

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4198

Appeal MA20-00364

Niagara Regional Police Services Board

May 16, 2022

Summary: The appellant submitted an access request to the Niagara Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a police occurrence report of a specified incident. The police provided the appellant with access to some of her own personal information, and later, on consent, some of her spouse's personal information in the report, but denied access to other information under the discretionary exemption in section 38(b) (personal privacy) of the *Act*. In this order, the adjudicator finds that the information remaining at issue is exempt from disclosure under section 38(b). She upholds the police's access decision, finding that they exercised their discretion properly, 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(1)(f), 14(2)(d), 14(2)(e), 14(2)(f), 14(2)(g), 14(2)(h), 14(2)(i), 14(3)(b) and 38(b).

Orders Considered: Orders M-167, MO-1466 and MO-2830.

OVERVIEW:

[1] By way of background, this request arises out of an altercation between neighbours, who are also engaged in civil litigation. The appellant and her spouse called the police, who spoke to them, as well as the other two neighbours (the affected parties), resulting in the creation of a police occurrence report. In this appeal, the appellant is seeking information about what the affected parties said to the police about

her and her spouse because she believes they provided false information about them.

[2] The Niagara Regional Police Services Board (the police) received a request from the appellant under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a report relating to the above incident.

[3] The police issued a decision, granting partial access to an occurrence report. The police claim that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under the discretionary personal privacy exemption in section 38(b) of the *Act*, taking into consideration the presumption in section 14(3)(b).

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

[5] During mediation, the appellant advised the mediator that she was pursuing access to the severed information in the Initial Report 1 of the police occurrence report. The mediator obtained consent from the appellant's spouse and conveyed this to the police, who subsequently disclosed additional information about the appellant's spouse to the appellant. The mediator was unable to obtain the consent of the other two affected parties (the affected parties).

[6] No further mediation was possible and this appeal was transferred to the adjudication stage of the appeal process, in which an adjudicator may conduct an inquiry under the *Act*.

[7] The adjudicator originally assigned to this appeal decided to conduct an inquiry and sought representations from the police and the two affected parties. The appeal was then transferred to me for completion and, after reviewing the file, I invited and received further representations from both parties. I shared the police's representations and a summary of the affected parties' representations with the appellant. I received representations from the appellant, which I then shared with the police and the affected parties. I then sought and received reply representations from the police and affected parties, followed by sur-reply representations from the appellant. The representations of the parties were shared with one another in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I find that the record contains the personal information of the appellant, her spouse and the affected parties, and that disclosure of the information at issue would result in an unjustified invasion of privacy pursuant to section 38(b) of the *Act*. I also find that the absurd result principle does not apply. I uphold the police's decision, finding that they exercised their discretion properly and dismiss the appeal.

RECORD:

[9] The record at issue is page 4 of 6 of the police occurrence report and is entitled

"Narrative: Initial Report 1" (the record). The police withheld information in the record, being part of the sixth paragraph and the entire seventh paragraph, where the police recorded what the affected parties told them (the information at issue).

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?
- C. Did the institution exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

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

[10] The discretionary personal privacy exemption in section 38(b) of the *Act* only applies to "personal information." Consequently, it must first be determined whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

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

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[11] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

Representations of the parties

[12] The police submit that the record contains information that qualifies as the personal information of identifiable individuals, including the appellant, the appellant's spouse and the affected parties. They submit that the information includes names, addresses and statements of these individuals. They also submit that the information is about the individuals in their personal capacity.

[13] The affected individuals take the position that the redacted information contains statements they made to the police.³ They are of the view that there is no valid reason for this information to be shared with the appellant because "it is...personal in nature..."

[14] The appellant submits that the information at issue is not the affected parties' personal information because the affected parties' lawyer had already disclosed it to her. The appellant explains that the affected parties' lawyer sent a letter to her lawyer as part of the civil proceedings between the parties, which included information about the incident between the parties (the letter).

¹ Order 11.

² Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

³ I note that the affected parties' representations refer to their personal information identifiers (for example, sex, date of birth, address, phone numbers, etc.) as still being at issue in this appeal. However, as noted above, during mediation, the appellant confirmed that she was not seeking access to the affected parties' personal information identifiers. Accordingly, I have not summarized these portions of the affected parties' representations.

[15] In response, the police submit that it is clear from the appellant's representations that she does not know the content of the information at issue; instead, based on the letter, she has a suspicion of what the information is.

[16] In response, the affected parties submit that the information at issue contains "...personal and private information to which the appellant is not entitled."

Analysis and findings

[17] Having reviewed the record, I find that it contains the personal information of the appellant, her spouse and the affected parties.

[18] First, the record contains the appellant's own personal information. While the information at issue is only a portion of the record, the IPC applies the "record-by-record" method of analysis in deciding which part of the *Act* applies to the access request. Requests for one's own personal information are assessed under Part II, whereas requests for records that do not contain the requester's own personal information are assessed under Part I.

[19] Applied to requests for access to one's own personal information, the "record-by-record" approach gives requesters a right of access to a record containing their own personal information, subject to any applicable exemptions. Under this approach, the whole record, rather than individual pages, paragraphs, sentences or words contained in a record, is analysed. This means that where the information at issue is the withheld portion of a record that has been partially released, the whole of the record (including released portions) is analyzed in determining whether a requester's right to access the withheld information should be analyzed under Part I or Part II.⁴

[20] Based on my review of the record and the representations of the parties, I find that the record contains the personal information of the appellant, her spouse and the affected parties. The record contains recorded information about identifiable persons, and includes information that fits within paragraphs (b), (d), (e), (g) and (h) of the definition of that term in section 2(1) of the *Act*.

[21] In the circumstances, I find that it is reasonable to expect that the affected parties can be identified from the information in the record, even if their names were severed. In addition, I am satisfied that the personal information in the record is about the parties in a personal capacity.

[22] Given my finding above that the record contains the personal information of the appellant, her spouse and the affected parties, I must assess any right of access that the appellant may have to it under the discretionary personal privacy exemption in

⁴ See Orders M-352 and PO-3642.

section 38(b), which is found in Part II of the *Act*.⁵ I will now consider the possible application of section 38(b) of the *Act*.

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

[23] 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.

[24] Under the section 38(b) exemption, an institution may refuse to disclose to disclose information in a record that contains the requester's personal information if disclosure of that information would be an "unjustified invasion" of another individual's personal privacy. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁶

[25] In the circumstances of this appeal, the police have already disclosed the majority of the record to the appellant. The only personal information remaining at issue for my analysis of section 38(b) is the information at issue, which includes both the affected parties' personal information, which is intermingled with the personal information of the appellant and her spouse.

[26] Therefore, it must be determined whether disclosing the affected parties' personal information to the appellant would constitute an unjustified invasion of the affected parties' personal privacy under section 38(b). I will also determine, with respect to the undisclosed personal information of the appellant and her spouse, whether the police have complied with their obligations under section 4(2) of the *Act* to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[27] With respect to the affected parties' personal information, sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met:

- if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b);
- section 14(2) lists "relevant circumstances" or factors that must be considered;

⁵ When a record does not contain a requester's personal information, the applicable personal privacy exemption is the mandatory one in section 14(1), which is found in Part 1 of the *Act*.

⁶ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

- section 14(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy; and
- section 14(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 14(3).

Section 14(1) exceptions

[28] The police claim that none of the exceptions in sections 14(1)(a) to (e) apply. They also claim that the situations in sections 14(4)(a) to (c) do not apply. The appellant and the affected parties did not make representations related to these sections.

[29] Based on my review of the information at issue, I agree with the police and find that sections 14(1)(a) to (e), as well as the paragraphs in section 14(4), do not apply in the circumstances of this appeal.

[30] As none of the exceptions in section 14(1)(a) to (e) apply, I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties to determine whether the disclosure of the personal information in information at issue would constitute an unjustified invasion of personal privacy under section 38(b).⁷

Section 14(3)

[31] I will start by examining the presumptions in section 14(3). This section lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b).

