Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3901

Appeal MA16-655

Ottawa Police Services Board

February 12, 2020

Summary: In response to an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the police granted the appellant partial access to police records containing the appellant's own name or the name of her son, on whose behalf the appellant exercises a right of access under section 54(c). In this order, the adjudicator upholds the police's decision to withhold discrete portions of the records on the basis they are not responsive to the request, or because disclosure of the personal information of other individuals would constitute an unjustified invasion of those individuals' personal privacy (section 38(b) of the *Act*). She also upholds the police's search for records. She dismisses the appeal of the police's decision.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 2 (definition of "personal information"), 14, 17, 36(1), 38(b), and 54(c).

OVERVIEW:

[1] The appellant made a request to the Ottawa Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records in which the appellant's name or the name of her son appear. She indicated a particular interest in "reports supposedly made by staff from [a named school] and/or the Catholic School Board."

[2] In a decision dated October 24, 2016 (the first decision), the police granted partial access to various police reports. The police denied access to portions of some reports on the basis of exemptions at sections 8(1)(i) (security) and (l) (facilitate commission of an unlawful act), and section 38(b) (denial of access to own information)

of the *Act*. The police also advised that there are no records relating to reports made by the named school or the Catholic School Board about the appellant or her son.

[3] The appellant appealed the police's decision to this office. During the processing of the appeal, the police issued several additional decisions.

[4] On November 22, 2016, the police granted full access to additional records. Those records are not at issue in this appeal.

[5] In a decision dated November 29, 2016 (the third decision), the police granted access to more records, but later advised that some information had been removed from the disclosed records on the basis this information is non-responsive to the request. The police's claim of non-responsiveness for some information in the records is at issue in this appeal.

[6] The police then conducted another search, and located additional records, which were addressed in a fourth decision, dated December 20, 2016. In this decision, the police granted partial access to records, denying access to other portions based on the same exemptions claimed in its first decision, as well as a claim of non-responsiveness for some information. In this decision, the police also addressed search issues raised by the appellant, identifying records that could not be located or that had been purged.

[7] During the mediation stage of the appeal process, the police provided responses to specific questions raised by the appellant about the records that had been disclosed to her. It also conducted another search for responsive records.

[8] On May 8, 2017, the police issued a fifth decision to address outstanding issues raised by the appellant. In this decision, the police addressed specific records sought by the appellant that had not been located in its searches, and questions raised by the appellant about wrong information appearing in the records. The police also reiterated its reliance on the exemptions claimed in its first decision (the October 24, 2016 decision). With this latest decision, the police provided the appellant with an affidavit setting out the search efforts undertaken by the police in responding to her requests. The appellant remains dissatisfied with the police's search for records.

[9] As no further mediation was possible, this appeal was transferred to the adjudication stage, where I decided to conduct a written inquiry under the *Act*. While I sought representations from both parties on the issues, I received representations only from the appellant.

[10] While the appellant continues to seek access to information withheld on personal privacy grounds, or based on a claim of non-responsiveness to her request, she no longer disputes the police's denial of police code and other information under the law enforcement exemptions at sections 8(1)(i) and (l). As a result, the police's severances to the records on law enforcement grounds are no longer at issue in this appeal. However, the appellant now asserts a public interest in disclosure of information

withheld on personal privacy grounds, and she continues to dispute the reasonableness of the police's search for records. I will address those arguments below.

[11] The appellant also asserts a right of access to the withheld information under section 51(1) of the *Act*. Section 51(1) provides that the *Act* does not impose any limitation on information otherwise available by law to a party to litigation. This section does not confer an independent right of access to the withheld information, and there is no evidence that the police have relied on the *Act* to deny access to information to which the appellant is otherwise legally entitled. I will not address this argument further.

[12] In this order, I uphold the police's decision to withhold certain information in the records on the claimed grounds. I also find that the police have provided evidence of reasonable efforts to locate records responsive to the appellant's request. There is no reasonable basis to order further searches. I dismiss the appeal.

