

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3866

Appeal MA18-514

Niagara Regional Police Services Board

November 27, 2019

Summary: The record at issue in this appeal is an occurrence report, which the appellant requested under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The institution, the Niagara Regional Police Service Board (the police) granted partial access to the record. The police withheld some of the information, claiming the application of the discretionary exemption in section 38(b) (personal privacy) of the *Act*. In this order, the adjudicator finds that the record contains the personal information of the appellant and other identifiable individuals. The adjudicator finds that the personal information of the other individuals is exempt from disclosure under section 38(b), but that one portion of the appellant's personal information is not exempt from disclosure. The police's exercise of discretion in withholding the information is upheld and the police are ordered to disclose the non-exempt information to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 14(1) and 38(b).

OVERVIEW:

[1] This order disposes of the issues raised as the result of an appeal of an access decision made by the Niagara Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for a specified "Information Report" relating to an incident that involved the requester's daughter at an assisted care facility.

[2] The police located a record responsive to the request and granted partial access

to it. The police withheld portions of the record, claiming the application of the discretionary exemption in section 38(b) (personal privacy) of the *Act* to some portions, while claiming that other portions were not responsive to the request.

[3] The requester (now the appellant), appealed the police's decision to this office.

[4] During the mediation of the appeal, the police issued a revised decision, disclosing some of the information they had previously removed as non-responsive. The appellant advised the mediator that he was not pursuing the remainder of the information that was removed as non-responsive. This information consists of one line of printing at the bottom of each page of the record.

[5] The appellant also confirmed that he was not pursuing the information that relates to the affected parties' dates of birth, contact information, such as telephone numbers and addresses, or the other information that follows their names in the "Related Person(s)" section of the record in dispute. This information is therefore not at issue in this appeal and consists of the withheld information on pages 2, 3, 4, 5 and 6 of the record. None of this information consists of statements made to the police.

[6] The appellant advised the mediator that he is pursuing access to the names of the individuals whose information is contained in the record at issue and the statements they made to the police.

[7] The police confirmed that they would not disclose the information sought by the appellant without the affected parties' consent. The mediator contacted some of the affected parties, but they did not consent to the disclosure of their information.

[8] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry under the *Act*. The adjudicator assigned to the appeal sought representations from the police, affected parties and the appellant. The police provided representations, as did the appellant and one affected party. Portions of the police's and the appellant's representations were not shared amongst them, as they met this office's confidentiality criteria found in *Practice Direction 7*. One affected party provided representations, which were withheld in full, as they too met this office's confidentiality criteria.

[9] The appeal was then transferred to me to continue the inquiry. While I will not be referring to the confidential representations, I have taken them into consideration in making this order.

[10] For the reasons that follow, I find that the record contains the personal information of the appellant and other identifiable individuals. I uphold the police's application of section 38(b) to most of the record, finding two portions not exempt from disclosure. I uphold the police's exercise of discretion and order them to disclose the non-exempt information to the appellant.

RECORD:

[11] The record is a 22 page General Occurrence report. The occurrence report relates to a complaint the appellant made to the police about an assisted living facility. As some of the personal information is no longer at issue, as well as the information the police indicate is not responsive to the request, the remaining information at issue consists of the following:

- The withheld portions on pages 10 and 15; and
- Pages 11-14 in their entirety.

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 exemption at section 38(b) apply to the information at issue?
- C. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[12] 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;

[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.¹

[14] 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.

[15] 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

¹ Order 11.

individual.²

[16] 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.³

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

Representations

[18] The police submit that the record contains "personal information" as defined in section 2(1) of the *Act*. In particular, the police submit that the record contains the personal information of the appellant and the appellant's daughter, as well as the manager and social workers at an assisted living facility. The personal information of the staff, the police argue, includes their dates of birth, home addresses and home telephone numbers, ethnicities, drivers' licence numbers, height, weight, eye and hair colour, and complexion.

[19] The police also note that, with respect to the staff of the assisted living facility, the names and job titles of these individuals have already been disclosed to the appellant, as well as statements made by them in their professional capacity to the police. Lastly, the police submit that perhaps some of the telephone numbers that were withheld are business telephone numbers, but it is not possible to determine whether they are business or personal telephone numbers.

