

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3880

Appeal MA19-00055

Toronto Police Services Board

December 18, 2019

Summary: The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a general occurrence report. The police issued a decision granting partial access to the responsive record with severances pursuant to the discretionary personal privacy exemption in section 38(b) of the *Act*. The requester, now the appellant, appealed the police's decision to this office. In this order, the adjudicator upholds the police's decision, and dismisses the appeal.

Statutes Considered: The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 38(b).

OVERVIEW:

[1] The Toronto Police Services Board (the police) received an access request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to police reports relating to two incidents involving the requester.

[2] The police issued a decision granting partial access to the responsive record, a general occurrence report, with severances pursuant to the discretionary personal privacy exemption in section 38(b) of the *Act*.

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

[4] A mediator was appointed to explore resolution. During the course of mediation, the mediator contacted an affected party to seek consent, but consent was not obtained. The appellant confirmed that he is only seeking access to the withheld

information on one page of the occurrence report. The police maintained their decision to deny access to the withheld information.

[5] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry, and invited and received representations from both the police and the appellant. I have reviewed and considered all of the representations in this appeal. However, I have only summarized those portions I found relevant to my determination below.

[6] In this order, I uphold the police's decision, and dismiss the appeal.

RECORDS:

[7] The information at issue in this appeal consists of the severed information on page 7 of a general occurrence report.

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:

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), the relevant portions are 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,

(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.¹ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[10] The police submit that the withheld information consists of the personal information of a suspect, the affected party, which if disclosed, would reveal their identity. The police further submit that the withheld information includes the affected party's sex, age (date of birth), address and telephone number. Therefore, the police submit that the withheld information consists of personal information according to paragraphs (a) and (d) of section 2(1) of the *Act*.

[11] The appellant did not address whether the record contains personal information in his representations.

[12] After reviewing the record and the representations of the police, I find that the record at issue contains the mixed personal information of the appellant and the affected party. Specifically, I find that the withheld portion contains personal information about the affected party that fits within paragraphs (a), (d) and (h) of the

¹ Order 11.

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

definition of that term in section 2(1) of the *Act*. The record also contains the appellant's personal information that fits within paragraphs (a), (b), (d) and (h). Because the record contains the appellant's personal information, the relevant personal privacy exemption is the discretionary one in section 38(b).³

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

[13] 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.

[14] 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.

[15] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). 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). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. 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 section 38(b).

[16] 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.⁴

[17] 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). Section 14(2) also lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy. 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

³ When a record does not contain a requester's personal information, the applicable personal privacy exemption is the mandatory one in section 14(1).

⁴ Order MO-2954.

listed under section 14(2).⁵

Representations

[18] The police submit that none of the exceptions in the paragraphs from (a) to (e) of section 14(1) apply to the withheld information, and that the exceptions in section 14(4) also do not apply.

[19] The police submit that the "pecuniary or other harm" factor at section 14(2)(e) and the "inaccurate or unreliable" factor at section 14(2)(g) apply to the withheld information. The police submit that they never contacted the affected party during the investigation, and the affected party's personal information was collected indirectly through a review of the case evidence. The police submit that there has been no further substantiation of the affected party's involvement in the offence beyond that of a suspect, before this case was transferred to another police force. The police submit that they do not know whether the affected party is still being investigated as a person of interest, and in the event that subsequent investigations ruled them out as a suspect, disclosing this personal information could cause undue harm to the affected party in a number of respects.

[20] The police submit that in this same vein, disclosure could also provide the appellant with unreliable information. The police explain that unreliability in this context would not refer to the accuracy of the personal information, but how the disclosure of this information could lead to incorrect inferences. The police submit that the report shows that the affected party, who is identifiable by the personal information listed, was suspected of being complicit in the crime, and this portrayal or inference could be inaccurate and thus, unreliable since they have no knowledge regarding the outcome of the investigation.

[21] The police submit that paragraph (b) of section 14(3) also applies to the withheld information, because that 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. The police submit that since the investigation was transferred shortly after it was opened, it is not known at the time of the appellant's request whether the investigation was ongoing. The police submit, therefore, that disclosure of the personal information at issue could potentially compromise the integrity of the investigation.

[22] The appellant submits that he wants access to the withheld information, because he wants to pursue civil litigation against the individual who defrauded him. Therefore, I understand the appellant is arguing that the "fair determination of rights" factor at

⁵ Order P-99.

section 14(2)(d) applies in favour of disclosure.

