

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4165

Appeal MA19-00318

Ottawa Police Service

February 17, 2022

Summary: An individual made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), to the Ottawa Police Services Board (the police), for access to records created in response to an incident that resulted in a physical altercation between himself and another party. The police issued a decision granting partial access to the responsive records, denying access to portions of them pursuant to the discretionary personal privacy exemption at section 38(b). The requester appealed the police's decision. In this order, the adjudicator upholds the police's decision and dismisses the appeal.

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"), 4(2), 14(2)(a), (d), (h), 14(3)(b), 17 and 38(b).

OVERVIEW:

[1] This order determines the issue of access to information contained in an occurrence report created by Ottawa Police in relation to an incident that resulted in a physical altercation between two parties.

[2] The requester, one of the two parties involved in the incident, made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ottawa Police Services Board (the police) for access to information relating to the incident. He identified the police file number and stated that, in addition to any reports that may have been created, he seeks access to all written and oral statements of any

witnesses interviewed by a named detective. In his request, the requester specifically identified by name, three witnesses who he believes were interviewed by the detective, but clarified that he also seeks access to statements made by any other witnesses who might have been interviewed.

[3] The police located the responsive records and issued a decision granting partial access to them. The police denied access to the withheld information pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*.

[4] The requester, now the appellant, appealed the police's decision to deny access to some of the information to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to attempt to assist the parties in reaching a mediated resolution.

[5] During mediation, the mediator confirmed that the appellant continues to seek access to information that the police withheld from a general occurrence report related to the incident (the occurrence report). Specifically, the appellant confirmed that he continues to seek access to the statement of the other individual involved in the incident (the affected party), on pages 5 and 6 of the occurrence report. The appellant also confirmed that he does not seek access to the information that was severed from the Table of Contents or pages 2 and 3 of the occurrence report. As a result, this information is not at issue.

[6] The mediator notified the affected party of the appellant's request but did not obtain their consent to disclose their information to the appellant.

[7] Also during mediation, the appellant questioned the reasonableness of the police's search. He advised that he believed that additional records responsive to his request, should exist. The police agreed to perform another search and, as a result of that search, located additional records: emails containing brief statements of two of the three witnesses identified by the appellant in his request. The police issued a supplementary decision granting partial access to the additional records, disclosing the content of the emails but not the identifying information relating to the individuals who provided them. Following a review of the information provided to him as a result of the additional search, the appellant confirmed that he does not seek access to the information severed from those additional records and advised that the reasonableness of the police' search for records is no longer at issue.

[8] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[9] The adjudicator assigned to the appeal decided to conduct an inquiry and prepared a Notice of Inquiry setting out the facts and issues on appeal. She sought representations from the police, the appellant and the affected party. The

representations of the police and the appellant were shared with each other pursuant to section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*. The affected party did not submit representations.

[10] Following receipt of the appellant's representations, the adjudicator noted that the Notice of Inquiry did not include, as an issue, the police's exercise of discretion with respect to their claim that section 38(b) applies to the withheld information. As a result, she sought additional representations from the police, specifically addressing their exercise of discretion.

[11] The appeal was transferred to me to complete the inquiry. Upon receipt of the police's representations on the issue of their exercise of discretion, I shared those representations with the appellant and subsequently, received representations from him in response. Following receipt of the appellant's representations addressing the police's exercise of discretion, I concluded the inquiry.

[12] In this order, I uphold the police's access decision and dismiss the appeal.

RECORD:

[13] The record at issue in this appeal is a general occurrence report (the occurrence report) that has been disclosed to the appellant, in part. The information that remains at issue is that which has been severed from pages 5 and 6 of the occurrence report, which consists of a witness statement (the statement) made to the police by an affected party.

ISSUES:

- A. Does the occurrence report contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the withheld portions of the occurrence report?
- C. Did the police exercise their discretion in denying access to the information that was withheld pursuant to section 38(b) of the *Act*?

DISCUSSION:

Issue A: Does the occurrence report contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[14] In order to decide whether the discretionary personal privacy exemption at

section 38(b) of the *Act* applies to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.¹ Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.²

[15] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.³ Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. See also section 2(2.1) which states:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[16] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.⁴

[17] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.⁵

[18] Section 2(1) of the *Act* gives a list of examples of personal information:

"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

¹ Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

² See sections 14(1) and 38(b).

