

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3889

Appeal MA18-00822

Halton Regional Police Services Board

January 21, 2020

Summary: The police received an access request for all police reports relating to the appellant for specified time periods. The police granted access, in part, and relied on the personal privacy exemption at section 38(b) to withhold the remaining information. In this order, the adjudicator upholds the police's decision, in part. She orders the police 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. M.56, as amended, sections 2(1) (definition of "personal information"), and 38(b).

Orders Considered: Orders P-256, MO-2777 and MO-3036.

OVERVIEW:

[1] The Halton Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the requester as follows:

Requesting all police reports including [incident], in person and phone communication from June 2015 to November 2015, April 2016 to August 2016, June 2018 to September 2018.

[2] The police granted partial access to the responsive records, and relied on the exemptions at sections 8(1)(e) (endanger life or safety), 8(1)(l) (facilitate commission of an unlawful act), 38(a) (discretion to refuse requester's own information) and the personal privacy exemptions at sections 14(1) and 38(b) of the *Act* to deny the

remainder.

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

[4] During mediation, the appellant advised that he is not pursuing access to the information relating to the police codes, patrol zones and statistical information. Accordingly, sections 8(1)(e), 8(1)(l) and 38(a) are no longer at issue in this appeal.

[5] The appellant also advised that he is not pursuing the names, date of birth, addresses and telephone number(s) of individuals whose information is contained in the records at issue. Accordingly, this information is also no longer at issue in this appeal.

[6] The appellant further advised that he wants to know what individuals said to the police, and, therefore, he wants access to their statement(s). He also wants his own statements.

[7] The mediator was unable to obtain consent from the affected parties for the disclosure of their statement(s).

[8] As further mediation was not possible, this appeal was moved to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*.

[9] During my inquiry, I invited the police, the appellant, and the affected parties to provide representations. Pursuant to this office's *Practice Direction Number 7*, a non-confidential copy of the police's representations was shared with the appellant.¹ I also received representations from the appellant.

[10] The affected parties who provided representations did not consent to the disclosure of their personal information.

[11] In this order, I uphold the police's decision, in part. I order the police to disclose the non-exempt information to the appellant.

RECORDS:

[12] The records at issue are the following ten general occurrence reports. I have numbered them as follows:

- Record 1 (occurrence report ending in 278)
- Record 2 (occurrence report ending in 536)

¹ 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*.

- Record 3 (occurrence report ending in 822)
- Record 4 (occurrence report ending in 294)
- Record 5 (occurrence report ending in 093)
- Record 6 (occurrence report ending in 688)
- Record 7 (occurrence report ending in 087)
- Record 8 (occurrence report ending in 243)
- Record 9 (occurrence report ending in 448)
- Record 10 (occurrence report ending in 013)

[13] The withheld information at issue is the statement(s) made by the affected parties and the appellant to the police in each of these occurrence reports.

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 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: Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[14] In order to determine whether 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.

[15] “Personal information” is defined in section 2(1). Relevant paragraphs of that section are as follows:

“personal information” means recorded information about an identifiable individual, including,

(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

[16] 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.²

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[18] The police submit that the records contain personal information as defined by the *Act*. They submit that the records contain information relating to the age, sex, education, medical history, employment history, address, telephone number, driver's license information, and views or opinions of identifiable individuals. The police also submit that the records contain statements and opinions of individuals about other individuals and the appellant. Finally, they submit that severing the personal identifiers would not necessarily mean that the statements would remain anonymous because of the appellant's familiarity with the circumstances surrounding each occurrence report.

[19] Although the appellant provided representations, his representations did not address this issue.

[20] Based on my review of the records, I find that they contain the personal information of the appellant and identifiable individuals. Specifically, they contain information of the appellant and other individuals, which would fall within paragraphs (e) and (g) of the definition of "personal information" in section 2(1) of the *Act*.

[21] With respect to the second paragraph of Record 7, it contains the personal information of the appellant and another individual. However, after severing a small portion in the second sentence, it no longer contains the personal information about an identifiable individual and only contains the personal information about the appellant. As the personal privacy exemptions cannot apply to exempt the appellant's own personal information from disclosure to himself, I will order the police to disclose the second paragraph (excluding a small portion) of Record 7 to him in accordance with the highlighted record enclosed with this order.

[22] As the records (excluding the majority of the second paragraph of Record 7)

² Order 11.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

contain personal information of both the appellant and other individuals, Part II of the *Act* applies and I must consider whether the records at issue are exempt pursuant to the discretionary exemption at section 38(b) of the *Act*.

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

[23] Since I found that the records contain the personal information of the appellant and other individuals, section 36(1) of the *Act* applies to the appellant's access request. Section 36(1) 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.

[24] 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 requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the appellant.⁴

[25] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[26] In making this determination, this office will consider, and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁵ However, if the information fits within any of paragraphs (a) to (e) of section 14(1) or within 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[27] If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy. Also, 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.⁶ Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. 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).⁷

⁴ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

⁵ Order MO-2954.

⁶ Order P-239.

