup> Orders MO-1196, PO-1679 and MO-1755.

<sup>13</sup> Orders M-757, MO-1323 and MO-1378.

Original Signed By \_\_\_\_\_

Diane Smith  
Adjudicator

October 31, 2019 \_\_\_\_\_