³ See the definition of "record" in section 2(1).

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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.

[19] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."⁶

Representations

[20] The police explain that the occurrence report records the specifics of an incident that occurred between two parties. They submit that it contains the personal information of both involved parties, the appellant and an affected party. The police submit that the information remaining at issue is the statement made by the affected party, and includes their name, contact and personal identifiers, as well as their views and opinions regarding the incident. The police submit that it is very reasonable to expect that the affected party will be identified if the statement is disclosed.

[21] In his representations, the appellant submits that the statement must contain both his own personal information and that of the affected party. He states that he does not seek access to the affected party's name, contact information and/or any other information in the record that might identify the affected party. He states that he is seeking the content of the affected party's statement to the police and submits that he disagrees with the police's submission that the affected party's statement is his personal information. He submits that pursuant to paragraph (e) of the section 2(1)

⁶ Order 11.

definition of personal information, the information contained in the affected party's witness statement, which is information about the physical altercation between the parties, is not the affected party's information but rather, it is his own personal information and should be disclosed. He submits that the statement consists of the views and opinions of the affected party about the assault on him, the appellant.

Analysis and finding

[22] I have reviewed the occurrence report and the parties' representations. I find that the occurrence report contains the personal information of the appellant, as well as that of the affected party. Because I find that the occurrence report contains personal information belonging to the affected party, their personal privacy may be affected by the disclosure of this information to the appellant.

[23] The occurrence report contains personal information of both the appellant and the affected party, including: information relating to their age, sex, marital or family status (paragraph (a) of the definition of "personal information" at section 2(1) of the *Act*); their addresses and telephone numbers (paragraph (d)), their views or opinions (e), views or opinions about them (paragraph (g)), as well as their names, along with other personal information about them (paragraph (h)).

[24] Having reviewed the occurrence report, as it was disclosed to the appellant, I confirm that, aside from the statement of the affected party, the police have only severed the personal information of the affected party; the remainder of the report has been disclosed to the appellant. As the appellant has made it clear that he does not wish to be provided the affected party's name, contact information or any other identifying information about him, it is only the affected party's statement found on pages 5 and 6 that remains at issue.

[25] The statement, which describes the incident from the affected party's perspective, contains the mixed personal information of both the appellant and the affected party; their personal information is intertwined. The statement contains the personal views and opinions of the affected party and, in some parts, those views and opinions are about the appellant (paragraphs (e) and (g) of the section 2(1) definition of "personal information").

[26] Having found that the occurrence report contains the personal information of both the appellant and the affected party, I must now determine whether the statement, which is the portion of the occurrence report that remains at issue, is exempt from disclosure under section 38(b) of the *Act*.

Issue B: Does the discretionary personal privacy exemption at section 38(b) apply to the withheld portions of the occurrence report?

[27] 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 some exemptions from

this right.

[28] Under section 38(b), if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy. Only the personal information of individuals other than the requester can be exempt from disclosure under section 38(b).⁷

[29] The section 38(b) exemption is discretionary. This means that the institution can also decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of the other individual's personal privacy.

[30] If disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 38(b).

[31] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy. 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).

[32] In this case, none of the parties claim, nor do I find that the evidence before me suggests that any of the exceptions at sections 14(1)(a) to (e) apply.

[33] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would not be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply. None of the situations listed in section 14(4) are present in this case.

[34] If, as in this case, section 14(4) does not apply, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁸

[35] If any of sections 14(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal

⁷ See Order PO-3672 at para 58, which addresses the equivalent provision in section 49(b) of the *Freedom of Information and Protection of Privacy Act*. See also Order PO-2560, which found that a requester's personal information cannot be exempt under section 49(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.

⁸ Order MO-2954.

information would constitute an unjustified invasion of personal privacy.⁹ The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).¹⁰

[36] In this case, the police argue that the presumption against disclosure at section 14(3)(b) applies. That section states:

14(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) 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[.]

[37] The appellant argues that the factors at section 14(2)(a) (public scrutiny) and (d) (fair determination of rights) apply to the statement, weighing in favour of its disclosure. The police argue that the factor at section 14(2)(h) (supplied in confidence) applies to the statement. This factor weighs against disclosure, if it is found to apply. Those sections state:

14(2) A head in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

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

...