RECORDS:

[13] At issue in this appeal are the withheld portions of occurrence reports and officer notebook entries that were otherwise disclosed to the appellant in the police's October 24, November 29 and December 20, 2016 access decisions (the first, third and fourth decisions).

ISSUES:

A. What is the scope of the request? What information is responsive to the request?

B. Do the records contain "personal information" as defined in section 2(1) of the *Act*, and, if so, to whom does it relate? Does the discretionary exemption at section 38(b) apply to the information at issue?

C. Did the police conduct a reasonable search for records?

DISCUSSION:

A. What is the scope of the request? What information is responsive to the request?

[14] The police withheld some information in the records on the basis it is not responsive to the appellant's request.

[15] The appellant submits that all the information at issue must relate to her request, because it is contained in records about incidents in which she or her son were involved, or were produced by or intended for her.

[16] I have reviewed the police's severances made on this ground, and agree that they contain information that is not responsive to the appellant's request. The police withheld as non-responsive discrete portions of officers' notebook entries that are about other people and other incidents that are unrelated to the appellant or to her son.

[17] The appellant observes that in each instance, information that is claimed to be non-responsive to the request appears on the same page of an officer's notebook as an entry relating to the appellant or her son (and the police agree that the latter type of entry is responsive to the request). I do not find this to be unusual, as the entries appear to be recorded in chronological order, with the result that one notebook page may contain a number of entries that are entirely unrelated to one another. It is also evident to me, based not only on the content of the various entries but also in the way that the entries on a page are set apart from one other (with underlining, for example, or with fresh date and time notations), that each entry is, in fact, about a separate incident, and that the police have withheld as non-responsive only those entries that concern matters entirely unrelated to the appellant or her son.

[18] I conclude that the withheld information does not "reasonably relate" to the appellant's request, and was properly withheld as not responsive.

B. Do the records contain "personal information" as defined in section 2(1) of the *Act*, and, if so, to whom does it relate? Does the discretionary exemption at section 38(b) apply to the information at issue?

Personal information

[19] The police withheld some information in the records on the basis that its disclosure would be an unjustified invasion of personal privacy. This claim can apply only to records that contain "personal information" within the meaning of the *Act*. In order to assess the personal privacy claim under the appropriate section of the *Act*, it is also necessary to determine to whom the personal information in the records relates.

[20] The police recognize that the records at issue are records of the appellant's own personal information. They are records responsive to the appellant's request for police records containing her own name, and they include, in addition to her name, her address and telephone number, her personal opinions and views, and certain context that reveals other personal information about her (such as the fact of her involvement with the police). All these types of information meet the definition of personal information in paragraphs (d), (e) and (h) of the definition at section 2(1) of the *Act*.

[21] Some of the records are also responsive to the appellant's request for police records containing the name of her son. Some of these records also contain her son's address and telephone number, and reveal his name in a context where disclosure would reveal other personal information about him. This information qualifies as the appellant's son's personal information under paragraphs (d) and (h) of the definition at section 2(1).

[22] The records also contain the personal information of individuals other than the appellant or her son. This information appears in many of the occurrence reports at issue, and includes the names, birth dates, addresses, telephone numbers and other identifying particulars (such as vehicle licence plate numbers) of other individuals. It also includes the personal opinions or views of those individuals, or the views or opinions of others about those individuals. In addition, because these individuals appear in the records as a result of their involvement in incidents concerning the appellant (for example, as subjects of complaints, or as witnesses to certain events), the appearance of their names in the records itself reveals personal information about them. All this information qualifies as the personal information of these individuals within the meaning of paragraphs (a), (c), (d), (e), (g) and (h) of the definition of "personal information" at section 2(1). For greater certainty, I confirm that, in one particular case, I have found that information about an employee appearing in the records qualifies as that employee's personal information, because it goes beyond information associated with him in his professional capacity and reveals something of a personal nature about him.[1]

[23] Finally, it is my understanding from the information before me that the appellant is the custodial parent for her son, who is under 16 years old. The police did not dispute my preliminary finding in the Notice of Inquiry that the appellant is therefore entitled to exercise a right of access under the *Act* to her son's personal information on his behalf [section 54(c)].

