Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4120

Appeal MA19-00875

Niagara Regional Police Services Board

October 28, 2021

Summary: The appellant submitted a request under the *Act* to the police for all records relating to him from November 2016 to the date of the request. The police located responsive records and issued an access decision to the appellant granting him partial access to them. The police withheld some information under the discretionary personal privacy exemption in section 38(b) of the *Act*. The appellant appealed the police's decision and claimed that additional responsive records ought to exist. In this order, the adjudicator finds the personal information at issue qualifies for exemption under section 38(b) of the *Act* and upholds the police's exercise of discretion to withhold it from disclosure. However, the adjudicator orders the police to conduct another search for responsive records.

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(2)(f), 14(3)(b), 17(1) and 38(b).

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Niagara Regional Police Services Board (the police) for all records relating to him from November 2016 to the date of the request.

[2] The police located records responsive to the appellant's request and issued an access decision granting him partial access to them. The police withheld portions of the

records under the discretionary personal privacy exemption in section 38(b) of the *Act*. The police raised the application of the presumption in section 14(3)(b) (investigation into a possible violation of law) to support their exemption claim. The police also advised the appellant they withheld portions of the records as not responsive to his request.

[3] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the appellant confirmed his interest in pursuing access to the information withheld from disclosure and claimed that further responsive records ought to exist, thereby raising the issue of reasonable search.

[5] The police conducted a further search for records and advised the mediator they did not locate any further records.

[6] The mediator identified and notified a number of affected parties whose interests may be affected by the disclosure of the records. One affected party consented to the disclosure of their personal information to the appellant. The police issued a revised access decision disclosing this affected party's personal information to the appellant.

[7] The appellant confirmed his interest in obtaining access to the information withheld from disclosure under the personal privacy exemption and claimed that additional responsive records should exist. The appellant did not indicate his interest in pursuing access to the information identified as not responsive. As a result, access to the non-responsive information is not at issue in this appeal.

[8] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. The adjudicator who had carriage of the appeal initially began the inquiry by inviting the police to make submissions in response to a Notice of Inquiry, which summarizes the facts and issues under appeal. The police submitted representations. The adjudicator then sought and received representations from the appellant in response to the police's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure* (the *Code*).

[9] The file was then transferred to me to continue the inquiry. I reviewed the appellant's representations and invited the police to make submissions in reply. The police submitted representations. I then sought and received further sur-reply representations from the appellant.

[10] I note the appellant made a number of submissions regarding a related appeal. I confirm I will not consider any issues outside the scope of this appeal. The appellant also made a number of submissions relating to personal matters and his interactions with the police. I cannot comment on these issues and will not address them in this order. The focus of my inquiry and this order is whether the appellant is entitled to

access to the information at issue and whether the police conducted a reasonable search for responsive records.

[11] In the discussion that follows, I uphold the police's application of the personal privacy exemption in section 38(b) to withhold the personal information at issue. However, I order the police to conduct another search for responsive records.

RECORDS:

[12] The police identified 20 reports responsive to the appellant's request, totaling approximately 206 pages. However, of those records, only thirteen are subject to the police's personal privacy exemption claim and remain at issue. Specifically, records 1 through 10, 13, 14, and 19 are at issue in this appeal.

ISSUES:

A. Do the records contain *personal information* within the meaning of section 2(1) of the *Act* and, if so, to whom does it relate?

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

C. Did the police exercise its discretion under section 38(b)? If so, should this office uphold its exercise of discretion?

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

DISCUSSION:

Issue A: Do the records contain *personal information* within the meaning of section 2(1) of the *Act* and, if so, to whom does it relate?

[13] 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. The term *personal information* is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual."

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

[15] The police submit the records contain personal information relating to the appellant and other individuals, including his neighbours. The police submit this personal information includes names, dates of birth, addresses, phone numbers, drivers'

license numbers, ethnicities, occupations, and witness statements. The police submit this information does not relate to these individuals in a professional capacity.

[16] The appellant submits he already knows the personal information of his neighbours. However, the appellant confirms he seeks access to the statements these individuals provided to the police so he may confirm their veracity.

[17] I reviewed the records at issue and find they all contain personal information relating to the appellant. Specifically, I find they contain his address and phone number (considered to be *personal information* under paragraph (d) of the definition of that term in section 2(1)), the views of another individual about him (paragraph (g)), his race, age, sex and marital status (paragraph (a)), his personal opinions or views (paragraph (e)), and his name (paragraph (h)). In addition, I find the records contain information that would serve to identify him as per the introductory wording of the definition of *personal information* in section 2(1) of the *Act*. Therefore, I find all of the records contain personal information relating to the appellant.