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

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence.

Representations

Police's representations

[38] The police submit that when deciding to exercise their discretion to apply the exemption at section 38(b) to the statement, they considered the presumption against

⁹ Order P-239.

¹⁰ Order P-99.

disclosure at section 14(3)(b) (investigation into a possible violation of law) and the factor weighing against disclosure at section 14(2)(h) (supplied in confidence). They submit that considering that presumption and factor they decided that disclosure of the statement would be an unjustified invasion of the affected party's privacy.

[39] The police submit that the presumption at section 14(3)(b) applies to the statement because it is part of a law enforcement record that was created for the purpose of investigating a possible violation of law.

[40] The police also submit that the factor at section 14(2)(h) is a relevant consideration as the affected party supplied the information in their statement in confidence. The police submit that when personal information is collected by the police in the course of a law enforcement matter, there is an expectation of confidentiality. They submit:

If the information collected by the police is released without consent of the individual who supplied it, then these same individuals may be hesitant to assist police in the future, as there would be no guarantee that the information would not be released.

[41] The police submit that no other factors under section 14(2) apply.

[42] Addressing the possible application of the absurd result principle, the police submit that the statement contains the personal information of the affected party, specifically, their statements or personal opinions or views.¹¹ They submit that the appellant was not present when the statement was provided and therefore, it is not information that is within the appellant's knowledge.

Appellant's representations

[43] The appellant disagrees with the police's position that disclosure of the statement would amount to a presumed unjustified invasion of the affected party's personal privacy under section 14(3)(b). He submits that the second part of that provision supports his position. Section 14(3)(b) states:

A disclosure of **personal information** is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) 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.**

¹¹ Above I found that the statement contains the personal information of both the appellant and the affected party and that it is intertwined.

[appellant's emphasis]

[44] The appellant submits that the detective in charge of the matter indicated "that the investigation would be reopened and continued if there is evidence to justify [it]." He submits that the disclosure may be necessary to continue the investigation or for the appellant to "prosecute the affected party privately."

[45] The appellant submits that the factor weighing in favour of disclosure at section 14(2)(a) should be considered in this case, because disclosure of the statement is desirable for the purpose of subjecting the activities of the police to public scrutiny. In support of this argument, the appellant refers to a civil defamation suit between the two parties and specifically, affidavits that the affected party filed with the Superior Court of Justice for the purposes of that proceeding.¹² The appellant submits that the affidavits put the conduct of the detective who investigated the incident into question and he should be permitted to compare them against the statement. He submits that comparing them would assist him in determining whether or not the conduct of the detective was appropriate. Specifically, the appellant alleges that the statement will reveal that the detective inappropriately informed the affected party of the content of witness statements of other involved parties prior to the affected party making his statement, that the detective did not interview a number of witnesses that should have been interviewed and that the detective had a "preordained conclusion" about the appellant's complaint regarding the incident which led to him to conclude it was "frivolous" and close the investigation prematurely.

[46] The appellant submits that the factor weighing in favour of disclosure at section 14(2)(d) is also relevant because disclosure of the statement is relevant to a fair determination of his rights in the civil defamation suit between the two parties and/or his rights in any future proceeding that he may or may not decide initiate.¹³ He submits that it is necessary for him to compare the affected party's statement against the information in the affidavits to ensure a fair determination of his rights in any existing or future proceeding between himself and the affected party.

[47] Responding to the police's submission that the affected party's statement was provided in confidence and therefore, that section 14(2)(h) is a relevant consideration weighing against disclosure, the appellant submits the affected party himself made the information in their statement to police public by describing the incident in the affidavits filed for the civil defamation suit because those affidavits are now publicly available.

[48] In his representations, the appellant also reviews the other factors in section

¹² The appellant provided the IPC with some of the materials that the affected party filed with the Ontario Superior Court of Justice with respect to that civil suit, including two affidavits (referred to by the appellant in his representations as 'sworn statements') of the affected party, both of which include a description of the incident to which the records responsive to the request at issue relate.

¹³ From the appellant's representations, it is not clear whether this civil suit is ongoing or has already been completed. It is also not clear whether any other proceedings are existing or contemplated.

14(2) that weigh against disclosure. He considers each of the remaining factors in sections 14(2)(e), (f), (g) and (i) and then concludes that none of these factors are relevant in the circumstances of this appeal.