Analysis and findings

[23] The police argue that none of the exceptions at sections (a) to (e) of 14(1) apply, and I agree and find that none apply to the withheld information. The police also argue that none of the exceptions in section 14(4) apply, and I also agree and find that none of them apply in the circumstances of this appeal.

[24] The police argue that the presumption in section 14(3)(b) applies. 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[.]

[25] Based on my review of the record, I am satisfied that the withheld information was compiled and is identifiable as part of an investigation into a possible violation of law. 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 Therefore, I find that the presumption at section 14(3)(b) applies to the withheld information, and its disclosure is presumed to be an unjustified invasion of the personal privacy of the individual to whom the information relates.

[26] Under section 38(b), the presumption in section 14(3)(b) must be weighed and balanced with any factors in section 14(2) that are relevant. As noted above, the police argue that the “pecuniary or other harm” factor at section 14(2)(e) and the “inaccurate or unreliable” factor at section 14(2)(g) apply to the circumstances of this appeal, while the appellant argues that the “fair determination of rights” factor at section 14(2)(d) applies.

Section 14(2) factors

[27] After reviewing the record and the representations of the parties, I find that none of the factors at section 14(2) applies in the circumstances of this appeal.

[28] I am unable to conclude that section 14(2)(g) applies to the withheld information, because the police have not persuasively argued that the withheld information itself is inaccurate or unreliable. Instead, the police argued that any

⁶ Orders P-242 and MO-2235.

inferences made from the withheld information could be inaccurate or unreliable. This position is not consistent with the intent of section 14(2)(g) and how previous orders of this office have interpreted it, which is to address situations where the personal information itself is inaccurate or unreliable.⁷ Therefore, I find that section 14(2)(g) does not apply in this appeal to weigh against disclosure of the withheld information.

[29] In order for section 14(2)(e) to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved. While the police argued that section 14(2)(e) applies, they did not provide me with sufficient arguments or any evidence to demonstrate that the damage or harm envisioned is present, or foreseeable, or how that damage or harm is unfair. Therefore, I find that section 14(2)(e) does not apply.

[30] 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.⁸

[31] In order for section 14(2)(d) to apply, all four parts must be established. I am not persuaded by the appellant's representations that section 14(2)(d) applies to the personal information at issue in this appeal. The appellant has not provided sufficient evidence to establish the application of this factor, outside of stating his desire to pursue civil litigation, because he believes the affected party is the individual that defrauded him. In any event, I find that the police's withholding of the affected party's personal information does not prevent the appellant from pursuing remedies that might be available to him within the civil litigation process.⁹ Therefore, as the appellant has

⁷ Orders MO-3672, MO3747, MO-3465 and MO-3088.

⁸ 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.).

⁹ Section 51(1) This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.

not persuaded me that the four-part test of section 14(2)(d) has been met, I find that section 14(2)(d) does not apply to this appeal.

[32] Outside of the listed factors in section 14(2), I also considered whether any unlisted factors favouring disclosure, such as inherent fairness issues, apply and I find that none apply.

[33] Since I have found that the section 14(3)(b) presumption applies and there are no factors favouring disclosure of the withheld information, balancing the interests of the parties, the facts of this appeal weigh against disclosure of the personal information at issue. Therefore, I find that the information at issue in this appeal is exempt from disclosure pursuant to the discretionary exemption at section 38(b) of the *Act*, subject to my findings below with respect to the police's exercise of discretion.

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

[34] 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.

[35] 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.

[36] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

[37] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹²

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

¹⁰ Order MO-1573.

¹¹ Section 43(2).

¹² 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.

Representations

[38] The police submit that they exercised their discretion under 38(b), withholding information only to the extent required to protect the privacy and personal information of the affected party. Furthermore, the police submit that they did not exercise their discretion in bad faith, and that all relevant factors were taken into account and no irrelevant factors were taken into account in exercising their discretion.

[39] The appellant's representations did not address the police's exercise of discretion.

Analysis and findings

[40] After considering the police's representations and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to their decision to deny access to the withheld information under section 38(b) of the Act. I am satisfied that they did not exercise their discretion in bad faith or for an improper purpose.

[41] I am also satisfied that the police took into account relevant factors, and did not take into account irrelevant factors in the exercise of discretion. In particular, it is evident that the police took into account the fact that the records contain the appellant's own personal information, and I am satisfied that the police provided him with access to as much information as possible by applying the exemptions in a limited and specific manner.

[42] Accordingly, I find that the police exercised their discretion in an appropriate manner in this appeal, and I uphold it.

ORDER:

I uphold the police's decision, and dismiss the appeal.

Original Signed by: _____
Anna Truong
Adjudicator

_____ December 18, 2019