[32] The parties do not claim that any presumptions in section 14(3) apply, other than section 14(3)(b). Based on my review of the information at issue, I find that none of the other presumptions at section 14(3) applies in the circumstances of this appeal.

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

[33] The police claim that the presumption in section 14(3)(b) applies to the information at issue. This provision states:

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

⁷ Order MO-2954.

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.

[34] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁸ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁹

[35] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.¹⁰ The presumption can apply to a variety of investigations, including those relating to by-law enforcement¹¹ and violations of environmental laws or occupational health and safety laws.¹²

[36] The police submit that the information at issue was collected for the purpose of an investigation into a possible violation of the law. They explain that while the original call came to police as a "threat in progress" call, which is an offence under section 264.1(1) of the *Criminal Code of Canada*, the investigation led the police to determine that it was a "disturbance" call instead.

[37] The affected parties object to the release of the information at issue because it addresses statements they made to police. The affected individuals are of the view that there is no valid reason for this information to be shared with the appellant because it "was provided in the context of a report made to the [police]" and they express concern about its disclosure given other outstanding legal matters between the parties.

[38] The appellant explains that her call to police was to the general telephone number, requesting that a police officer come to her home to get this incident/threat on record.

[39] I have reviewed the information at issue in this appeal, which contains what the affected parties said to the police about the incident. It is my understanding that no charges were laid against any of the parties, who were advised by the police to not communicate with each other directly.

[40] Based on the representations before me, I find that the police compiled the report, including the information at issue, as part of an investigation into a possible violation of the law, namely, a possible "uttering of a threat" offence, contrary to the Criminal Code. This is not altered by the fact that the call to police was originally classified as a "threat in progress" and then changed to a "disturbance call". The police,

⁸ Orders P-242 and MO-2235.

⁹ Orders MO-2213, PO-1849 and PO-2608.

¹⁰ Orders M-734, M-841, M-1086, PO-1819 and MO-2019.

¹¹ Order MO-2147.

¹² Orders PO-1706 and PO-2716.

as part of their law enforcement role, compiled the information in the record specifically describing the incident with a view to assessing whether charges were warranted, regardless of the fact that criminal proceedings were not commenced and the decision not to do so was made when the information was recorded.

[41] Accordingly, section 14(3)(b) applies and the disclosure of the information at issue is presumed to be an unjustified invasion of personal privacy for the purposes of section 38(b). 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 this presumption along with any factors in section 14(2).¹³

Section 14(2)

[42] Having found above that the presumption in section 14(3)(b) applies to the information at issue, I will also consider the factors listed in section 14(2) of the *Act* that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy.

[43] If established, the factors in paragraphs (a), (b), (c) and (d) of section 14(2), generally weigh in favour of disclosure, while those in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection.¹⁴ The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹⁵

[44] The police submit that the “supplied in confidence” factor at section 14(2)(h) applies to the information at issue, while the affected parties submit that the “highly sensitive” factor at section 14(2)(f) applies to the information at issue, each of which generally weighs against disclosure, if found to apply.

[45] The appellant submits that the factors at sections 14(2)(d) (fair determination of rights), 14(2)(e) (pecuniary or other harm), 14(2)(i) (unfair damage to reputation) and 14(2)(g) (inaccurate or unreliable) apply to the information at issue. The factor in section 14(2)(d) typically weighs in favour of disclosure, if found to apply, and I will consider it below. The other three factors, if found to apply, typically weigh against disclosure, which is not the position of the appellant.¹⁶ Accordingly, I will consider the appellant’s representations related to these additional factors as unlisted factors below, and determine how much weight I will give them, in the circumstances of this appeal.

¹³ Order MO-2954.

¹⁴ Order P-2265.

¹⁵ Order P-99.

