

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4017

Appeal MA19-00349

Halton Regional Police Services Board

February 25, 2021

Summary: The appellant made an access request to the Halton Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for the 911 audio call complaining about his driving a motorcycle with his stepson on board. The police denied access to the 911 audio call in full, relying on section 38(b) (personal privacy).

In this order, the adjudicator find that, on balance, disclosure would not be an unjustified invasion of privacy and that section 38(b) does not apply. In the alternative, she finds that the absurd result principle applies. She orders disclosure of the record 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), 14(3)(b), 14(2)(d), and 38(b).

OVERVIEW:

[1] This order addresses an individual's right of access to a 911 audio call. This individual made an access request to the Halton Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for records regarding a complaint made about his driving his motorcycle with his minor stepson on board.

[2] The request was made by the stepfather of the child and specifically sought records relating to the complaint, as follows:

...CAD [Computer Assisted Device] call details including any notes for dispatching purpose and audio file of the call...associated police report created from the incident including full report, officer notes, supplementary notes and statement from complainant.

[3] The police issued an access decision granting partial access to certain records and denying access to the 911 audio call in full. The police relied on section 38(b) (personal privacy). The police also relied on section 38(a) (discretion to refuse requester's own information) in conjunction with the law enforcements exemptions in sections 8(1)(e) and (l), which were applied specifically to the police 10-codes, patrol zone information and/or statistical codes.

[4] The requester, now the appellant, appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC), and a mediator was appointed to explore resolution. During the course of mediation, the mediator contacted the father of the child (the affected person), the individual who made the 911 audio call, to determine if consent could be obtained for the disclosure of the information at issue. The affected person did not provide consent.

[5] The appellant advised that he was only seeking access to information in the CAD report and the 911 audio call; therefore, the remainder of the records are no longer at issue. The appellant advised that he was also not seeking access to names and/or addresses of any of the affected persons, or the 10-codes, patrol zone information and/or statistical codes contained within the CAD report or the 911 audio call. Accordingly, the portions of the records to which sections 8(1)(e) and 8(1)(l) were applied, and the exemptions in sections 38(a) and 8(1), are no longer at issue.

[6] No further mediation was possible and the appellant advised that he wished to proceed to adjudication, where an adjudicator may conduct an inquiry, to obtain access to the remaining information at issue.

[7] I sought the representations of the police and the affected person, initially. Only the police provided representations, which were provided to the appellant, except for the confidential portions.¹ The affected person, however, did indicate that he would prefer that that the appellant not receive access to the record.²

[8] I then sought and received the representations of the appellant. In his representations, the appellant indicated that he had a copy of the police occurrence report at issue. Therefore, this record is not at issue in this appeal. The only record that remains at issue in this appeal is the 911 audio call.

¹ The police provided both confidential and non-confidential representations. In accordance with the IPC's *Practice Direction 7*, in this order, I will only be referring to the non-confidential representations, but I will consider the police's representations in their entirety in my determination of the issues.

² More details as to what the affected person advised the IPC is set out below.

[9] In this appeal, I find that the record is not exempt under section 38(b) and order it disclosed to the appellant.

RECORD:

[10] The record at issue is an audio recording of the 911 call made by affected person about the appellant's driving.

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 personal privacy exemption at section 38(b) apply to the information at issue?

DISCUSSION:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[11] In order to determine whether the discretionary personal privacy exemption in section 38(b) of the Act may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. The personal privacy exemption can only apply to "personal information". That term is defined in section 2(1) 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,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(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;

[12] 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

[13] To qualify as personal information, the information must be about the individual in a personal capacity. 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.⁴

[14] 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.⁵

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶

Representations

[16] The police state that the record contains information relating to individuals, including the appellant, such as the name, age, address, telephone number, relationship, and views or opinions, as well as the tone, cadence, and voice of individuals. It also states that the record contains statements and opinions of individuals about other individuals, including the appellant.

[17] The appellant addressed the incident set out in the record in his representations,

³ Order 11.

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

but did not dispute the police's characterization of the personal information in the record.

Analysis/Findings

[18] Based on my review of the wording of the request and the parties' representations, I agree with the police that the record contains the personal information of identifiable individuals in their personal capacity, namely, the appellant (the driver of the motorcycle), his stepson,⁷ and the affected person (the complainant who called the police).

[19] I agree with the police that the record includes these individuals' names, ages, addresses, telephone numbers, family status, and their views or opinions in accordance with paragraphs (a), (d), (e) and (g) of the definition of personal information in section 2(1).

[20] I have found that the record contains the personal information of the appellant, his stepson, and the affected person. In the absence of specific representations from the police on why the affected person's voice, tone and cadence is his personal information, I cannot find such in this case.

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

[21] 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.

[22] 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.

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

[24] If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The information does not fit within these paragraphs.

⁷ The affected person's son is the appellant's stepson.

[25] 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).

[26] 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

[27] 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).

[28] The police rely on the presumption in section 14(3)(b), which 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

Representations

[29] The police state that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, namely an investigation into a traffic complaint. It states that this investigation may have led to charges under *the Criminal Code of Canada*, the *Highway Traffic Act* of Ontario, or another provincial statute.

[30] The police further state that following the investigation, officers determined that there were no grounds to support an offence (criminal, traffic, or other), but they submit that this does not negate the fact that the occurrence was still investigated with regard to a possible violation of law.

[31] The appellant does not dispute that the personal information was compiled as part of an investigation into a possible violation of law. The appellant states that the affected person witnessed the appellant driving his stepson, the affected person's son, on the back of the appellant's motorcycle and called the police by calling 911. The police were then dispatched to interview the appellant.