[18] I also find the records contain personal information relating to other identifiable individuals including their contact information (paragraph (d)), their age, sex, marital status and race (paragraph (a)), their personal views or opinions (paragraph (e)), the views of another individual about them (paragraph (g)), and their names (paragraph (h)). Some of these individuals were contacted during the appeal process. One individual provided their consent to the disclosure of information relating to them during mediation and the police issued an access decision granting the appellant access to this individual's information. However, the other affected parties did not provide their consent to the disclosure of information relating to them.

[19] In conclusion, I find the records at issue contain personal information relating to the appellant and other identifiable individuals. Accordingly, I will consider access to the records under Part II of the *Act*.

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

[20] The police applied section 38(b) to withhold portions of records 1 through 10, 13, 14, and 19 from disclosure.

[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.[1]

[23] If any of the exceptions in sections 14(1)(a) to (e) applies, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Based on my review, none of the section 14(1)(a) to (e) exceptions is applicable here.

[24] In determining whether the disclosure of the personal information in the records *would* be an unjustified invasion of personal privacy under section 38(b), sections 14(2) to (4) of the *Act* offer guidance. The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Additionally, 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). None of the circumstances listed in section 14(4) are present here.

[25] The police submit the presumption in section 14(3)(b) applies to the information at issue. 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.

Specifically, the police state they were investigating claims of mischief, property damage, harassment, and assault, which are all criminal offences.

[26] In his submissions, the appellant addresses the police's arguments regarding section 14(3)(b). The appellant questions whether the presumption is applicable because charges were not laid.

[27] The appellant also addresses the factors listed in section 14(2) of the *Act*, which requires a head to consider certain circumstances in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. However, the appellant does not address the factors in relation to whether the disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy. Instead, the appellant submits the non-disclosure of the information at issue has caused him significant distress in his submissions on section 14(2)(f), which considers whether the personal information is highly sensitive. The appellant also submits there has been damage to his reputation and other harms to himself by the lack of disclosure by the police.

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[1] See Issue C, below, for more information on the exercise of discretion.

[28] The appellant also submits that he knows all of the names, telephone numbers and addresses of the affected individuals and the absurd result principle should apply to the information.

[29] I reviewed the records and find the presumption in section 14(3)(b) applies to the personal information at issue. The IPC has established that the presumption in section 14(3(b) can apply to a variety of investigations regardless of whether charges are laid. Based on my review, I agree with the police that the personal information in the records was compiled during law enforcement investigations into potential mischief, assault, property damage, and harassment. The personal information at issue was compiled by the officers during their investigations into possible criminal offences.

[30] I have also considered the factors listed in section 14(2) of the *Act* and find the factor favouring nondisclosure of personal information in section 14(2)(f) applies to the personal information at issue. These sections state,

> 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,
>
> (f) the information is highly sensitive.

The police did not address any of the factors listed in section 14(2) in their representations. As stated above, the appellant referred to the factors in his representations, but did not make arguments relevant to the disclosure of the personal information at issue.

[31] Based on my review of the records and section 14(2), I find the factor in section 14(2)(f) applies in favour of its nondisclosure. I make this finding in consideration of the fact that the records were compiled by the police in the process of law enforcement investigations. The personal information at issue relates to individuals who filed complaints against the appellant or were targets of complaints filed by the appellant and were interviewed in the course of a police investigation. Given these circumstances, I find that disclosing these individuals' personal information could reasonably be expected to cause them significant personal distress. Therefore, I find the factor in section 14(2)(f) applies in favour of nondisclosure of the personal information at issue.

[32] I have considered the appellant's representations regarding the section 14(2) factors weighing in favour of the disclosure of the personal information and find that none apply. However, I find the appellant's arguments can be characterized as raising

"inherent fairness issues"[2] given his desire to know what the affected parties told the police about him. I will give this factor some weight in favour of the disclosure of the personal information at issue.

[33] I have considered the application of the presumption in section 14(3)(b) and the factor in section 14(2)(f) and weighted these against the unlisted factor identified by the appellant in relation to the personal information at issue. After this consideration, I find that the personal information at issue qualifies for exemption under section 38(b) of the *Act*. While I appreciate the appellant's desire to know what was said about him to the police, this factor does not override the application of the presumption in section 14(3)(b) and the factor favouring nondisclosure in section 14(2)(f).