¹⁶ See Order P-559, which found that the factor of unfair pecuniary or other harm at section 21(2)(e), the provincial equivalent of section 14(2)(e), was to be taken into account only in favour of privacy protection and is not intended to favour disclosure of personal information; and Order PO-2271, which found that the factor of information unlikely to be accurate at section 21(2)(g), the provincial equivalent to section 14(2)(g), is intended to weigh against disclosure, where the information is unlikely to be accurate or reliable, and is not intended to assist a requester in arguing that information should be disclosed.

[46] The sections related to the factors raised by the parties 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,

...

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

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

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

(i) the disclosure may unfairly damage the reputation of any person referred to in the record....

Section 14(2)(d): fair determination of rights

[47] The appellant submits that the factor of fair determination of rights in section 14(2)(d) of the *Act* applies in favour of disclosure. For section 14(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹⁷

¹⁷ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

[48] The appellant submits that she is requesting the information at issue because she believes the affected parties made a false police report following the incident, to justify their actions during the incident. She explains that the letter the affected parties wrote in the context of the civil litigation makes a false claim about the interaction between the parties because it seems to suggest that her spouse admitted to the police that he initiated the conflict with the affected parties. The appellant also explains that she would like the opportunity to correct the record if the affected parties reported false information to the police, to ensure it is accurate. She believes that she should have the right to address any false claims made by the affected parties to the police.

[49] In response, the police explain that the appellant may not request that the police "correct" a third party's version of events; however, at any time, she may have a statement of disagreement attached to the record to reflect *her* version of events.

[50] Based on the appellant's representations, I am not persuaded by the appellant's argument that the factor at section 14(2)(d) applies to the information at issue. I note that the appellant has not indicated that she requires the information at issue for the current civil litigation proceedings between the parties; rather she seeks to correct any false information the affected parties provided to the police.

[51] I am also not satisfied that the appellant has established that the information at issue has some bearing on or is significant to the determination of the right in question, or that it is required in order to prepare for the proceeding or to ensure an impartial hearing (the third and fourth parts of the test). Specifically, although the appellant believes that the affected parties provided false information to the police, she has not explained how or why the information at issue is required for her to commence any contemplated proceedings, or to prepare for the proceeding or to ensure an impartial hearing. In my view, the potential to seek correction is not generally relevant to determining whether the factor of fair determination of rights at section 14(2)(d) applies. As I noted above, the appellant has also not explained how the information at issue relates to her current civil proceedings with the affected parties. In any case, the appellant may seek the information through the court's discovery mechanisms if it is relevant in that context.

[52] In order for section 14(2)(d) to apply, all four part of the test must be established. Since the appellant has not persuaded me that all four parts of the section 14(2)(d) test have been met, I find that section 14(2)(d) does not apply to weigh in favour of the disclosure of the information at issue in this appeal.

Section 14(2)(f): highly sensitive

[53] The affected parties submit that the factor of highly sensitive in section 14(2)(f) of the *Act* applies.

[54] To be considered highly sensitive, there must be a reasonable expectation of

significant personal distress if the information is disclosed.¹⁸

[55] The affected parties submit that the information at issue is sensitive in nature because it contains the statements they made to police. While the appellant submits that the information at issue may be considered "sensitive", she submits that it is not *highly* sensitive. The appellant appears to be suggesting that the circumstances of this appeal do not indicate that there is a "reasonable expectation of significant personal distress if the information is disclosed." While the police agree that the information at issue is sensitive, they do not indicate whether this is a factor in favour or against disclosure.

[56] Based on my review of the information at issue and the representations, I find that the information at issue is highly sensitive because there is a reasonable expectation that disclosure of the information at issue would cause significant personal distress to the affected parties. Given the context in which it was gathered, the information at issue is inherently highly sensitive and, therefore, the factor at section 14(2)(f) is relevant to the determination of whether it should be disclosed. Accordingly, I find that the factor at section 14(2)(f) applies to the information at issue and weighs against disclosure of the information at issue.

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

[57] This factor 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.¹⁹

[58] The police submit that the information at issue was supplied to the police in confidence. They submit that:

...it is reasonable to assume that the public expects that what they say to a police officer will be held in confidence. If they didn't, I don't think anyone would speak to the police. There are times, albeit, when parties ask that the police convey their statement(s) to the other party involved. It was not the case here. The fact that the [affected parties] denied consent to releases their personal information seems...to confirm this.