[32] The appellant submits that although there was an investigation into whether there was a possible violation of law, disclosure of the record is necessary; he appears to rely on the factor favouring disclosure in section 14(2)(d), which reads:

⁸ Order MO-2954.

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request.

[33] The appellant states that the affected person is the ex-husband of his wife. He states that the affected person is involved in family court proceedings with his wife regarding the custody of his stepson.

[34] The appellant says that, in the family court proceedings, he received a full copy of the police report that resulted from the affected person's 911 audio call. As well, he states that the affected person admitted in these family court proceedings that he made the 911 audio call. He quotes from an affidavit filed in the court proceedings, where the affected person stated that:

... since at least June of 2018, I am aware of the fact that [the appellant's wife] has encouraged and permitted both children⁹ to be driven around [name of municipality] on the back of her husband's [the appellant's] motorcycle. This is something that I have personally witnessed with my own two eyes. I have sought the assistance of the Halton Police Service and they have investigated the situation and verified that [name of appellant], has in fact, been operating his motorcycle and having [name and age of affected person's son], as the passenger seated behind him...

[35] The appellant states that the affected person is using the incident as reported in the affected person's 911 audio call as evidence in family court to support his quest for sole custody of the affected person's children.

[36] The appellant submits that the nature of this call is relevant to the family court proceeding to demonstrate that the affected person's claims against him in those proceedings are malicious and not substantiated.

[37] The affected person did not provide representations in response to the Notice of Inquiry sent to him. However, when contacted by the IPC as to whether he would be providing representations, the affected person stated that, while in general, he would rather the appellant does not get the information, he does not see why the appellant made the request.

[38] The affected person also advised the IPC that the appellant is aware that he made the 911 audio call. The affected person said he did not see any need to participate in the inquiry, as he suspected it is as much about annoying him as anything

⁹ The record only concerns one of the affected person's children.

else, and because the incident recounted in the record had already been discussed between the appellant and the affected person in another forum (Family Court).

Analysis/Findings

[39] In this case, no criminal proceedings were commenced against the appellant. However, 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.¹⁰

[40] I agree with the police that the personal information in the 911 audio call was compiled and is identifiable as part of an investigation into a possible violation of law, namely, an investigation into a traffic complaint that may have led to charges under the *Criminal Code of Canada*, the *Highway Traffic Act* of Ontario, or another provincial statute.

[41] 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.¹¹

[42] 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).¹²

[43] The appellant appears to be relying on the factor favouring disclosure in section 14(2)(d) concerning the fair determination of his rights. 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

¹⁰ Orders P-242 and MO-2235.

¹¹ Order P-239.

¹² Order P-99.

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing¹³

[44] I find that I have sufficient evidence to determine that all four parts of the test for section 14(2)(d) have been established and that this factor favouring disclosure applies.

[45] In support, the appellant has indicated that the nature of the 911 audio call is relevant to his and his wife's family court proceeding to demonstrate that the affected person's claims against him are malicious and cannot be substantiated and I am satisfied that this is the case. I find that the four-part test has been established because:

1. the child custody issue is about a legal right which is drawn from the concepts of common law or statute law; and
2. this right is related to a family court proceeding which is existing; and
3. the personal information in the 911 audio call that the appellant is seeking access to has some bearing on the determination of the custody proceeding; and
4. the personal information in the call is required in order to prepare for the proceeding or to ensure an impartial hearing¹⁴

[46] As stated above, 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.

[47] I have considered and weighed the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties. In doing so, I note that I did not receive specific representations from the affected person detailing why disclosure of the record would be an unjustified invasion of personal privacy. I have also considered that:

- the factor in section 14(2)(d) that favours disclosure applies,
- the appellant has a copy of the police report that was generated from this 911 audio call, and

¹³ 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.).

¹⁴ 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.).

- the 911 audio call was discussed by the appellant and the affected person at Family Court.

[48] I find that, even though the presumption against disclosure in section 14(3)(b) applies; on balance, disclosure of the 911 audio call would not be an unjustified invasion of the personal privacy of the affected person.

[49] Therefore, I find that the record is not exempt under section 38(b). As no other discretionary exemptions have been claimed and no mandatory exemptions apply, I will order the 911 audio call disclosed to the appellant.

Absurd result

[50] Even if I had found that the record is exempt under section 38(b) by reason of the presumption in section 14(3)(b), I would have applied the absurd result principle to order disclosure of the record.

[51] Where the requester originally supplied the information, or the requester 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.¹⁵

[52] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement¹⁶
- the requester was present when the information was provided to the institution¹⁷
- the information is clearly within the requester's knowledge¹⁸

[53] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.¹⁹

[54] The affected person admitted that the appellant knows that he made the 911 audio call, and said that he discussed the call with the appellant during family court proceedings.

[55] Furthermore, the appellant was the subject of the 911 audio call and the appellant's representations discuss the call in detail. The appellant was interviewed by

¹⁵ Orders M-444 and MO-1323.

¹⁶ Orders M-444 and M-451.

¹⁷ Orders M-444 and P-1414.

¹⁸ Orders MO-1196, PO-1679 and MO-1755.

¹⁹ Orders M-757, MO-1323 and MO-1378.

the police immediately following the 911 audio call and he received a copy of the full police occurrence report that was generated following this call.

[56] Therefore, I find that the information in the record, the 911 audio call, is information that is clearly within the appellant's knowledge. I find that to withhold the 911 audio call in the circumstances of this appeal would be absurd and inconsistent with the purpose of the section 38(b) exemption. Accordingly, the absurd result principle applies in this appeal to allow disclosure of the record, the audio recording of the 911 call.

ORDER:

I order the police to disclose the 911 audio call to the appellant by **April 1, 2021** but not before **March 26, 2021**.

Original signed by: _____
Diane Smith
Adjudicator

February 25, 2021 _____