[49] The appellant raises the possible application of the absurd result principle in this case. He submits that as a result of the affected party's affidavits, he is aware of the information that the affected party's statement contains and therefore, it would be absurd for the police to exercise their discretion not to disclose the statement to him.

Section 14(3): presumptions against disclosure

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

[50] The police argue that the presumption against disclosure at section 14(3)(b) is a relevant consideration because the statement was compiled for an investigation into the incident that occurred between the appellant and the affected party and that investigation was into a possible violation of law. I agree.

[51] Based on my review of the statement, which forms part of an occurrence report about an investigation into an incident which involved a physical altercation between two parties, I am satisfied that it was compiled and is identifiable as part of an investigation into a possible violation of law. Given the nature of the incident which resulted in allegations of assault, it is possible that the investigation into that incident could have resulted in charges under the *Criminal Code of Canada*. The fact that no charges were laid has no bearing on the application of this presumption. Even if no criminal proceedings were commenced against an individual in relation to the incident of it they were later withdrawn, section 14(3)(b) may still apply; the presumption only requires that there be an investigation into a possible violation of law.¹⁴ Therefore, I find that section 14(3)(b) applies to the statement, and that its disclosure is presumed to be an unjustified invasion of the personal privacy of the affected party.

[52] I note that the appellant relies on the second part of section 14(3)(b), which states that disclosure of information compiled and identifiable as part of an investigation into a possible violation of law amounts to a presumed unjustified invasion of personal privacy "...except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation." Past orders of the IPC have interpreted this sentence as meaning that disclosure of the personal information may be required in a prosecution or in order to continue an investigation.¹⁵

[53] Although I acknowledge that the appellant would prefer that the police continue their investigation and would like the incident to be prosecuted, those are matters for the police and the Crown attorney's office to determine, not the appellant or the IPC. Based on the evidence before me, specifically, the content of the occurrence report and

¹⁴ Orders P-242 and MO-2235.

¹⁵ Order MO-3867.

the police's representations, I am satisfied that the police concluded their investigation into the incident without laying charges and, as a result, no prosecution is anticipated. As disclosure of the statement is not necessary to prosecute the violation or to continue the investigation for the purpose of the second part of section 14(3)(b), the provision does not assist the appellant in arguing that the statement should be disclosed.

[54] I find that section 14(3)(b) applies and weighs against the disclosure of the statement.

[55] Under section 38(b), the presumptions in section 14(3) must be weighed with any factors in section 14(2) that are relevant, and those presumptions and factors must be balanced against the interests of the parties. As no other presumptions in section 14(3) have been claimed or are relevant in this appeal, I will now consider the factors in section 14(2).

Section 14(2): factors weighing for or against disclosure

[56] As indicated above, section 14(2) sets out a non-exhaustive list of factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.¹⁶ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

Section 14(2)(a): public scrutiny

[57] The appellant submits the disclosure of the statement is desirable for the purpose of subjecting the activities of the detective who investigated the incident to public scrutiny. His submissions suggest that he believes the detective acted inappropriately and disclosure of the statement will reveal this.

[58] The objective of section 14(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. I have reviewed the appellant's representations, the content of the statement and the other evidence before me. The statement does not address or respond to the appellant's concerns regarding the conduct of the detective or the conduct of the police service in general, which is the subject of 14(2)(a) analysis.

[59] Therefore, I conclude that the disclosure of the statement would not result in the activities of the police being subject to greater public scrutiny and I find that the factor at section 14(2)(a) is not relevant.

[60] *Section 14(2)(d): fair determination of rights*

[61] I have also considered the relevance, as submitted by the appellant, of the factor at section 14(2)(d) – whether disclosure of the statement is relevant to the fair

¹⁶ Order P-239.

determination of the appellant's rights. Section 14(2)(d) weighs in favour of disclosure of the personal information of another individual to a requester where the information is needed to allow them to participate in a court or tribunal process. Past IPC orders have found 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.¹⁷

[62] The appellant must establish that all four parts of the test have been met.

