

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4475

Appeal MA22-00258

Port Hope Police Services Board

December 21, 2023

**Summary:** The Port Hope Police Services Board (the police) received a request under the *Act* for reports made to the police by a named individual. The police granted partial access to records, but withheld emails sent by the named individual to the police, along with police responses, under sections 38(a) (discretion to refuse requester's own information), read with 8(1)(e) (endanger life and safety), and section 38(b) (personal privacy).

In this order, the adjudicator finds that the emails are exempt from disclosure under section 38(b) 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) (personal information), 14(1), and 38(b).

**Orders Considered:** Orders MO-2980, MO-3911, and PO-3458.

### OVERVIEW:

[1] The Port Hope Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any report made to the police by a named individual (the complainant) about the requester between two specified dates. The complainant had previously contacted the police with concerns about the requester's behaviour towards her.

[2] The police issued a decision granting partial access, disclosing some records and

an index to the requester. The police denied access to a general occurrence report and portions of an officer's notebook pages.

[3] During the request stage, the police issued a revised decision and index after locating a related email (email 5). In addition to denying access to the general occurrence report and officer's notebook pages, they denied access, in full, to email 5 under section 38(b) (personal privacy).

[4] The requester (now the appellant) appealed the decision to the Information and Privacy Commissioner of Ontario (IPC). At mediation, the appellant informed the mediator that they were only seeking access to emails involving the complainant's report to the police. As such, the general occurrence report and the redactions to the officers' notebook pages are no longer at issue in the appeal.

[5] The police conducted an additional search during mediation, locating two additional emails (email 7 and email 8), and issued a decision and a revised records index. The police withheld email 7 under section 38(a) (discretion to refuse requester's own information) read with section 8(1)(e) (endanger life and safety), and section 38(b). The police withheld email 8 under section 38(b). With respect to email 5, the police clarified with the mediator that they are relying on section 38(a), read with section 8(1)(e), and section 38(b) to deny access.

[6] Further mediation was not possible, and the appeal was moved to the adjudication stage, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry. I sought and received representations from both parties and representations were shared in accordance with the IPC's *Code of Procedure*. I determined that I did not need to seek representations from the complainant or other individuals named in the records.

[7] For the reasons that follow, I uphold the police's decision and dismiss the appeal.

## **RECORDS:**

[8] The records remaining at issue are three emails, consisting of four pages in total and identified as emails 5, 7, and 8 by the police (the emails).

## **ISSUES:**

- A. Do the emails 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 personal information at issue?
- C. Did the police exercise their discretion under section 38(b)?

## **DISCUSSION:**

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

[9] Because of the exemption claims made by the police, I must first determine whether the records contain “personal information.” If they do, I must determine whether the personal information belongs to the appellant, other identifiable individuals, or both. “Personal information” is defined in section 2(1) of the *Act* as “recorded information about an identifiable individual.”

[10] 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. 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.<sup>1</sup> Section 2(1) of the *Act* gives a list of examples of personal information.

[11] The police submit that email 5 contains the personal information of the complainant and that it is reasonable to expect that the complainant could be identified from the information in the emails. They submit that email 7 contains the personal information of both the complainant and the appellant. They did not provide representations on whether email 8 contained personal information. The appellant did not provide specific representation on whether the emails contained personal information.

[12] I have reviewed the records and I find that email 5 contains the personal information of both the appellant and the complainant, with their names both contained in the email. Additionally, the email contains information about the appellant’s alleged conduct towards the complainant, and the complainant’s feelings about the appellant.

[13] Emails 7 and 8 do not specifically mention the appellant by name, but otherwise contain sufficient detail to identify her, particularly when combined with the surrounding context of the emails. Additionally, the appellant’s alleged conduct towards the complainant and the complainant’s feelings about the appellant are contained in the emails. All of the emails also contain the names and other contact information of police officers and other city staff. However, this information is in a professional context, which has been found to not be “about” an individual for the purposes of section 2(1).<sup>2</sup>

[14] Considering the above, I find that the emails are records containing the mixed information of the appellant and the complainant.

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<sup>1</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

[15] Having found that the emails contain the personal information of the appellant and the complainant I will now consider if they are exempt from disclosure under section 38(b). 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.

[16] 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.<sup>3</sup>

[17] The section 38(b) exemption is discretionary. This means that the institution can 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.

[18] 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). Additionally, the requester's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.<sup>4</sup>

[19] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b). If any of the five exceptions in sections 14(1)(a) to (e) apply, the section 38(b) exemption does not apply to the report. The police submit that these exceptions do not apply, and the appellant did not dispute this. I agree and find that none of these exceptions apply to this appeal.

[20] Section 14(2) provides a list of factors for the police to consider in making this determination, while section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. In their representations, the police have relied on or discussed the presumption in section 14(3)(b) and the factors in sections 14(2)(e), (f), (h), and (i):

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

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<sup>3</sup> However, the requester's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy; Order PO-2560.

<sup>4</sup> Order PO-2560.

(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

(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,

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

(f) the personal information is highly sensitive

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

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

[21] Section 14(4) sets out certain types of information whose disclosure is not an unjustified invasion of personal privacy. The police submit that none of the paragraphs in section 14(4) apply to the information at issue and the appellant did not dispute this. I agree and find that none of the situations described in section 14(4) are applicable in this appeal.

