

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4370

Appeal MA21-00747

Peel Regional Police Services Board

April 25, 2023

Summary: The police received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related a specified occurrence. The police denied access to the records pursuant to section 38(b) (personal privacy) of the *Act*. In this order, the adjudicator upholds the police's decision in part. She finds that some of the information withheld under section 38(b) is not exempt and orders the police to disclose it to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. M.56, as amended, sections 14(2)(d), 14(2)(f), 14(2)(h), 14(3)(b), and 38(b).

OVERVIEW:

[1] The Peel Regional Police Services Board (the police) received a request under the *Act* for all documents related to a specified occurrence.

[2] The police issued a decision denying access to the responsive records pursuant to section 38(b) (personal privacy) of the *Act*. In their decision, the police acknowledged that the requester had asked that the parties named in the file be contacted to obtain consent to disclose their personal information to the him. The police stated that "attempts to contact the individuals were met with negative results" and that they were therefore unable to release these individuals' personal information to the requester.

[3] The requester, now the appellant, appealed the police's decision to the

Information and Privacy Commissioner of Ontario (IPC).

[4] During mediation, the police confirmed that no consent was obtained at the request stage and that they would not seek consent again at the mediation stage. The police also advised that the subject of the occurrence report was a missing person's investigation, and provided some context as to the appellant's appearance in the report. The appellant subsequently advised the mediator that he would still like to proceed with the appeal.

[5] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage.

[6] The adjudicator originally assigned to this appeal decided to conduct an inquiry. She sought and received representations from the police. The appeal was then assigned to a different adjudicator, who sought and received representations from the appellant. The file was then assigned to me to continue the adjudication of the appeal.¹

[7] In this order, I uphold the police's decision in part. I order the police to disclose to the appellant personal information that relates only to him. I otherwise uphold the police's severances.

RECORDS:

[8] The records at issue in this appeal relate to a 2015 missing person's incident and include the following:

- An occurrence report (11 pages); and
- Police officers' notes (19 pages)

ISSUES:

- A. Does the record 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 information at issue?

¹ I have reviewed the parties' representations and concluded that I do not need further representations before rendering a decision.

DISCUSSION:

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

[9] As noted above, the police withheld information on the basis that it is exempt from disclosure under section 38(b). In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains “personal information,” and if so, to whom the personal information relates. As I explain below, I find that the records contain the personal information of the appellant and a number of affected parties.

[10] 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 or electronic records.²

[11] 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.³

[12] The term “personal information” is defined in section 2(1) of the *Act*, and reads in part:

“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,

(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,

² See the definition of “record” in section 2(1).

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

(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.

[13] The list of examples of personal information under section 2(1) is not a complete list. Other kinds of information could also be "personal information."⁴

Representations, analysis and findings

[14] The police submit that the records relate to a police investigation into a complaint of a missing person and that it would be reasonable to expect that several affected parties may be identified based on the information in the records. They note that the records contain minimal personal information relating to the appellant, who was not successfully contacted during the investigation.

[15] The police submit that the majority of the personal information in the records relates to affected parties, and includes their names, ages, dates of birth, race, family and relationship statuses, medical information, employment information, criminal record queries, home addresses, telephone numbers, and interview notes containing their personal opinions made to the police.

[16] The appellant does not make representations with respect to this issue.

[17] I have reviewed the records and find that all of them contain the personal information of the appellant and affected parties. In particular, I find that the records contain information about the appellant that fits under paragraphs (d), (g) and (h) of the definition of personal information in section 2(1) and information about other identifiable individuals that fits under paragraphs (a), (b), (d), (e), (g) and (h).

Appellant

[18] Based on my review of the records, I find that the appellant's name, in the context of an occurrence report, is personal information that relates only to the appellant. I find that this information, which appears on page 7 of the occurrence report, constitutes his personal information under paragraph (h) of the definition of that term in section 2(1) of the *Act*.

[19] The personal privacy exemption in section 38(b) can only apply to the personal information of an individual other than the requester. As this information only relates to the appellant, I find that it cannot be withheld from him under section 38(b).

⁴ Order 11.

Affected parties

[20] I have reviewed the records and the police's representations, and find that the records contain the personal information of affected parties, including their names, identifying information and views and opinions recorded during the investigation at issue. The affected parties' personal information appears throughout the occurrence report and the police officers' notes, which, as mentioned above, were entirely withheld by the police. Where this information is intertwined with the personal information of the appellant, it is not reasonably severable from it.

[21] I have found that the records contain the personal information of the appellant mixed with the information of the affected parties. I will therefore consider whether the latter is exempt under section 38(b) under Issue B below.

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

[22] 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.

[23] Under the section 38(b) exemption, 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. 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).

[24] Since the section 38(b) exemption is discretionary, the institution may 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.

