

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4107

Appeal MA19-00776

Toronto Police Services Board

September 29, 2021

Summary: The appellant sought access to a police report relating to a specified incident involving two individuals at a long-term care home. The appellant has power of attorney for one of the individuals involved. The police issued a decision granting partial access to the report with severances on the grounds that disclosure of the withheld personal information would constitute an unjustified invasion of the personal privacy of the other individual involved in the incident under section 38(b) of the *Act*. This order finds that disclosing the name of the other individual involved in the specified incident would constitute an unjustified invasion of their personal privacy taking into consideration the presumptions and factors in sections 14(2) and (3) and that the police properly exercised their discretion in denying access to the personal information under section 38(b). Accordingly, the police decision denying access to part of the police report is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c M56, as amended, sections 2(1) (definition of "personal information"), 14(2), 14(3)(b), 38(b), and 54(b).

OVERVIEW:

[1] This order determines the personal privacy issues raised by a request for access to personal information in a police general occurrence report relating to a specified incident.

[2] 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 a report relating to a specified incident involving two individuals at a long-term care home (LTCH).

[3] The requester has a power of attorney for personal care for one of the individuals named in the report and involved in the incident. Section 54(b) of the *Act* states that any right or power conferred on an individual by the *Act* may be exercised by the individual's attorney under a power of attorney for personal care.¹ Consequently, the access request submitted by the requester must be treated as if it was submitted by the individual for whom the requester has power of attorney, the individual involved in the incident to which the report relates.

[4] The police issued a decision and granted partial access to the requested record. Severances were made pursuant to the discretionary personal privacy exemption in section 38(b), with reference to section 14(3)(b) of the *Act*. These severances related to information about two individuals, the manager of the LTCH who reported the incident to the police and the other individual involved in the incident (the affected parties).

[5] The requester, now the appellant, appealed the police's decision to deny access to part of the requested record to the Information and Privacy Commissioner (the IPC).

[6] During mediation, the manager of the LTCH provided consent for disclosure of their name and contact information and the police issued a supplemental decision disclosing that information in the record to the appellant. The police continued to withhold the remaining information under section 38(b), with reference to section 14(3)(b) of the *Act*.

[7] As a mediated resolution was not achieved, the file was transferred to the adjudication stage, where an adjudicator may conduct an inquiry. An inquiry was conducted and representations were sought from the police, the affected party involved in the incident and the appellant. The police, the appellant and the affected party whose information remains at issue provided representations. There is a power of attorney (POA) for personal care in force with respect to the affected party whose information is severed from the requested police report. The individual with POA confirmed that they did not consent to the disclosure of the affected party's personal information.

[8] In this order, I find that the personal privacy exemption at section 38(b) of the *Act* applies to the personal information severed from the responsive record and the police's decision not to disclose it is upheld.

¹ Section 54(b) provides for rights conferred by the *Act* to be exercised by an individual's attorney under a continuing power of attorney, an individual's power of attorney for personal care, a guardian of the person and a guardian of property.

RECORDS:

[9] The parts of the responsive record at issue consist of the severed portions of pages 1 to 4 of a 5-page general occurrence report.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) of the *Act* 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?
- C. Did the police properly exercise their discretion under section 38(b)?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1) of the *Act*?

[10] The police withheld information under the personal privacy exemption at section 38(b) of the *Act*. In order for that exemption to apply, the information must be "personal information".

[11] "Personal information" is defined in section 2(1) of the *Act* in part 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,

...

(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 parties do not dispute that the police report contains the personal information of the two individuals involved in the specified incident. One of those individuals is the person in respect of whom the appellant has POA.

[13] From my review of the responsive record, I am satisfied that it includes both individuals' personal information such as their names along with their ages, medical history and views and opinions about them, as defined in paragraphs (a), (b), (g) and (h) of the definition of the term in section 2(1), as set out above.

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

[14] Section 38 provides for a number of exemptions from an individual's general right under section 36(1) to access their own personal information held by an institution. For the purposes of this appeal and by application of section 54(b), the appellant exercised the section 36(1) right of the individual for whom he has POA when making the request for access to the police report.

[15] Under section 38(b), where a record contains personal information of both the requester (or, as in this case, the individual on whose behalf the request is made) and another individual, and disclosure of the information would be an "unjustified invasion of [the other] individual's personal privacy", an institution may refuse to disclose that information. Since the section 38(b) exemption is discretionary, once the police formed the view that the record was exempt under section 38(b), they were required to exercise their discretion to decide whether to disclose the police report to the requester in full or to claim the application of the personal privacy exemption in relation to all or part of it.

[16] Section 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 38(b). Section 14(4) also lists situations that would not be an unjustified invasion of personal privacy. None of the situations listed in section 14(4) apply to the facts of this appeal.²

[17] In determining whether the disclosure of the personal information in the record would be an unjustified invasion of personal privacy under section 38(b), the IPC will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and

² Also, if any of the section 14(1)(a) to (e) exceptions apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b). None of these exceptions is relevant in the circumstances.

balance the interests of the parties.³

The parties' representations

[18] It is the police's position that the personal information withheld from the responsive record was compiled as part of an investigation into a possible violation of the law and that section 14(3)(b) applies favouring privacy protection. The police also state that the appellant can obtain access to the police report via other means.