[59] The appellant appears to submit that this factor should not apply because, as indicated above, she believes the affected parties provided false information to the police, based on the letter the affected parties wrote in the context of the civil proceedings.

[60] Based on the information at issue and the representations of the parties, I find

¹⁸ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁹ Order PO-1670.

that the section 14(2)(h) factor applies against disclosure.

[61] In Order M-167, the adjudicator found that not all information collected by the police during the course of a law enforcement investigation is presumed or understood to have been obtained in confidence. In addition, in Order MO-2830, the adjudicator found that whether an individual supplied their 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.

[62] In the particular circumstances of this appeal, the information at issue includes statements made by the affected parties to the police during an investigation, which, as noted above, is highly sensitive in nature. I note the nature of the incident that took place between the parties and the adversarial relationship between them. I also note that the police did not lay criminal charges against any party and this matter did not go to criminal court. Accordingly, I am satisfied that the affected parties and the police had a reasonable expectation that the information at issue would be received and maintained in confidence and that this expectation was reasonable in the circumstances.

[63] The appellant believes the section 14(2)(h) factor does not apply because the affected parties provided false information to the police. I disagree. Even if this was a relevant consideration for this factor, I do not accept that the letter supports her belief, nor has she provided me with other evidence to support her belief.

[64] In the circumstances, I accept that the affected parties and the police had reasonable expectation of confidentiality that the information at issue would be held in confidence. Therefore, I find that the factor at section 14(2)(h) applies to the information at issue and weighs against its disclosure.

Other factors/relevant circumstances

[65] In previous orders, considerations which have also been found relevant in determining whether the disclosure would be an unjustified invasion of personal privacy include:

- inherent fairness issues;²⁰
- ensuring public confidence in an institution;²¹
- personal information about a deceased person;²² and
- benefit to unknown heirs.²³

²⁰ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

²¹ Orders M-129, P-237, P-1014 and PO-2657.

²² Orders M-50, PO-1717, PO-1923, PO-1936 and PO-2012-R.

[66] As noted above, I will consider the appellant's additional representations, which she submits weigh in favour of disclosing the information at issue, and determine how much weight I will give them, in the circumstances of this appeal.

[67] The appellant submits that the information given by the affected parties to the police is inaccurate or unreliable. She explains that if the information at issue is consistent with the contents of the letter the affected parties wrote in the context of the civil proceedings, then it is false, whereas if it is not, then the affected parties reported two different versions of the same event. She also submits that if the affected parties provided false information to the police, she is concerned that this could affect volunteer or employment opportunities for her and her spouse, and could cause harm and unfairly damage their reputation, from a financial, professional and reputational perspective.

[68] The police respond that they cannot speak to the accuracy of the information at issue.

[69] In Order MO-1466, the adjudicator found that, where the requester submits that an institution has received incorrect information about them and continues to share it with other institutions, and the requester wishes to obtain access to the information in order to request a correction, this is a relevant unlisted factor favouring disclosure. However, I note that the adjudicator also found that this factor carried little weight, as the appellant in that appeal had been made aware of the contents of the evaluation records and the reasons for his not being considered as a suitable candidate for employment by the police force in that appeal. While I adopt a similar approach here, I am mindful that the records sought in that appeal are different from the information at issue in the current appeal, and the circumstances are different too, as there is no evidence before me that the police have been sharing the information at issue with other institutions.

[70] Based on my review of the information at issue and the representations, I am prepared to accept the appellant's position, in part. I appreciate that the appellant believes that disclosure of the information at issue would provide her with access to what the affected parties said to police about the incident. However, I agree with the police when they state that they are unable to speak to the accuracy or reliability of the information at issue, given that the affected parties provided it to the police based on their subjective recollection of the incident. In the circumstances, it is difficult to see how this particular information would be relied on to the detriment of the appellants. As a result, I give this factor minimal weight in favour of disclosure in the circumstances.

