

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3897

Appeal MA18-444

Toronto Police Services Board

January 30, 2020

Summary: The Toronto Police Services Board (the police) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified occurrence. The police issued a decision granting partial access to the responsive records with severances under the discretionary personal privacy exemption at 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 a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

RE: July 1, 2017 at [specified address]

Police notes from all 3 officers that attended above address

All 911 phone calls (audio CD) and/or a direct transcript of the phone calls

Witness statements to police

Any letters/reports sent [to the specified agency]

Any letters/reports received from [the specified agency]

[2] The police issued a decision granting partial access to the responsive records. Access to the withheld information was denied pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*.

[3] In the decision, the police identified the responsive records as a General Occurrence report, I/CAD¹ Events Details report and attending officers' memorandum book notes. The police also identified some information that was removed, as it was not responsive to the request.

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

[5] During the course of mediation, the appellant advised that she was seeking access to the information withheld pursuant to the personal privacy exemption, and confirmed she was not pursuing access to information that was not responsive to the request. The appellant also advised that an audio recording of the 911 call should exist. In response, the police identified a CD containing the call as a responsive record, and advised that it was withholding it in full pursuant to the exemptions cited in its decision letter. This office notified an affected party in an attempt to obtain consent to disclose their information to the appellant. However, the affected party did not consent.

[6] 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 decided to commence the inquiry by inviting representations from the police and affected party, initially. Representations from the police were received and shared in full with the appellant. Representations were also invited and received from the appellant.

[7] After the inquiry commenced, the affected party consented to the release of most of their information contained within the written records, and the police issued a supplementary decision releasing that information to the appellant. After receiving the additional information, the appellant confirmed that she was still pursuing the appeal, because she would like the audio CD of the 911 call. Accordingly, only the audio CD of the 911 call and the withheld portions of pages 10, 16, 17 of the I/CAD Event Details report and attending officers' memorandum book notes remain at issue in this appeal.

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

RECORDS:

[9] The records at issue consist of the audio CD of the 911 call (withheld in full), as

¹ Intergraph Computer Aided Dispatch.

well as the withheld information on pages 10, 16 and 17 of the I/CAD Event Details report² and attending officers' memorandum book notes.

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?

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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,

(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,

² Referred to as the "911 Call Transcript" in the decision letter.

(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;

[11] 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.³ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[12] The police submit that the records at issue contain the personal information of the affected party, specifically the name, sex, ethnicity, address, and phone number, as well as personal opinions and views of the affected party. The police further submit that in the recording of the 911 call, the affected party identifies another specified individual involved in this incident.

[13] While the appellant's representations do not specifically address whether or not the records at issue contain personal information, she acknowledges that the information at issue, specifically the audio CD of the 911 call, contain the information of the affected party and another specified individual.

[14] During the inquiry, on consent, the affected party was revealed to be the Property Manager of the appellant's building. 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.⁵ However, 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.⁶ In the circumstances of this appeal, most of the affected party's information contained in the records at issue appears in a business capacity. However, based on my review of the records at issue, I find that disclosure of the withheld information would reveal something of a personal nature about the affected party. Accordingly, I find the records at issue contain the personal information of the affected party.

[15] After reviewing the records at issue and the representations of the parties, I find that the records at issue contains the mixed personal information of the appellant, the

³ Order 11.

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

⁵ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁶ When a record does not contain a requester's personal information, the applicable personal privacy exemption is the mandatory one in section 14(1).

affected party and one other specified individual. Specifically, I find that the records at issue contain the personal information of these individuals that fits within paragraphs (a), (b), (d), (e), (g) and (h) of the definition of that term in section 2(1) of the *Act*. Since the records contain the appellant's personal information, the relevant personal privacy exemption is the discretionary one in section 38(b).⁷

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

[16] 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.

[17] 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.

[18] 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).

[19] 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.⁸

[20] 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

⁷ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁸ Order MO-2954.

listed under section 14(2).⁹

Representations

[21] 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. The police submit that the presumption at paragraph (b) of section 14(3) applies to the withheld information, because that information was compiled and is identifiable as part of an investigation into a possible violation of law, even though it did not lead to charges being laid.

[22] The police submit that the "pecuniary or other harm" factor at section 14(2)(e), the "highly sensitive" factor at section 14(2)(f) and the "supplied in confidence" factor at section 14(2)(h) apply to the withheld information and weigh in favour of non-disclosure. The police submit that affected party only became involved in this incident due to being a member of the property management's office, and did not expect that their personal information would subsequently be the subject of an appeal, which could result in its disclosure. The police further submit that if the withheld information is released to the appellant, the affected party's identity would be revealed and they may be foreseeably be subject to harm or retaliation.¹⁰

[23] The police submit that the fact that a staff member from the property management office phoned 911 should be considered sufficient information already released to the appellant. The police further submit that, as a staff member, the affected party works in the building where the appellant resides, and should their identity be revealed, their life and safety would be greatly affected.

[24] The police submit that the audio CD of the 911 call contains the personal information of the affected party, and they have not consented to its release. The police submit, therefore, that its release would constitute an unjustified invasion of the affected party's personal privacy.

[25] The appellant submits that the factors the police argue apply to the withheld information do not apply. The appellant submits that she knows the identity of the caller and the other individual mentioned in the 911 call, and that the affected party has consented to disclosure of her office number and address. The appellant argues, therefore, there is no longer any reason to deny her access to the withheld information.

[26] The appellant submits that the police are withholding critical information based on the false assumption of retaliation and vengeful agendas, which are impossible given

⁹ Order P-99.