[19] The appellant does not specifically address the section 14(3)(b) presumption, nor does he point specifically to any factors listed under section 14(2) as favouring disclosure.

The appellant's position is that he knows the name of the other individual involved in the incident. The appellant is involved in a civil court action against the LTCH and he submits that

“[T]he assailant's name, which is known to both parties, will eventually have to be revealed to the court. As both parties need the name of the assailant to establish that this police report can be considered evidence that the assailant in question is one and the same person, it would be absurd for the name, which is known to both parties, not to be released to the requestor and now the appellant in this appeal.”

[20] The individual with POA for the affected party provided representations and requests that no additional information be disclosed to the appellant.

Section 14(3)(b): investigation into violation of law

[21] 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 or 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.

[22] Even if no criminal proceedings were commenced against any individual, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of the law.⁴

[23] I have reviewed the record at issue in this appeal. The record includes reference to the details of the specified incident, the individuals involved, the individual making

³ Order MO-2954.

⁴ P-242.

the report and the purpose of the report being to document the incident. From my review of the report, I note that, at the time the report was made, the decision had been made not to lay charges.

[24] I have considered whether, in these circumstances, the information in the record was compiled as part of an investigation into a possible violation of law or merely for documenting purposes. For the reasons that follow, I find that the personal information in the report was compiled as part of an investigation into a possible assault.

[25] The fact that the incident was reported externally to the police by the LTCH staff points to the information being compiled for more than purely documenting purposes. The police, as part of their law enforcement role, compiled the information in the report specifically describing the incident with reference to the offence of assault and referring to the individuals involved in that context, as "subject" and "victim". The report points to consideration having been given to the possibility of laying charges.

[26] Though criminal proceedings were not commenced in this case and the decision not to do so was made at the time that the information was recorded, I find that the police compiled the report as part of an investigation into a possible violation of the law, namely a possible assault contrary to the *Criminal Code*. Consequently, section 14(3)(b) applies and the disclosure of the affected party's personal information is presumed to be an unjustified invasion of personal privacy for the purposes of section 38(b).

[27] However, this is only the first step in determining whether the exemption in section 38(b) applies. The next step is for me to consider, and weigh, the factors in section 14(2) and balance the interests of the parties.⁵

Section 14(2) factors

[28] The appellant made submissions describing the individual for whom he has POA as the victim in the specified incident. The appellant submits that the effect of treating the other individual's name as confidential allows the LTCH to act "without scrutiny" and is unjust for the victim's family seeking recourse in the courts.

[29] Although the factors listed at sections 14(2)(a) and (d) are not specifically raised by the appellant, I have considered whether they weigh in favour of disclosure, should they be found to apply in this appeal. Section 14(2)(a) and (d) states:

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,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

⁵ MO-2954.

...

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

[30] Public scrutiny as it is provided for in section 14(2)(a) refers to the scrutiny of the activities of the institute on from which a party has requested access to information. The appellant's position is that it is the LTCH, not the police, which is seeking to avoid scrutiny by treating the affected party's personal information as "confidential".

[31] In my view, section 14(2)(a) is not a factor favouring disclosure in this appeal. The appellant made his information access request to the police, not the LTCH, and I find no basis for considering that disclosure in this appeal is desirable in order to subject the police's activities to public scrutiny. The appellant's complaint, as set out in his representations, is directed at the LTCH. Below, I will address whether the appellant's argument is nonetheless a relevant unlisted factor under section 14(2).

[32] With respect to section 14(2)(d), I note that in his representations, the appellant describes the civil action that he has brought against the LTCH. The appellant states that the identity of the other party involved in the specified incident is known to him and to the LTCH. The appellant has begun the court action and it is progressing to mediation without the withheld information. It is the police's position that the litigation process provides mechanisms available to the appellant to obtain the record in the proceedings.

[33] In previous IPC orders, it has been decided that 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;
2. The right is related to a proceeding, which is either existing or contemplated, not one that has already been completed;
3. The personal information that 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.⁶

[34] From the appellant's representations, it appears that the first two of these

⁶ PO-1764, in which the relevant considerations for the application of section 14(2)(d) were adopted from the test set out in 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.).

factors are present in this case: the appellant is seeking to assert legal rights derived from the common law or statute in the form of an action in the civil courts and the proceedings have been commenced and are ongoing. It is not clear from the appellant's representations the significance of the withheld information to the determination of the legal action. The appellant states that the identity of the other individual involved in the incident at the LTCH is needed in order to admit the police report into evidence. However, it is not clear how the disclosure of the withheld information under the *Act* will assist with that process.