[63] I am not persuaded that section 14(2)(d) applies to the statement. Despite evidence of a civil defamation suit between the two parties,¹⁸ in my view, the appellant's representations do not provide sufficient evidence for me to conclude that any part of the section 14(2)(d) test has been met. In particular, I find that that the fourth part of the test has not been established. Even if the defamation suit has not been completed, from my review of the affected party's statement and the appellant's submissions, I am not persuaded that disclosure of the statement is required in that proceeding in order for the appellant to prepare for or ensure an impartial hearing. I also have no evidence of any other proceeding, either existing or contemplated, for which the statement is required for preparation or to ensure impartiality. As all four parts of the test must be established for section 14(2)(d) to apply, I find that the factor does not apply to weigh in favour of disclosure in the circumstances of this appeal.

[64] In considering the relevance of section 14(2)(d) in this case, I note that the appellant's right of access to information under the *Act* is different from his entitlement to seek information under other legal frameworks. A denial of access under the *Act* does not prevent the appellant from pursuing other legal remedies that might be available to him, nor does it prevent him from receiving the same information in a

¹⁷ 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.).

¹⁸ As noted above, from the appellant's representations, it is not clear whether this proceeding has been completed.

different legal context.¹⁹

Section 14(2)(h): supplied in confidence

[65] The police take the position that section 14(2)(h) is a relevant factor weighing against disclosure of the statement because, they submit, when personal information is collected by the police in the course of a law enforcement matter, there is an expectation of confidentiality.

[66] As past orders have established, section 14(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.²⁰

[67] In my view, whether an individual supplied his or her personal information to the police in confidence during an investigation is contingent on the particular facts, and such a determination must be made on a case-by-case basis.

[68] In the particular circumstances of this appeal, I find that this factor weighing against disclosure applies in this case. The personal information at issue is a statement made to the police by the affected party in relation to an alleged incident of assault arising from an altercation between himself and the appellant. In my view, given the nature of the incident and the relationship between the involved parties, I accept that the affected party had a reasonable expectation that the personal information that he provided to the police in his statement would be treated confidentially. I also accept that this expectation of confidentiality was reasonable in the circumstances. I find, therefore, that the factor at section 14(2)(h), weighing against the disclosure of the statement, is a relevant consideration in this appeal.

Summary of finding on the application of section 38(b)

[69] In sum, I have found that no section 14(2) factors, listed or unlisted, apply and weigh in favour of disclosure of the affected party's statement to the appellant, but I have found that the factor at section 14(2)(h) (supplied in confidence) applies and weighs against its disclosure. I have also found that the presumption against disclosure at section 14(3)(b) applies. Balancing the interests of both parties, the facts of this appeal weigh against the disclosure of the statement.

[70] Having considered the content of the statement and the context in which it appears, and having considered and weighed the factors and presumptions in sections 14(2) and (3), I find that its disclosure would constitute an unjustified invasion of the

¹⁹ Section 51(1) of the *Act* provides that "This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation."

²⁰ Order PO-1670.

affected party's personal privacy within the meaning of the exemption section 38(b). However, as the appellant raised the possible application of the absurd result principle in his representations, I will consider that now.

Absurd result

[71] 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.²¹ Conversely, 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.²²

[72] The absurd result principle has been applied where, for example, the requester sought access to his or her own witness statement,²³ the requester was present when the information was provided to the institution,²⁴ or the information is clearly within the requester's knowledge.²⁵

[73] The appellant suggests that the absurd result principle should apply to permit disclosure of the affected party's statement because he knows the identity of the affected party and he knows the affected party's views and opinions about the incident as a result of the affidavits that the affected party filed with the court in the civil defamation suit between them. He submits that the content of the statement should be the same information that was in the affidavits so he knows what is contained in the statement.

[74] Although I acknowledge that the appellant is aware of the affected party's identity. I also acknowledge that the information in the affected party's witness statement may be similar to the information in affidavits the affected party put before the court and which may be publicly available. However, in the particular circumstances of this case, I will not order disclosure of the statement as it appears in the occurrence report.

[75] The statement was not provided to the police by the appellant, it was provided by the affected party. The appellant was not present when the statement was provided by the affected party to the police. Even if there may be similarities between the information contained in the statement and the affidavits sworn by the affected party for the purpose of a proceeding in a different venue, I am not satisfied that the information in the statement is clearly within the requester's knowledge.

²¹ M-444, MO-1323.

²² M-757, MO-1323, MO-1378.

²³ M-444, M-451.

²⁴ Orders M-444, P-1414.