[20] The appellant disputes the police's position that some of the information provided by staff was in a personal capacity. He submits that any comment by any worker at any time about this matter is done in a professional capacity and does not qualify as personal information, and should, therefore, be disclosed. In addition, the appellant submits that the fact that the police have not sorted out whether the telephone numbers are business or personal leads him to believe that there may be more information that was withheld that is not personal information.

Analysis and findings

[21] I find that the record contains the personal information of the appellant, another identifiable individual and staff members of the care facility. In particular, I find that portions of pages 10 and 15 contain the personal information of the appellant. On page

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

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.).

10, a portion consists of an individual's opinion about the appellant, which qualifies as the appellant's personal information under paragraph (g) of the definition of personal information in section 2(1) of the *Act*. I further find that the appellant's personal information on page 15 of the record qualifies as his personal information, as it consists of the appellant's name with other personal information about him, meeting the requirements of paragraph (h) of the definition. Given that this personal information is solely that of the appellant, I find that the personal privacy exemption in section 38(b) does not apply, and I will order the police to disclose these portions of pages 10 and 15 to the appellant.

[22] I also find that a portion of page 12 contains the personal information of an identifiable individual (not a staff member). This portion qualifies as this individual's personal information, as it contains their name with other personal information relating to them, falling within paragraph (h) of the definition.

[23] Lastly, I find that the personal information of staff members of the facility is contained in pages 10 through 15. I find that while the staff members were acting in their professional capacity, I find that these pages reveal information of a personal nature about a number of staff members, thus qualifying as their personal information.

[24] I will now go on to determine if this personal information is exempt from disclosure under section 38(b) of the *Act*.

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

[25] 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.

[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.

[27] If any of paragraphs (a) to (e) of section 14(1) apply, the personal privacy exemption is not available.

[28] In applying the section 38(b) exemption, sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[29] 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.

[30] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's personal information), 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.⁵

[31] The police are claiming the application of the presumption in section 14(3)(b), as well as the factors in sections 14(2)(f) and 14(2)(h). Section 14(3)(b) states:

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;

[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.⁶ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁷

[33] Sections 14(2)(f) and (h) state:

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;

(g) the personal information has been supplied by the individual to whom the information relates in confidence;

[34] The factor in section 14(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.⁸

⁵ Order MO-2954.

⁶ Orders P-242 and MO-2235.

⁷ Orders MO-2213, PO-1849 and PO-2608.

⁸ Order PO-1670.

Representations

[35] The police submit that the discretionary exemption in section 38(b) applies to the information at issue because the record also contains the appellant's personal information. The police further submits that neither the exceptions in paragraphs (a) to (e) of section 14(1), nor those in section 14(4) apply. Conversely, the police submits that the presumption in section 14(3)(b) applies because the police were called by the appellant to investigate an alleged assault. The information was compiled by the police even though no charges were laid. The police further argue that two factors in section 14(2) apply, namely section 14(2)(f) (highly sensitive) and 14(2)(h) (supplied in confidence). These factors, the police submit, do not favour the disclosure of the personal information at issue. Lastly, the police submit that the absurd result principle does not apply because the appellant has been provided with all of the information he supplied to the investigating officer.

[36] The appellant argues that he requires all of the information in the record to pursue a civil claim by taking the information to a Justice of the Peace and have them judge the merits of the case. The appellant goes on to state:

I believe getting all the information will prove a number of issues. First, an incident occurred. Second, I was targeted in revenge for bringing deficient programs up to management and falsely accused of hurting my daughter. Third, when the agency realized I could prove I did not hurt my daughter, only then did they [try] to backpedal and say they got their dates mixed up when they documented I did the assault. I will need to see all the documents to determine how this incident came to be.

Analysis and findings

[37] I find that the disclosure of most of the withheld information would constitute an unjustified invasion of the personal privacy of individuals other than the appellant, and is exempt from disclosure under section 38(b). In coming to this conclusion I have reviewed the representations of the parties as well as the record itself.

[38] I find that the presumption in section 14(3)(b) weighs heavily against the disclosure of the information at issue, as this information was compiled and is identifiable as part of an investigation into a possible violation of law, which, in this case did not lead to charges being laid by the police.