[34] The appellant raised the absurd result principle in his representations. Specifically, the appellant states he is aware of the affected parties' names, birthdates, and contact information. The police did not address the absurd result principle in their representations. The absurd result principle may apply where the appellant originally supplied the information at issue or is otherwise aware of it. Where circumstances are present, 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.[3] The absurd result principle has been applied where, for example: the requester sought access to his or her own statement;[4] the requester was present when the information was provided to the institution;[5] and the information is clearly within the requester's knowledge.[6]

[35] I reviewed the personal information that qualifies for exemption under section 38(b) and find the absurd result principle does not apply to it. The appellant did not provide any evidence demonstrating that the personal information at issue is within his knowledge beyond asserting that he is aware of the affected parties' personal information. For example, he did not identify which individual's personal information is within his knowledge. As such, it is not clear what information that is subject to the police's section 38(b) claim, if any, is within his knowledge even though he may have been present when some of the information was provided and/or is aware of the names and contact information of some of the affected parties. In light of the circumstances, I find it would not be absurd or inconsistent with the purpose of the exemption in section 38(b) to withhold the personal information at issue.

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[2] See Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014, which recognize inherent fairness issues as an unlisted factor to consider in the section 14(2) analysis.
[3] Orders M-444 and MO-1323.
[4] Orders M-444 and M-451.
[5] Orders M-444 and P-1414.
[6] Orders MO-1196, PO-1679 and MO-1755.

[36] I note that some of the personal information relating to the affected parties is mixed with the appellant's personal information. For example, a number of witness statements contain the affected parties' opinions and views about the appellant and recollection of interactions with the appellant. However, based on my review, I find that the appellant's personal information is inextricably intertwined with that of the affected parties' and cannot be reasonably severed without an unjustified invasion of the affected parties' personal privacy.

[37] In conclusion, I find the personal information at issue is exempt under section 38(b) of the *Act*, subject to my review of the police's exercise of discretion below.

Issue C: Did the police exercise its discretion under section 38(b)? If so, should this office uphold its exercise of discretion?

[38] The exemption in section 38(b) is discretionary and permits an institution to disclose the information subject to it despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. The IPC may find 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 or fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[7] However, the IPC may not substitute its own discretion for that of the institution.[8]

[39] The police submit they exercised their discretion under section 38(b). The police submit they attempted to give the appellant access to as much of his own personal information as possible without breaching the privacy of other individuals. The police submit they are unaware of the appellant having any sympathetic or compelling need for the information exempt under section 38(b). Finally, the police submit there is no undisclosed information that should be disclosed to him.

[40] The appellant did not address whether the police exercised their discretion in applying section 38(b) in his representations beyond quoting the police's representations.

[41] I reviewed the parties' representations and the information I found to be exempt under section 38(b) of the *Act*. Based on this review, I am satisfied the police considered relevant factors in exercising their disclosure and did not take into account irrelevant factors. Specifically, the police considered the sensitivity of the personal information at issue, the purpose of the personal privacy exemption, balanced the

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[7] Order MO-1573.
[8] Section 43(2) of the *Act*.

appellant's right of access to his personal information with the privacy interests of other identifiable individuals, and whether the appellant had a sympathetic or compelling need for the information. There is no evidence before me to suggest the police took irrelevant considerations into account or that it exercised its discretion in bad faith or for an improper purpose.

[42] Accordingly, I am satisfied the police did not err in exercising its discretion to withhold information exempt under section 38(b) and I will not interfere with it on appeal.

Issue D: Did the police conduct a reasonable search for records?

[43] Where a requester claims additional responsive records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 17 of the *Act*.[9] If, after conducting an inquiry, the adjudicator is satisfied the institution carried out a reasonable search in the circumstances, they will uphold the institution's search. If the adjudicator is not satisfied they may order further searches.

[44] The *Act* does not require an institution to prove with absolute certainty that further records do not exist. However, the police must provide sufficient evidence to show they made a reasonable effort to identify and locate responsive records.[10] To be responsive, a record must be *reasonably related* to the request.[11]

[45] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to identify and locate responsive records.[12] An adjudicator will order a further search if the institution does not provide sufficient evidence to demonstrate it made a reasonable effort to identify and locate all of the responsive records within its custody or under its control.[13]

[46] Although the requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.[14]

[47] The appellant's original request states that he seeks access to "all the information the [police] has obtained and recorded on me since November 2016."