Summary of findings related to sections 14(3) and 14(2)

[71] I have found that the presumption in section 14(3)(b) applies and the factors at

²³ Orders P-1493, PO-1717 and PO-2012-R.

sections 14(2)(f) and (h) also weigh against disclosure of the information at issue. While I have found that none of the listed factors in section 14(2) weighs in favour of disclosure, I have found some unlisted factors raised by the appellant apply in favour of disclosure, although I only give them low weight. Balancing the interests of the parties, I find that the disclosure of the information at issue would be an unjustified invasion of person privacy under section 38(b), subject to the absurd result principle, which I consider next.

Absurd result

[72] Where the requester originally supplied the information or the requester is otherwise aware of it, the information may not be exempt under section 38(b) because to withhold the information would be absurd and inconsistent with the purpose of the exemption.²⁴

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

- the requester sought access to his or her own witness statement,²⁵
- the requester was present when the information was provided to the institution,²⁶ and
- the information is clearly within the requester's knowledge.²⁷

[74] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.²⁸

[75] The police submit that the absurd result principle does not apply to the information at issue because the information at issue is not within the appellant's knowledge.

[76] The appellant submits that the disclosure of the information at issue would not result in an invasion of privacy because all of the parties were present during the interaction. She believes that the information at issue has been disclosed to the appellant already based on the letter the affected parties wrote in the context of the civil proceedings.

[77] In response, the police submit that it is clear from the appellant's representations that she does not know the contents of the information at issue. In support of this, it points to her representations that use such statements as "I suspect", "I have reason to

²⁴ Orders M-444 and MO-1323.

²⁵ Orders M-444 and M-451.

²⁶ Orders M-444 and P-1414.

²⁷ Orders MO-1196, PO-1679 and MO-1755.

²⁸ Orders M-757, MO-1323 and MO-1378.

believe”, “may have given a false report”, “if a statement was made”, “in order to confirm if a false report...was...made” and “we are unclear”. It submits that the appellant has a suspicion as to what the information at issue may contain based on the contents of the letter and she seeks access to it to determine its content.

[78] Also in response, the affected parties submit that it is “entirely inaccurate” to claim that the information at issue is contained in the contents of the letter. They submit that the information at issue contains statements they made to the police and this information is not contained in the contents of the letter.

[79] In sur-reply, the appellant admits she has not seen the information at issue, hence, she is requesting it. She submits however that the absurd result principle applies because she was present during the interaction with the affected parties and she knows what occurred and what was said, which should be reflected in the record. As the contents of the letter indicate the affected parties’ version of events related to the interaction, she submits that the letter is relevant to the application of the absurd result principle.

[80] Based on my review of the information at issue and the representations of the parties, I am of the view that it would not be absurd to withhold the information at issue from the appellant in the circumstances.

[81] The appellant submits that the absurd result principle applies to the information at issue because all of the parties were present during the incident and certain information has been disclosed to the appellant already in the contents of the letter. I do not agree with the appellant’s position. I agree with the police that the information at issue is not within the appellant’s knowledge. I also agree with the affected parties that the information at issue is not revealed in the letter.

[82] I am not convinced that the appellant already knows the information at issue. Even if the appellant is aware of some of this information, in my view, the absurd result principle has no application in the circumstances of this appeal. The appellant did not provide the information at issue. She has not established that she is otherwise aware of the information at issue. I find that it would not be contrary to the purpose of the personal privacy exemption to withhold the information at issue. Accordingly, I find that the absurd result principle does not apply given the circumstances of this appeal.

[83] I find that the discretionary exemption in section 38(b) of the Act applies to the information at issue, subject to my review of the police’s exercise of discretion below.

Section 4(2) - severability obligation

[84] The police severed the record and disclosed the appellant’s own personal information to her, and that of her spouse with their consent, except for the information provided to the police by the affected parties about the appellant and her spouse. These comments contain the personal information of both the affected parties and the

appellant and her spouse, and this information is closely intertwined.

