

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3983-F

Appeal MA19-00358

Durham Regional Police Services Board

December 10, 2020

Summary: This order addresses the re-exercise of discretion under section 38(b) by the Durham Regional Police Services Board (the police) ordered by the adjudicator in Interim Order MO-3899-I. At issue under the *Municipal Freedom of Information and Protection of Privacy Act* was access to two police reports that contained the personal information of the appellant and other identifiable individuals. The police denied access to the records, relying on the discretionary personal privacy exemption in section 38(b).

In Interim Order MO-3899-I, the adjudicator ordered the police to re-exercise their discretion concerning the narratives in the records. Following the interim order, the police disclosed portions of the narratives to the appellant.

In this final order, the adjudicator finds that the police re-exercised their discretion in a proper manner concerning disclosure of the information remaining at issue in the narrative sections of the records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1) (paragraphs (e) and (g) of the definition of personal information), 14(3)(b), and 38(b).

Orders Considered: Order MO-3899-I.

OVERVIEW:

[1] This order concerns whether the Durham Regional Police Services Board (the police) re-exercised their discretion properly regarding the information provided by the

appellant's neighbours about the appellant contained in two police reports.

[2] The appellant made a request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for access to two police reports that contained information about her dispute with her neighbours.

[3] The police issued a decision letter denying access to the reports, pursuant to the discretionary personal privacy exemption in section 38(b) of the *Act*. The appellant appealed the police's decision.

[4] As mediation did not resolve the issues in this appeal, it was transferred to the adjudication stage where an adjudicator may conduct an inquiry.

[5] Representations were then sought from the police, the appellant, her spouse and her neighbours.

[6] The appellant's spouse consented to disclosure of his personal information in the records. The neighbours named in the request, the affected persons, did not provide representations, but did convey their objection to disclosure of their personal information to the appellant.

[7] I then issued Interim Order MO-3899-I (the interim order), where I ordered the police to:

- disclose the biographical information of the appellant and her spouse to the appellant found in the first three pages of each record, the two general occurrence reports;
- re-exercise their discretion concerning the three-page narratives in each record and to separately advise the appellant, the affected persons, and this office of the result of this re-exercise of discretion, in writing; and,
- provide the appellant, the affected persons, and this office with an explanation of the basis for re-exercising their discretion. The appellant and the affected persons were provided with an opportunity to respond to the police's re-exercise of discretion.

[8] The police disclosed the biographical information to the appellant as ordered. They re-exercised their discretion concerning the three-page narratives in each record and provided the IPC, the appellant and the affected persons with an explanation as to why they continued to withhold part of this information. The affected persons did not respond to the police's explanation, but the appellant did, providing representations.

[9] Therefore, the only issue in this order is whether the police re-exercised their discretion in a proper manner concerning the information remaining at issue in the records, the undisclosed portions of the narratives.

[10] In this order, I determine that the police re-exercised their discretion in a proper manner concerning disclosure of the information remaining at issue in the narrative sections of the records.

RECORDS:

[11] The records at issue in this final order consist of two police general occurrence reports from 2016 and 2017 that total 15 pages. At issue are portions of the three-page narratives in each record. In the interim order, I ordered the police to re-exercise their discretion concerning the narratives in both records, which had been withheld in full. Following the interim order, the police disclosed portions of the narratives to the appellant.

[12] At issue in this order, therefore, is the undisclosed information in the narratives in the records, which contain the personal information of the appellant and her spouse, as well as that of the affected persons.¹

DISCUSSION:

Did the police re-exercise their discretion under section 38(b) in a proper manner?

[13] 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.

[14] 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.

¹ The remaining portions of the records (not the narratives of the two reports or the biographical information of the appellant and her spouse), consist of the biographical information of the affected persons, as well as information as to why the reports were generated and concluded. In the interim order, I found that in withholding this information, the police exercised their discretion in a proper manner, taking into account proper considerations. Therefore, I upheld the police's exercise of discretion under section 38(b) with respect to this information.

[15] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.² This office may not, however, substitute its own discretion for that of the institution.³

[16] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁴

- 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.

² Order MO-1573.

³ Section 43(2).

⁴ Orders P-344 and MO-1573.

Representations

[17] The police state that they re-exercised their discretion in accordance with the analysis set out in the interim order and disclosed certain information from the narratives in both records. They state that the basis for re-exercising their discretion to disclose this information is that the two reports contain some information about which the appellant would already be aware.

[18] The police maintain that the remaining information that has been withheld from the narratives in these two records is the affected persons' personal information. They state that the withheld information contains the affected persons' thoughts and opinions about the appellant. The police submit that the affected persons' wish, as implied in the reports, is that the appellant not be given access to their personal information.