¹⁰ After the police made these representations, on consent, the affected party's identity has been revealed to the appellant.

that she pays rent to live where she does. The appellant argues that she should be given the opportunity to protect her family against these false claims and accusations. She further argues that her family are the ones "exposed unfairly to pecuniary or other harm".

[27] The appellant alleges that it was the police and the affected party who reported her to another specified agency, which resulted in an investigation that caused considerable emotional and psychological harm, and damaged her reputation in the community. The appellant argues that the police are withholding critical information, which would allow her to understand why this other agency became involved.

[28] The appellant submits that she wants the audio CD of the 911 call, because she believes that the affected party "embellished facts and disclosed private tenant information to the police, thus breaching laws", and provided false and damaging information, which prompted the involvement of the police and the specified agency.

[29] The appellant submits that she wants the information at issue in this appeal, because it "may be used for purposes of initiating or defending a Landlord and Tenant complaint or legal dispute." Therefore, I understand the appellant is arguing that the "fair determination of rights" factor at section 14(2)(d) applies in favour of disclosure.

Analysis and findings

[30] 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.

[31] 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[.]

[32] Based on my review of the records, I am satisfied that the withheld information was compiled and is identifiable as part of an investigation into possible violations 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.¹¹ Therefore, I find that the presumption at section

¹¹ Orders P-242 and MO-2235.

14(3)(b) applies to the withheld information, and its disclosure is presumed to be an unjustified invasion of the personal privacy of the individuals to whom the information relates.

[33] 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), the “highly sensitive” factor at section 14(2)(f) and the “supplied in confidence” factor at section 14(2)(h) apply to the withheld information in favour of non-disclosure, while the appellant suggests that the “fair determination of rights” factor at section 14(2)(d) applies in favour of disclosure.

Section 14(2) factors

[34] After reviewing the records and the representations of the parties, I find that the “highly sensitive” factor at section 14(2)(f) and the “supplied in confidence” factor at section 14(2)(h) apply to the withheld information and weigh in favour of non-disclosure. I do not find that the other factors listed at section 14(2) or any unlisted factors, including those that might weigh in favour of disclosure, applies in the circumstances of this appeal.

[35] In order for section 14(2)(f) to apply, the withheld information must be considered to be highly sensitive, which means there must be a reasonable expectation of significant personal distress if the information is disclosed.¹² While the affected party consented to the release of most of their information within the written records, they did not consent to the disclosure of the audio CD of the 911 call. Based on my review of the records and the representations of the parties, I am satisfied that the information that remains at issue in this appeal can be considered to be “highly sensitive”, especially the audio CD of the 911 call, and I find that it applies as a factor favouring non-disclosure that carries some weight in this appeal.

[36] 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.¹³ I find that this factor applies in the circumstances of this appeal and that it favours non-disclosure, as the affected party had a reasonable expectation that the information they provided to the police would be kept in confidence¹⁴, especially the audio of their 911 call.

¹² Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹³ Order PO-1670.

¹⁴ *R. v Quesnelle*, 2014 SCC 46, [2014] 2 SCR 390, MO-3593, MO-3790 and MO-3418.

[37] 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. The police argue that section 14(2)(e) applies, because if the information at issue is released to the appellant, the affected party's identity would be revealed, and they may be subject to foreseeable harm or retaliation. However, the appellant argues that this argument is now moot, because the affected party has already consented to the release of their identity and other information. I agree. Given the partial disclosure, by consent, of the affected party's personal information, including their name, I conclude that the expectation of harm argued by the police is no longer present or foreseeable. Therefore, I find that section 14(2)(e) does not apply.

[38] For section 14(2)(d) (fair determination of rights) to apply in favour of disclosure, 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.¹⁵

[39] 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 that the withheld information "may be used for purposes of initiating or defending a Landlord and Tenant complaint or legal dispute." In any event, I find that the police's withholding of the affected party's personal information does not prevent the appellant from pursuing legal remedies that might be available to her.¹⁶ Therefore, as the appellant has not persuaded me that the four-part test of section 14(2)(d) has been met, I find that

¹⁵ 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.).

¹⁶ Section 51(1) of the *Act* provides that "This Act does not impose any limitation on the information otherwise available by law to a party to litigation."

section 14(2)(d) does not apply in this appeal.

[40] 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 of them do.

[41] I have found that the “highly sensitive” factor at section 14(2)(f) and the “supplied in confidence” factor at section 14(2)(h) apply to the withheld information and that both weigh in favour of non-disclosure. I have also found that the section 14(3)(b) presumption applies to the withheld information. Since 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?

[42] 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.

[43] 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.

[44] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁷ This office may not, however, substitute its own discretion for that of the institution.¹⁸

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

¹⁷ Order MO-1573.

¹⁸ Section 43(2).

relevant:¹⁹

- 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
 - 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

[46] The police submit that they exercised their discretion under section 38(b) appropriately, 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. The police submit that in withholding the information under section 38(b),

¹⁹ Orders P-344 and MO-1573.

they considered the following:

In assessing the value of protecting the privacy interests of an individual other than the requester, one needs to consider the nature of the institution. The nature of a law enforcement institution is in great part to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police.

Law enforcement institution records are not simple business transaction records in which disclosure of another individual's personal information may not, on balance, be offensive. Given the unique status of law enforcement institutions within the *Act* and the unique status to authorize the collection of personal information, we generally view the spirit and content of the *Act* as placing a greater responsibility to [safeguard] the privacy interests of individuals where personal information is being collected.

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

Analysis and findings

[48] 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.

[49] 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 her with access to as much information as possible by applying the exemptions in a limited and specific manner.

[50] 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

January 30, 2020

Adjudicator