²⁵ Orders MO-1196, PO-1679, MO-1755.

[76] I find that withholding the statement would not be absurd or inconsistent with the purpose of the exemption at section 38(b) and, as a result, the absurd result principle does not apply.

Section 4(2): Severability

[77] I have also considered whether the statement can be severed in a manner that would permit disclosure of the appellant's personal information without disclosing that of the affected party and find that it cannot.

[78] As I found above, the statement contains the personal information of both the affected party and the appellant; their personal information is closely intertwined. In addition to containing the personal information of the affected party, the statement contains comments that the affected party made about the appellant which is the appellant's personal information.

[79] Section 4(2) of the *Act* requires the police to disclose as much of the record as can be reasonably severed without disclosing information that falls under one of the exemptions.²⁶ Consequently, the appellant's personal information in the statement can only be disclosed to him if the statement can reasonably be severed without disclosing the personal information of the affected party that I have found falls under the section 38(b) exemption.

[80] Because the personal information of the appellant and the affected party is so closely intertwined, I find that the statement cannot be reasonably severed without disclosing the personal information of the affected party that falls under section 38(b). As a result, the appellant's personal information in the statement cannot be severed and disclosed to him.

Issue C: Did the police exercise their discretion in denying access to the information that it withheld pursuant to section 38(b) of the *Act*? If so, should the IPC uphold their exercise of discretion?

[81] The exemption at section 38(b) is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[82] In addition, the IPC may find that the institution erred in exercising its discretion

²⁶ Section 4(2) of the *Act* states:

If an institution receives a request for access to a record that contains information that falls within one of the exemptions under section 6 to 15 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Also, see Order MO-3106.

where, for example,

- it does so in bad faith or for an improper purpose,
- it takes into account irrelevant considerations, or
- it fails to take into account relevant considerations.

[83] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁷ The IPC cannot, however, substitute its own discretion for that of the institution.²⁸

Representations

[84] The police submit that in exercising their discretion not to disclose the statement to the appellant under section 38(b), they balanced the appellant's right to his own personal information against the affected party's right to privacy and determined that "the affected party's right to privacy outweighs any claims made by the appellant regarding that information."

[85] The police submit that in exercising their discretion they considered the following factors:

- the privacy rights of the involved individuals,
- the appellant's right of access to his own personal information,
- that the information was supplied to them by the affected party in confidence, and
- that consent to disclose the personal information was not obtained by the affected party,

[86] The police also submit that in exercising their discretion under section 38(b), they considered the acrimonious nature of the relationship between the appellant and the affected party.

[87] The appellant submits that the police "failed to conduct a proper and comprehensive analysis of its discretion by failing to address the relevant factors" when it decided not to disclose the statement. He submits that by merely enumerating the factors that they considered, the police "simply made a conclusory statement" without demonstrating how they analysed the factors and arrived at their decision to refuse disclose the information.

²⁷ Order MO-1573.

²⁸ Section 43(2).

[88] The appellant also submits that the police failed to turn their mind to their discretion *to* disclose the information. He argues that his right to the information outweighs the affected party's right to privacy. The appellant submits that by filing the affidavits with the court in the defamation suit, the affected party waived his right to privacy with respect to the information that they contain, including the description of the incident that appears within them. The appellant submits that the police erred by not considering this as a factor in their exercise of discretion.

Analysis and finding

[89] I have considered the parties' representations, the content of the statement and the circumstances of this appeal. I find that the police properly exercised their discretion under section 38(b) not to disclose the statement to the appellant.

[90] I am satisfied police considered relevant factors when exercising their discretion. Specifically, they considered the purposes of the *Act* and the personal privacy exemption at section 38(b), the nature and sensitivity of the content of the statement and the specific circumstances of this appeal, including the relationship between the affected party and the appellant. In addition, I am satisfied that the police considered and balanced the appellant's right of access to his own personal information against the affected party's privacy rights. I am also satisfied that there is no evidence before me to suggest that the police took irrelevant considerations into account or that it exercise its discretion in bad faith or for an improper purpose.

[91] For these reasons, I find that the police properly exercised their discretion under section 38(b) not to disclose the statement to the appellant and I uphold it.

ORDER:

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

Original Signed by: _____

Catherine Corban
Adjudicator

February 17, 2022 _____