[24] I will accordingly consider the appellant's right of access to records containing her own personal information or the personal information of her son under section 36(1) of the *Act*, which confers a higher right of access to records of a requester's own personal information than the general access right found in section 4(1). Consequently, any exemptions claimed by the police to withhold information in these records must be made under section 38 of the *Act*, which permits an institution to refuse to disclose to a requester her own personal information in certain circumstances.

Personal privacy

[25] The police claim that the disclosure of information about other individuals in the records would constitute an unjustified invasion of those individuals' personal privacy.

[26] Under section 38(b), where a record contains personal information of both the requester and one or more other individuals, and disclosure of the information would be an "unjustified invasion" of the other individuals' 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.

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[1] Orders P-1409, R-980015, PO-2225 and MO-2344.

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

[28] 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). In addition, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. None of these sections is applicable in the circumstances.

[29] 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). 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.[2]

[30] 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). The police rely on the presumption at section 14(3)(b), which 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[.]

[31] It is evident from my review of the records that the personal information in the occurrence reports was compiled in the context of police investigations into various matters, often as a result of allegations made by the appellant about other individuals, and is identifiable as such. The appellant contends that the presumption cannot apply because all her police cases were ultimately closed by the investigators. However, the presumption only requires that there be an investigation into a possible violation of law.[3] Even if no criminal proceedings are commenced against any individuals, section 14(3)(b) may still apply. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[4] In view of the circumstances of the records' creation, I am satisfied that section 14(3)(b) applies.

[32] There is no evidence before me to suggest that any other presumption against disclosure applies.

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[2] Order MO-2954.
[3] Orders P-242 and MO-2235.
[4] Orders MO-2213, PO-1849 and PO-2608.

[33] I next turn to the factors at section 14(2), some of which would, if established, weigh in favour of disclosure and others against. In their first decision letter to the appellant, the police explained that they found relevant the factors weighing against disclosure at paragraphs (f), (h) and (i) of section 14(2). The appellant suggests that the factors weighing in favour of disclosure at paragraphs (a), (b) and (d) may be applicable. The relevant portions of section 14(2) state:

> (2) 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,
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> > (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
> >
> > (b) access to the personal information may promote public health and safety;
> >
> > (d) The personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
> >
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[34] I will first consider the appellant's arguments in favour of disclosure. The appellant asserts that she and her son have been the victims of many crimes, and that despite reporting all these crimes, she has not seen the return of her stolen property, received any special protections, or obtained any of the other kinds of relief she seeks. She maintains that the police's failure to investigate her reports has allowed the crimes against her and her son to continue.

[35] The factors at paragraphs (a) and (b) have generally to do with a broader public benefit to disclosure. The factor at section (d) may be applicable where the personal information being sought is relevant to the determination of a legal right in an existing or contemplated proceeding (and other criteria are met). I am not persuaded that any of these factors, or any other listed or unlisted factor favouring disclosure, applies in the circumstances.

[36] Given this, and my finding that the presumption against disclosure at section 14(3)(b) applies, it is unnecessary for me to consider the potential application of any of the additional factors weighing against disclosure cited by the police. I conclude that the personal privacy exemption at section 38(b) of the *Act* applies to the withheld

personal information of other individuals in the records.

[37] I also uphold the police's exercise of discretion under section 38(b). While the police declined to provide representations on this topic at the inquiry stage, they provided reasons in their first decision letter that demonstrate that they took into account such relevant considerations as the appellant's right of access to the information and the personal privacy interests of the other individuals. This balancing of interests is also evident to me from the limited and discrete severances the police applied to the records before disclosing them to the appellant. In arguing that the police improperly exercised their discretion, the appellant reiterates her claims that the police have not properly investigated any of her complaints. She explains that she needs access to all the records in order to learn the reasons behind their refusal to do so. These submissions do not persuade me that there has been any defect in the police's exercise of discretion, and I will not interfere with it on appeal.