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[9] Orders P-85, P-221 and PO-1954-I.
[10] Orders P-624 and PO-2559.
[11] Order PO-2554.
[12] Orders M-909, PO-2469 and PO-2592.
[13] Order MO-2185.
[14] Order MO-2246.

[48] In their representations, the police state they conducted a search of their Versadex Records Management System for all reports relating to the appellant created within the time period identified. The police submit the Versadex system contains all records created since May 2006. The police state they interpreted the appellant's broadly as he requested access to *all* information the police had obtained and recorded on him since November 2016 and conducted a broad search on the Versadex system accordingly. The police state they located twenty records and they granted the appellant full or partial access to them and no other reports exist. The police submit no further reports exist and there is no other database to search for responsive records.

[49] In his representations, the appellant submits his original request included officers' notes and two recordings that he agreed to participate in when he and his wife met with the police in Port Colborne and the police's Headquarters in Niagara Falls. From a review of the appellant's representations, it appears these meetings took place in September 2017 and March 2018.

[50] In their reply representations, the police provided a sworn affidavit from the Acting Information and Privacy Clerk who conducted the search for the records. The police state they interpreted the appellant's request broadly, but did not call in officers' duty book notes made in relation to these reports because they contain point form notes of what is contained in the actual reports. The police state the appellant did not confirm his interest in pursuing access to the duty book notes upon receiving the police's access decision nor during mediation. However, the police state that if the appellant seeks access to the officers' notes, they "will provide them to him."

[51] As stated above, the *Act* does not require the police to prove with absolute certainty that further responsive records do not exist. However, the police must provide sufficient evidence to show they made a reasonable effort to identify and locate responsive records.[15] In the circumstances of this appeal, I am not satisfied the police have done so. In other words, I find the police failed to establish they conducted a reasonable search to identify all of the records responsive to the appellant's request.

[52] The police's representations and affidavit demonstrate they only conducted a search of the Versadex Records Management System for records responsive to the appellant's request. Through this search, the police located twenty reports that were responsive to the appellant's request. However, as the police admit, the appellant's request was quite broad. The appellant clearly states he seeks access to "all the information the [police] has obtained and recorded on me since November 2016." While I accept the individual who conducted the search is an experienced employee knowledgeable in the subject matter of the request, I find the police's search for

[15] Orders P-624 and PO-2559.

records responsive to the appellant's request to be too narrow. It appears from a review of the police's representations that their search was limited to the Versadex system and focused on the reports located on that system. The police did not conduct a search for officers' notes nor did they address the appellant's representations concerning any recordings made during his meetings with the police. Given these circumstances, I am unable to conclude that the police conducted a reasonable search for all records relating to the appellant, in general, and for the officers' notes and recordings in particular.

[53] With regard to the officers' notes, the police submit they focused on the reports because the officers' duty book notes contain point form notes of what is contained in the actual reports. It appears the police did not search for the officers' notes because there was potentially duplicative material. However, I note the appellant's request clearly indicates he seeks access to *all* information about him regardless of whether there is overlap in the information contained in different types of records and I find that the officers' notes would be within the scope of his request.

[54] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.[16] In this case, the appellant identified the officers' notes as responsive to his request and identified possible recordings that were made of his meetings with the police. In their representations, the police state they are willing to locate officers' notes responsive to the appellant's request. Therefore, it is clear the officers' notes exist. With regard to the recordings, I find the appellant has provided a reasonable basis for his belief that such recordings exist, but the police did not make any submissions on possible recordings in their representations. Therefore, I find the appellant has established there is a reasonable basis for his belief that additional responsive records may exist.

[55] Given these circumstances, I find the police have failed to demonstrate that they conducted a reasonable search for responsive records, while the appellant provided a reasonable basis for concluding that additional responsive records may exist within their records holdings. As a result, I will order the police to conduct a search for records responsive to the appellants' request, as detailed in the provisions of this order.

ORDER:

1. I uphold the police's decision to withhold the personal information at issue under section 38(b) of the *Act*.

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[16] Order MO-2246.

2. I order the police to conduct a search for records responsive to the appellant's access request, including for officer's notes and recordings of any meetings between the appellant and the police.

3. I order the police to issue an access decision to the appellant regarding any records located as a result of the searches ordered in provision 2, in accordance with the *Act*. For the purposes of the timelines the police must adhere to, the date of this order is to be treated as the date of the request.

4. I order the police to provide me with a copy of the access decision(s) referred to in order provision 3.

Original Signed by: October 28, 2021

Justine Wai
Adjudicator