[25] I found above that the records contain the personal information of affected parties, both on its own and intertwined with the appellant's information. For the reasons that follow, I find that section 38(b) applies to this information because its disclosure would amount to an unjustified invasion of the affected parties' personal privacy.

Would disclosure be "an unjustified invasion of personal privacy" under section 38(b)?

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

[27] 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). Based on my review of the records and the parties' representations, I find these exceptions do not apply in the circumstances.

[28] 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. I also find that none of the situations described in section 14(4) apply in the circumstances.

[29] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the decision-maker⁵ must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁶

[30] The police submit that the presumption at section 14(3)(b) and the factors at sections 14(2)(f) (highly sensitive) and 14(2)(h) (supplied in confidence) are applicable in the circumstances. Though the appellant does not specifically address this issue in his representations, he submits that he wishes to have access his own personal information, and that information revealing the identities of other parties may be redacted in accordance with the *Act*. In addition, he submits that the information at issue in this appeal is essential to a civil matter he has in Superior Court, suggesting that section 14(2)(d) (fair determination of rights) may be applicable.

Section 14(3) - is disclosure presumed to be an unjustified invasion of personal privacy?

[31] Sections 14(3)(a) to (h) list several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 38(b). The police submit that the presumption at section 14(3)(b) is applicable in this appeal. Section 14(3)(b) states:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[32] This presumption requires only that there be an investigation into a *possible* violation of law.⁷ Even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.⁸

⁵ The institution or, on appeal, the IPC.

⁶ Order MO-2954.

⁷ Orders P-242 and MO-2235.

⁸ The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).

Representations, analysis and finding

[33] The police submit that the personal information in the records is exempt as it “was compiled and is identifiable as part of an investigation into a possible violation of law,” as specified in section 14(3)(b). They argue that the records contain police officers’ notes, criminal records queries, interview notes and reference to evidence pertaining to a missing person’s investigation, which they submit is inherently sensitive in nature. The police submit that the section 14(3)(b) presumption requires only that there be an investigation into a possible violation of law, and is applicable even if criminal proceedings were never ultimately pursued. They note that the relevant investigative statute was the *Criminal Code of Canada*.

[34] The police further submit that since section 14(3)(b) applies, disclosure of the information at issue is presumed to be an unjustified invasion of privacy. Citing *John Doe v. Ontario (Information and Privacy Commissioner)*,⁹ the police submit that the presumption may not be rebutted by the factors in section 14(2), and while it may be rebutted by one of the situations in section 14(4), none apply.

[35] Firstly, *John Doe v. Ontario (Information and Privacy Commissioner)* sets out the process to follow where a request is for another individual’s personal information. It is not applicable in the circumstances as the appellant seeks access to his own personal information. As such, I will consider the section 14(2) factors raised by the parties below.

[36] Based on my review the parties’ representations and the records, I agree with the police that section 14(3)(b) applies. The report and police officers’ notes were compiled and are identifiable as part of an investigation into a possible violation of the *Criminal Code*, and in response to a report of a missing person. As the police point out, the presumption applies even if the investigation did not lead to criminal proceedings. Section 14(3)(b) requires only that there be an investigation into a possible violation of law, which is the case here. Accordingly, I find the section 14(3)(b) presumption applies to the personal information contained in the records and weighs against its disclosure.

Section 14(2): Do any factors in section 14(2) help in deciding if disclosure would be an unjustified invasion of personal privacy?

[37] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.¹⁰ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[38] 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

⁹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

¹⁰ Order P-239.

not listed under section 14(2).¹¹

[39] Each of the first four factors, found in sections 14(2)(a) to (d), if established, would tend to support disclosure of the personal information in question, while the remaining five factors found in sections 14(2) (e) to (i), if established, would tend to support non-disclosure of that information.

[40] The police submit that none of the factors listed under sections 14(2)(a) to (d), which tend to weigh in favour of disclosure, are present in this appeal. According to the police, the only relevant factors in the circumstances are the ones at sections 14(2)(f) and (h), both of which weigh against disclosure of the records.

14(2)(f): the personal information is highly sensitive

[41] This section is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.¹² For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.¹³

[42] The police submit that section 14(2)(f) applies, as the records contain personal information about witnesses, complainants, or suspects in a police investigation that could result in significant personal distress if disclosed. I agree.

[43] Based on my review of the records, the affected parties interacted with police officers as complainants, witnesses or suspects. In addition, I note that the affected parties' personal information was gathered in the course of a missing person's investigation, which, in my view, is a highly sensitive context. I find it reasonable to expect that disclosure of this personal information would cause the affected parties significant personal distress in the event that it was disclosed. Accordingly, I find that the section 14(2)(f) factor applies and weighs in favour of non-disclosure.