[38] Finally, the appellant raises the potential application of the public interest override at section 16 of the *Act*. If there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemption, then the personal privacy exemption does not apply. I find no evidence here of a compelling public interest in disclosure of the records. The appellant suggests that other members of the public may have suffered the same types of violations by the police, and on this basis proposes that there is a compelling public interest in knowing if the police are acting in accordance with its established policies and procedures. These claims do not establish a "compelling public interest" within the meaning of section 16. There is no connection between the limited information withheld under section 38(b), which consists of the personal information of individuals named in occurrence reports involving the appellant, and matters of broader public interest like police accountability and transparency.

[39] I therefore uphold the police's reliance on section 38(b) to withhold discrete portions of the occurrence reports. I also confirm for the appellant's benefit that despite the application of the exemption, the police have disclosed all the portions of the records that can reasonably be severed from the exempt information (section 4(2) of the *Act*).

C. Did the police conduct a reasonable search for records?

[40] The appellant maintains that the police have failed to locate all records responsive to her request. In her submission, the missing records include: records of the many calls the appellant has placed to the police's call centre; notes of the investigators in charge of the appellant's reports (she states that some of these notes are severed, while others are missing altogether); and a record of a call made to the police by the secretary of the principal of her child's school in relation to a trespass order against her. With respect to the last item, the appellant states that the principal swore in court that this call occurred, but the police's freedom-of-information analyst has sworn in an affidavit that there exists no record of this call; as a result, the appellant says, she does not know who is telling the truth. She also describes other

records that she has received from the police (such as certain officers' notes) as being "incomplete." She explains that she needs all these records as evidence in a court matter.

[41] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[5] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[42] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[6]

[43] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[7]

[44] While the police declined to provide representations on this topic at the inquiry stage, there is evidence that the police made a number of efforts throughout the request stage and the appeal process to address questions raised by the appellant about the records disclosed to her, and about missing records. This includes detailed responses from the police to specific questions posed by the appellant, which are contained in the police's fifth decision letter (the May 8, 2017 decision) and are accompanied by a sworn affidavit of the police's freedom-of-information analyst.

[45] In this decision, the police analyst explains the efforts she made to locate additional records (beyond those already disclosed) from particular sources identified by the appellant, and why certain records sought by the appellant do not exist or no longer exist. For example, the analyst explains that not all calls to the police's Victims Services Unit are registered, and that in the case of a call transferred to a supervisor (like one specific call identified by the appellant), the person who transferred the call is not required to take notes. The analyst explains why records dating back several years may no longer exist, based on the police's records retention schedule. In respect of certain records described by the appellant as "missing" or "incomplete," the analyst notes that severances were made to some disclosed records, and she refers the appellant to the police's first decision letter for an explanation of the various grounds for denying access. The analyst also sets out in her sworn affidavit the particular steps she took to attempt to locate records relating to trespass notices involving the appellant, which the

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[5] Orders P-85, P-221 and PO-1954-I.
[6] Orders P-624 and PO-2559.
[7] Orders M-909, PO-2469 and PO-2592.

appellant has indicated are of particular interest to her.

[46] In my view, the police have provided evidence of reasonable efforts to locate responsive records, as well as reasonable explanations for their failure to locate certain other records identified by the appellant. In light of the police's evidence, I asked the appellant to explain the basis for her belief that additional records ought to exist. The appellant has not provided reasons that establish a reasonable basis for concluding that they do.

[47] I find that the police have conducted a reasonable search for records, in accordance with their obligation under section 17.

[48] Based on all the above, I dismiss the appeal.

ORDER:

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

Original Signed by: February 12, 2020

Jenny Ryu
Adjudicator