[39] Turning to the factors in section 14(2), I find that the factor in section 14(2)(d), which the appellant raised, and which favours disclosure, does not apply in these circumstances. Past orders of this office have found that in order for section 14(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁹

[40] I find that the appellant's representations reveal that there is not an existing proceeding and that his evidence regarding the contemplation of a proceeding is speculative, at best.

[41] Turning to the factors that the police referred to in their representations, which do not favour disclosure, I find that both factors in sections 14(2)(f) and 14(2)(h) apply, and I give them moderate weight. The personal information of the other identifiable individuals contained in the record, I find, is highly sensitive within the meaning of section 14(2)(f).

[42] Turning to the factor listed by the police in section 14(2)(h), I find that in these circumstances, it applies. As previously stated, the factor in section 14(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁰ I find that, based on the evidence before me, the staff members and the other identifiable individual had a reasonable expectation that the information they provided to the police would be kept in confidence.

[43] I find that none of the exceptions in section 14(1) apply. Having found that the presumption in section 14(3)(b) and the factors in sections 14(2)(f) and 14(2)(h) apply to the personal information at issue, and balancing the presumption and the factors against the appellant's right of access under the *Act*, I find that most of the withheld portions of the record at issue are exempt from disclosure under section 38(b), subject

⁹ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

¹⁰ Order PO-1670.

to my findings regarding the police's exercise of discretion.

[44] While I acknowledge the appellant's position that, in his view, the police withheld too much information and could have severed the record, I find on my review of the record that some of the appellant's personal information is so intertwined with that of the staff members that it is not possible to reasonably sever it.

Issue C: Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[45] 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.

[46] 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, or it fails to take into account relevant considerations.

[47] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution.¹²

[48] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant¹³:

- the purposes of the *Act*, including the principles that 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, 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 or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;

¹¹ Order MO-1573.

¹² Section 43(2).

¹³ Orders P-344 and MO-1573.

- 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.

Representations

[49] The police submit that they properly exercised their discretion and took into account relevant considerations, including that the appellant had the right to his own personal information, as well as that of his daughter. The police further submit that they disclosed as much information as permitted under the *Act*, without breaching the personal privacy of other individuals. With respect to other considerations taken into account, the police state:

The police did not feel there was anything criminal in this matter nor did they feel that the appellant's daughter was not well cared for or in good health. In fact, the officer stated in the report that the appellant "seemed more concerned with the perceived deceit by staff" than whether or not criminal charges would be laid. The appellant has stated that he requires the report for the purpose of a civil proceeding. For these reasons, I do not feel there is a sympathetic or compelling need for the release of the withheld information . . .

[50] Although the appellant did not directly address whether the police properly exercised their discretion, he implies in his representations that they did not because, in his view, the police carelessly and improperly severed the record.

Analysis and finding

[51] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.¹⁴ It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution

¹⁴ Order MO-1287-I.

to reconsider the exercise of discretion.¹⁵ Having found that most of the record at issue is exempt from disclosure under the personal privacy exemption in section 38(b), my finding regarding the police's exercise of discretion is in relation to the information withheld under this exemption.

[52] I am satisfied that the police properly exercised their discretion in not disclosing the withheld portions of the record that I have found to be exempt from disclosure under the personal privacy exemption. I find that the police took relevant factors into consideration, including the purpose of the exemption in section 38(b), which is to protect the privacy of individuals other than the requester.

[53] Further, I find that other relevant factors were taken into consideration in the exercise of discretion. Based on the police's representations, I am satisfied that they took into consideration that the appellant is an individual, seeking his own information, the age of the information and the historic practice of the police with respect to similar information. I also find that the police did not take any irrelevant factors into consideration in exercising their discretion, nor did they exercise their discretion in bad faith. Lastly, I note that, the police withheld only those portions of the record that contain the personal information of other individuals or was so intertwined with the appellant's personal information that it could not be severed in a meaningful way.

ORDER:

1. I uphold the police's application of section 38(b) to most of the information in the record.
2. I order the police to disclose the portions of the record that I have found not to be exempt from disclosure on pages 10 and 15. I enclose copies of these pages and have highlighted the portions that are to be disclosed to the appellant by **January 6, 2020** but not before **December 30, 2019**.
3. I reserve the right to require the police to provide this office with a copy of the information they disclose to the appellant.

Original Signed By: _____
Cathy Hamilton
Adjudicator

November 27, 2019 _____

¹⁵ Order 58.