14(2)(h): the personal information was supplied in confidence

[44] This section weighs against disclosure 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. This requires an objective assessment of whether the expectation of confidentiality is "reasonable."¹⁴

[45] The police submit that section 14(2)(h) applies, as the records contain the personal information of affected parties which these parties supplied in confidence.

¹¹ Order P-99.

¹² Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹³ Order MO-2980.

¹⁴ Order PO-1670.

According to the police, both the affected parties and recipients of the information (in this case police officers) had a reasonable expectation that the information would be treated confidentially, both due to the private nature of the conversations between the parties and the recipients' law enforcement roles. The police submit that an objective assessment would find this expectation was reasonable in the circumstances.

[46] I agree with the police and find that the affected parties supplied personal information to the police in confidence. I note that the affected parties provided highly sensitive information to police officers, in the context of a missing person's investigation. I further note that the investigation did not lead to charges or court proceedings. Accordingly, I find that the affected parties and the police officers who interacted with them had a reasonable expectation that the information provided would remain confidential, and that section 14(2)(h) applies and weighs in favour of non-disclosure.

14(2)(d): the personal information is relevant to the fair determination of requester's rights

[47] This section supports disclosure of someone else's personal information where the information is needed to allow them to participate in a court or tribunal process. Though the appellant does not explicitly raise section 14(2)(d), he alludes to it in his representations.

[48] The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four parts of the test must be met:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information significant to the determination of the right in question?
4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?¹⁵

[49] The appellant did not address the four-part test in his representations, although he does state that the information at issue is essential to a civil matter he has in Superior Court, in which the police and the Ministry of the Attorney General are also

¹⁵ See 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.).

parties. He also refers to a process under the *Rules of Civil Procedure*¹⁶ through which he can obtain relevant information by a judge's order.

[50] I find that section 14(2)(d) does not apply in this case. The appellant states that the information he seeks is essential to a civil matter before the Superior Court, but otherwise provides no additional information addressing the four-part test. The appellant also raises the possibility of obtaining the information he seeks through another disclosure process. The IPC has found in previous orders that the existence of disclosure processes available to parties under the *Rules of Civil Procedure* reduces the weight to be given to the section 14(2)(d) factor.¹⁷ Consequently, had the appellant made out all four parts of the test, I would have accorded this factor little weight.

[51] I found above that disclosure of the information at issue would be a presumed unjustified invasion of privacy under section 14(3)(b), and that the factors at sections 14(2)(f) and (h) weigh in favour non-disclosure. Given the lack of factors weighing in favour of disclosure, the sensitivity of personal information compiled in the context of a missing person's investigation, and the reasonable expectation that this information would remain confidential, I find that disclosure would amount to an unjustified invasion of the affected parties' privacy. Accordingly, the occurrence report and police officers' notes are exempt under section 38(b) (aside from the appellant's name on page 7 of the occurrence report).

Severability of the records

[52] In making my determinations, I have also considered the police's obligation under section 4(2) to disclose as much of the records as can reasonably be severed without disclosing information that is exempt under the *Act*. In my view, aside from the information I have found should be disclosed, the appellant's personal information is so intertwined with the affected parties' that any possible disclosure would amount to meaningless or disconnected snippets, which the police is not required to disclose.¹⁸

The police's exercise of discretion under section 38(b)

[53] As the section 38(b) exemption is discretionary, the police can decide to disclose information even if the information qualifies for exemption. On appeal, the IPC may determine whether the police erred in exercising its discretion where, for example, they do so in bad faith or for an improper purpose, take into account irrelevant considerations, or fail to take into account relevant considerations.

[54] The police submit that they properly exercised their discretion, in complying with the relevant provisions of the *Act*, and determining that disclosure of the information at

¹⁶ R.R.O. 1990, Reg. 194, Rule 30.10.

¹⁷ Orders MO-2943 and PO-1715.

¹⁸ Order PO-1663 & *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)

issue would constitute an unjustified invasion of the affected parties' personal privacy interests. The police state that they demonstrated good faith in attempting to contact the affected parties to obtain their consent to disclosure prior to issuing its decision.

[55] The appellant did not address the police's exercise of discretion in his representations.

[56] I find that the police exercised its discretion in good faith, taking into account relevant considerations. In making its decision, the police considered the purpose of section 38(b), the affected parties' privacy interests, and the sensitive and confidential nature of the information at issue. There is no evidence before me to suggest that the police took into account irrelevant considerations or that it exercised its discretion in bad faith. Accordingly, I uphold their exercise of discretion.

ORDER:

1. I order the police to disclose to the appellant the information highlighted in the copy of the records included with the police's copy of this order by **May 25, 2023**.
2. I otherwise uphold the police's decision.
3. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the records disclosed to the appellant.

Original signed by: _____

Hannah Wizman-Cartier
Adjudicator

April 25, 2023 _____