[85] Section 4(2) of the *Act* requires the police to disclose as much of the information at issue to the appellant as can reasonably be severed without disclosing the information that falls under section 38(b). This provision states, in part:

If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15, ...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.

[86] I have found that the affected parties' personal information is exempt from disclosure under section 38(b) of the *Act* because disclosing it to the appellant would constitute an unjustified invasion of their personal privacy. In accordance with section 4(2), the appellant's personal information, and that of her spouse, that is found in the information at issue must be disclosed to her if those portions can reasonably be severed without disclosing the affected parties' personal information that falls under section 38(b).

[62] Because the personal information of the affected parties, and the appellant and her spouse, in the information at issue is closely intertwined, I find that those parts of the information at issue cannot reasonably be severed without disclosing the personal information of the affected parties that falls under section 38(b). In these circumstances, I find that the police have disclosed as much of information at issue as reasonably can be severed and I uphold their decision to refuse disclosure of the appellant's personal information and that of her spouse, in the information at issue.

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

[87] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

[88] In either case, the IPC may send the matter back to the institution for an

exercise of discretion based on proper considerations.²⁹ However, the IPC may not substitute its own discretion for that of the institution.³⁰

[89] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant and additional unlisted considerations may be relevant:³¹

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking their own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations of the parties

[90] The police submit that they exercised their discretion under section 38(b) of the *Act*. They explain that they considered the fact that individuals should have a right of access to their own personal information and that privacy should be protected. They also explain that they attempted to give the appellant as much access as possible to her

²⁹ Order MO-1573.

³⁰ Section 43(2).

³¹ Orders P-344 and MO-1573.

own personal information, while trying to protect the privacy of the affected parties, who expressed not wanting their personal information released to the appellant. In addition, they explain they considered that the relationship between the appellant and the affected parties is adversarial. The police indicate that they are not aware of any sympathetic or compelling need on the part of the appellant to receive the information at issue.

[91] The appellant submits that when the police exercised their discretion, they did not know the reason why the appellant was requesting the information at issue. As noted above, the appellant explains that she is requesting the information at issue because she believes the affected parties made a false police report to justify their actions. She explains that the police failed to take into account this relevant consideration when they exercising their discretion, meaning that they did not have all of the information when they made their decision not to release the requested information.

[92] In response, the police submit that they did not consider this factor in their exercise of discretion because they cannot speak to the accuracy of the information at issue.

Analysis and findings

[93] Since the section 38(b) exemption is discretionary, and permits the police to disclose the information at issue, despite the fact that it could withhold it, I considered the police's exercise of discretion.

[94] The appellant submits that the police did not have all of the relevant factors, including why the appellant was seeking access to the requested information, at the time they exercised their discretion not to disclose the information at issue to her. The appellant has now advised the police, as part of this appeal, that she seeks the information at issue because she believes the affected party provided false information to police. In response, the police submit that, as they cannot speak to the accuracy of the information at issue, this is not a factor to be considered in their exercise of discretion.

[95] Based on the circumstances of this appeal, the police's exercise of discretion to withhold the information at issue under section 38(b) is consistent with the purposes of the *Act* and previous IPC jurisprudence. In exercising their discretion to apply that exemption to withhold the information at issue, the police properly weighed the appellant's right of access to her own personal information (and that of her spouse on consent) against the affected parties' right to privacy.

[96] In these circumstances, I am satisfied that the police exercised their discretion in denying access to the information at issue under section 38(b) and did so appropriately. I find that they took relevant factors in account in exercising their discretion, and there

is no evidence before me to suggest that they exercised their discretion in bad faith or for an improper purpose, or that they took into account irrelevant considerations. I accept the police's position that they did not consider the accuracy of the information at issue as part of their exercise of discretion, and I see no error in that assessment in the circumstances.

[97] Accordingly, I uphold the police's exercise of discretion under section 38(b) of the Act.

ORDER:

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

Original Signed by: _____

Valerie Silva
Adjudicator

_____ May 16, 2022