[35] I am not satisfied that the appellant has established that the withheld information is needed in order for him to prepare for the court proceedings or to ensure an impartial hearing. This is not a case where the identity of an affected party is required in order to commence court proceedings and the appellant has not provided any representations about steps he has taken to admit the police report into evidence or to obtain access to the withheld information through the disclosure provisions in the Code of Civil Procedure that are available to him in the civil court action. In addition, there is no basis for finding that without the personal information, there is a risk that the civil action will not be disposed of through an impartial hearing.

[36] In my view, the requirements for applying section 14(2)(d) are not established in this appeal and the fact that the appellant's litigation against LTCH has begun and is progressing, with the identity of the affected individual being known to both the parties, diminishes the relevance of the withheld personal information to the fair determination of the parties' rights. Section 14(2)(d) is therefore not a factor that weighs in favour of disclosure in this appeal.

[37] The list of factors under section 14(2) is not exhaustive and I will therefore consider the appellant's representations that by treating the identity of the other party involved in the incident as confidential, the LTCH is avoiding scrutiny and whether this is an unlisted factor that favours disclosure.

[38] This appeal is concerned with the decision of the police to withhold personal information from the disclosed report pursuant to the provisions of the *Act*. The treatment of the affected party's information by a third party, namely the LTCH, is not the subject of this appeal. In this appeal, there is no evidence before me setting out how the withholding of the affected party's personal information has caused or contributed to the LTCH avoiding scrutiny. The police incident report refers to the general manager of the LTCH as being the party who reported the incident to the police and the contents of the report, save for the redaction of the personal information of the other involved party, have been disclosed to the appellant. In the ongoing litigation, the identity of the affected individual is known to both parties and I am therefore not satisfied that disclosure of the information will shed light on the activities of the LTCH. In my view, the appellant's representations do not present an unlisted factor weighing in favour of disclosure.

[39] As I stated above, in deciding whether information is exempt under section 38(b), the IPC considers, and weighs, the factors and presumptions in sections 14(2) and 14(3). I have found that the presumption in section 14(3)(b) applies and weighs against the disclosure of the withheld information. I have also found that there are no factors in section 14(2) that weigh in favour of disclosure.

[40] In light of my findings set out above, I conclude that the disclosure of the affected party's personal information would constitute an unjustified invasion of their personal privacy, and the exemption at section 38(b) therefore applies, subject to my discussion of the absurd result principle below.

Absurd result

[41] Where a requester originally supplied the information or the requester is otherwise aware of it, the information may be found not exempt under section 38(b) because to find otherwise would be absurd and inconsistent with the purpose of the exemption.⁷ Conversely, if disclosure is inconsistent with the purpose of the exemption, the absurd principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.⁸

[42] The absurd result principle has been applied where, for example, the requester sought access to his or her own witness statement⁹, the requester was present when the information was provided to the institution¹⁰ or the information is clearly within the requester's knowledge.¹¹

[43] The appellant takes the position that the absurd result principle should apply to the withheld information in the police report, as the name of the affected party is known to the parties in the civil court action. The appellant does not assert that he originally supplied the information at issue to the police or that he was present when the report was compiled, but that it has been made known to him by other means.

[44] I do not agree with the appellant's view of the information at issue. While the name of the individual identified in the report may have become known, the information contained in the report, goes beyond the individual's name. I am not convinced that the appellant already knows all of the withheld information.

[45] Even if the appellant is aware of some of the withheld information, in my view, the absurd result principle has no application in the circumstances of this appeal. The information was not provided by the appellant and is sensitive in nature. In my view, it would offend the spirit of the *Act* and the purpose of the exemption for the personal

⁷ M-444, MO-1323.

⁸ M-757, MO-1323, MO-1378.

⁹ M-444, M-451.

¹⁰ M-444, P-1414.

¹¹ MO-1196, PO-1679, MO-1755.

information of an affected party to be disclosed by the police in these circumstances.

C. Did the police properly exercise their discretion under section 38(b) of the *Act*?

[46] The section 38(b) exemption is discretionary, and permits the police to disclose information, despite the fact that it could be withheld. The police must exercise its discretion and, on appeal, I may determine whether the police failed to do so.

[47] In its representations, the police submits that in exercising its discretion under section 38(b) of the *Act*, it applied a test to balance the interests in disclosure against the privacy of individuals about whom the information relates. The police state that it took into consideration the nature of the circumstances of the incident and exercised caution on the side of maintaining privacy and confidentiality of the involved parties. The police note that as a law enforcement institution, its nature in great part entails gathering and recording information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police.

[48] The appellant made no representations specifically about the police's exercise of discretion under section 38(b).

[49] I have reviewed the police's representations. I find that the police exercised their discretion properly, in good faith and without taking into account irrelevant considerations. I am satisfied that the police took into account the fact that the record contains the personal information of the individual whom the requester represents in this instance. The police also took into account the relevant considerations of the spirit and content of the *Act*, the collection of personal information in the context of its role in law enforcement and the privacy interests of the individuals involved in this case.

ORDER:

The police's decision to deny access to the information severed from the responsive record is upheld and the appeal is dismissed.

Original Signed by: _____
Katherine Ball
Adjudicator

September 29, 2021 _____