⁷ Order P-99.

Analysis and findings

[28] I note that the withheld information at issue does not fit within the exceptions set out in section 14(1)(a) to (e) nor section 14(4) of the *Act*. As such, I will turn to discuss whether any of the factors or presumptions under sections 14(2) and (3) apply.

[29] The police submit that the presumptions at sections 14(3)(a) and 14(3)(b) apply. Sections 14(3)(a) and (b) state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(a) Relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) 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;

[30] With respect to section 14(3)(b), they submit that they investigated a possible violation of the law, specifically the *Criminal Code of Canada*, for all these incidents.

[31] 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.⁸ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁹

[32] Based on my review of the records, I find that the presumption at section 14(3)(b) applies in this circumstance. The records concern information about investigations relating to a number of offences. The withheld information was compiled and is identifiable as part of the police investigations into possible violations of the *Criminal Code of Canada*, which did not result in any 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.¹⁰ Section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld information.

[33] The police also submit that the factors at sections 14(2)(e) and 14(2)(i) apply. They read as follows:

⁸ Orders P-242 and MO-2235.

⁹ Orders MO-2213, PO-1849 and PO-2608.

¹⁰ Orders P-242 and MO-2235.

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,

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[34] The police rely on Order P-256, where former Assistant Commissioner Tom Mitchinson wrote:

The applicability of both these clauses is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be “unfair” to the individual involved.

[35] On my review of the withheld personal information, I find that the factor in section 14(2)(e) applies and that the damage or harm to the affected parties would be unfair. Accordingly, I find that the factor in section 14(2)(e) should be given significant weight in my determination of the application of section 38(b).

[36] While the appellant did not provide representations on the listed factors favouring disclosure, he submitted that he would like access to the statements in the records because he wants to “find out what is truth and what is not” and “hold the facts that are not true facts accountable in court.”¹¹ I accept the appellant’s unlisted factor which I will weigh in favour of disclosure of the withheld personal information.

[37] Having reviewed the personal information at issue and considering the factor and presumption in sections 14(2) and (3), I find that disclosure of the withheld information would be an unjustified invasion of the affected parties’ personal privacy. The personal information was compiled and is identifiable as part of several police investigations. Furthermore, the police have provided evidence of the possible factor set out in section 14(2)(e). While I also give weight to the appellant’s desire to know the nature of the information in the records, I find that it is outweighed by the factor and presumption weighing in favour of non-disclosure. Accordingly, I find that the remaining personal information is exempt under section 38(b) subject to my finding on the police’s exercise of discretion.

[38] Finally, I note that some of the withheld information consist of statements made

¹¹ The appellant’s representations mentions that he wants the untrue facts to be accountable in court, but he does not elaborate. As such, I did not consider the factor in section 14(2)(d) (fair determination of rights) to be applicable.

by the appellant to the police. In my view, the absurd result principle applies to these withheld portions of the records. This principle states that where the appellant originally supplied the information, or the appellant 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.¹² In this case, the police interviewed and recorded the appellant's statements. The appellant originally supplied the information contained in his statements to the police, and so he would be aware of what he had previously supplied to the police in these particular incidents. As such, I find that it would be absurd to withhold the information from him. Accordingly, I find that these particular withheld portions in Records 3, 5, 6, 7 and 8 are not exempt from disclosure under the discretionary privacy exemption at section 38(b) of the *Act*.

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

[39] As I found that the section 38(b) exemption applies to the withheld information in the records at issue, I will consider whether the police exercised their discretion under this section.

[40] 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.

[41] 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.

[42] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹³ This office may not, however, substitute its own discretion for that of the institution.¹⁴

[43] In their representations, the police submit that they carefully considered and reviewed all relevant factors with each of the circumstances being considered separately. They also submit that their decision was made carefully and without

¹² Orders M-444 and MO-1323.

¹³ Order MO-1573.

¹⁴ Section 43(2).

prejudice. The police finally submit that they considered the appellant's right to access his own personal information and the personal privacy interests of the affected parties.

[44] Although the appellant provided representations, his representations did not address this issue.

[45] Based on my review of the police's representations and the nature and content of the records at issue, I find that the police properly exercised their discretion to withhold the personal information pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. I note that the police took into account the following relevant considerations: the relationship between the appellant and the affected parties; and the wording of the exemption and the interests it seeks to protect. I am satisfied that they did not act in bad faith or for an improper purpose. Accordingly, I uphold the police's exercise of discretion in deciding to withhold the personal information pursuant to the section 38(b) exemption.

ORDER:

1. I uphold the police's application of the personal privacy exemption at section 38(b), in part.
2. I order the police to disclose to the appellant the withheld information in Records 3, 5, 6, 7 and 8 by **February 26, 2020** but not before **February 21, 2020** in accordance with the highlighted records I have enclosed with the police's copy of this order. To be clear, the highlighted information should be disclosed to the appellant.
3. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the records as disclosed to the appellant.

Original signed by: _____

Lan An
Adjudicator

January 21, 2020