[19] As was the case regarding the records in the interim order, the police, in their letter in response to the interim order, continue to rely on the discretionary personal privacy exemption in section 38(b) of the *Act*, which reads:

A head may refuse to disclose to the individual to whom the information relates personal information if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[20] The police also continue to rely on the presumption in section 14(3)(b) to support the application of section 38(b). Section 14(3)(b) reads:

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.

[21] In response, the appellant provided extensive representations; however, these representations do not address the information withheld from the narratives. Essentially, the appellant's representations address the ongoing dispute with the affected persons. Her representations also do not address the police's re-exercise of discretion.

Analysis/Findings

[22] The records are two general occurrence reports. One is seven pages long; the other is eight pages long. The first three pages of each report contains biographical information of the appellant, her spouse and the affected persons. In the interim order, I ordered the police to disclose the biographical information of the appellant and her spouse, which is found in the first three pages of both reports.

[23] At issue are the narratives in the records, which contain the personal information

of the appellant and her spouse, as well as that of the affected persons. I ordered the police to re-exercise their discretion concerning the narratives.

[24] The personal information at issue now, and that still remains in the narratives, is the appellant and her spouse's personal information intermingled with the affected persons' personal information. The personal information of the appellant and her spouse remaining at issue in the narratives includes the affected persons' views or opinions about the appellant and her spouse, which fits into paragraph (g) of the definition of personal information in section 2(1) of the *Act*.⁵

[25] The personal information of the affected persons remaining at issue in the narratives also includes their personal opinions or views that do not relate to the appellant or her spouse, which fits into paragraph (e) of the definition of personal information in section 2(1) of the *Act*.⁶ This personal information is intermingled with that which comes within paragraph (g) of the definition of personal information section 2(1).

[26] In the interim order, I found that the personal privacy exemption in section 38(b) applied to exempt the narratives, relying on the presumption in section 14(3)(b). In the interim order, I stated:

It is clear from my review of the information at issue in this appeal that the personal information in the reports was compiled by the police and is identifiable as part of an investigation into a possible violation of law. The possible violation of law was a charge of criminal harassment under the *Criminal Code*. Therefore, I find that section 14(3)(b) applies to the records.

[27] 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.⁷

[28] In the interim order, I considered and weighed the application of the presumption against disclosure in section 14(3)(b) and the absence of any listed or unlisted factors favouring disclosure, as well as the parties' representations and the

⁵ Paragraph (g) of the definition of personal information in section 2(1) reads:

"personal information" means recorded information about an identifiable individual, including, the views or opinions of another individual about the individual.

⁶ Paragraph (e) of the definition of personal information in section 2(1) reads:

"personal information" means recorded information about an identifiable individual, including, the personal opinions or views of the individual except if they relate to another individual.

⁷ Order MO-2954.

information at issue in the records. I found that disclosure of the personal information remaining at issue in the records, including the narratives, would be an unjustified invasion of personal privacy of the affected persons.

[29] I went on to consider whether the police exercised their discretion in a proper manner under section 38(b).

[30] In the interim order, I found that in denying access to the narrative sections of the police reports, the police exercised their discretion in an improper manner by not taking into consideration a relevant factor, namely that the narrative portions contain the personal information of the appellant and her spouse, in addition to that of the affected persons.

[31] In this final order, I find that in re-exercising their discretion, the police did so in a proper manner. I am satisfied that they have taken into account the factor that I found was not considered in their original exercise of discretion, namely that the narratives contain the personal information of the appellant and her spouse, as well as that of the affected persons.

[32] As evidenced by their representations and the portions of the two narratives disclosed following the interim order, both of which contain the appellant and her spouse's personal information, I find that the police have now properly considered that the information in the narratives included the appellant and her spouse's personal information. In the interim order, I ordered the police to consider this in re-exercising their discretion.

[33] I also find, considering the entirety of the police's representations overall, they considered other relevant considerations in withholding information from the narratives, including:

- the purposes of the *Act*, including that individuals should have access to their own personal information,
- the relationship between the appellant and the affected persons,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the appellant or the affected persons, and
- whether the appellant has a sympathetic or compelling need to receive the information.

[34] Therefore, I am upholding the police's re-exercise of discretion under section 38(b) with respect to the remaining information at issue, the undisclosed portions of the narratives in the two records. As I am upholding the police's re-exercise of discretion, I find that the withheld information, the undisclosed portions of the narratives in both records, is exempt under section 38(b).

ORDER:

I uphold the police's re-exercise of discretion to deny access to the remaining information at issue in the records.

Original signed by _____
Diane Smith
Adjudicator

December 10, 2020 _____