[22] In determining whether the disclosure of the emails would be an unjustified invasion of personal privacy under section 38(b), therefore, I will consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>5</sup>

## ***Representations***

### *Police representations*

[23] The police submit that the personal information in the emails is identifiable as part of an investigation into a possible violation of law, specifically possible charges under the *Criminal Code* for harassment or threatening, engaging the presumption in section 14(3)(b). They submit that these emails would constitute the first part of an investigation, specifically the gathering of information from a complainant to determine if charges should be laid. They submit that the emails were received, answered, and compiled by a police inspector as part of a possible investigation, and they note that the IPC has previously held that charges do not have to be laid to engage this

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<sup>5</sup> Order MO-2954.

presumption.<sup>6</sup>

[24] The police submit that none of the factors favouring disclosure apply to the emails. Referring to section 14(2)(d) (fair determination of rights) specifically, they state that there is no information in the original request that the appellant wants the information for court purposes, and even if she does, there are other avenues available to obtain this information.<sup>7</sup>

[25] The police also submit that the section 14(2)(f) (highly sensitive) factor is relevant to the appeal, stating that the complainant feeling threatened, harassed, and intimidated by the appellant is highly sensitive in nature. They state that the complainant would feel personal distress if the information was released to the appellant. Referencing Order MO- 2980, they submit that personal information about witnesses, complainants, or suspects in a police investigation may be considered highly sensitive, supporting withholding the information. Similarly, the police submit that section 14(2)(e) (exposure to unfair pecuniary or other harm) is relevant to this appeal, since it could lead to mental stress to the complainant, and the appellant might commence legal action against the complainant if the emails were disclosed.

[26] The police state that the emails were sent by the complainant to the police in confidence regarding a potential criminal investigation, engaging the factor in section 14(2)(h). Citing Order PO-1670, they submit that this factor applies if both the individual supplying the information and the recipient had an expectation of confidentiality that is reasonably in the circumstances.

[27] They submit that when complainants provide information to the police there is an inherent belief that their personal information will be used for that particular purpose and will not be released without their knowledge for another purpose, such as an access request. They state that if the personal information of complainants and witnesses were to be released without their knowledge, individuals may stop contacting the police about their concerns. They also note that one of the responses from the police to the complainant contained the word "Confidential" in the subject line, assuring the complainant of the confidentiality of the emails.

[28] Last, the police cite section 14(2)(i) as a factor weighing against disclosure, stating that the records could be used by the appellant to damage the reputation of the complainant by "allowing the appellant to show these emails to other like-minded individuals."

[29] With respect to severing parts of the emails, the police submit that they already provided the appellant with as much information as possible while respecting the privacy of the complainant. They further state that they would be willing, if ordered by

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<sup>6</sup> The police refer to Orders MO-2235 and P-242.

<sup>7</sup> The police refer to Order MO-2980, where the adjudicator explained a process for obtaining information in a court proceeding.

the IPC, to disclose information that the appellant is already aware of that the complainant submitted to the police.

*Appellant representations*

[30] The police's representations were provided to the appellant for a response. The appellant's representations generally focused on the relationship between the appellant and the complainant for the purposes of the section 38(a) exemption, and the appellant did not provide specific representations on the application of section 38(b). I have summarized the portions of the appellant's representations that are relevant to section 38(b) below.

[31] The appellant submits that the name of the complainant is already known to her and is stated in the police officer's notes that were already disclosed as part of this access request. With respect to an expectation of confidentiality regarding the information provided by the complainant to the police, the appellant submits that this was done with the expectation that an investigation would commence, negating the expectation of confidentiality.

[32] The appellant also disagrees with the police's submissions regarding the application of the section 14(2)(h) factor, stating that any information that leads to a police investigation and charges is required by law to be disclosed, meaning that it is not supplied in confidence. She submits that the police's submission that disclosing the emails might cause others to not contact the police is baseless.

[33] The appellant further disputes the police's representations regarding the relationship between the appellant and complainant. She provided evidence that they are frequently involved in community projects together and states that any allegations related to harassment are completely without merit, as well as slanderous.

***Analysis and finding***

[34] As stated above, the issue in this appeal is whether disclosure of the emails would be an unjustified invasion of the personal privacy of individuals other than the appellant under section 38(b).

*Presumptions and factors*

Investigation into a possible violation of law

[35] Under section 14(3)(b), the disclosure of an individual's personal information to another individual is presumed to be an unjustified invasion of personal privacy if the personal information:

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

[36] Even if no criminal proceedings were commenced against any individual, as is the case in this appeal, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of the law.<sup>8</sup>

[37] The emails at issue consist of questions about possible criminal activity sent to the police by the complainant, as well as multiple responses from the police. Based on this, I am satisfied that they were compiled as part of an investigation into a possible violation of law; as the police submitted, the gathering of information is clearly part of any investigation, and these represent that preliminary stage.

[38] The appellant states that the nature of the complainant's allegations was meritless. However, even if no charges were ultimately filed, the collection and compilation of these emails by the police was part of the investigation, and the appellant does not dispute that they were sent by the complainant with the knowledge that an investigation could commence. As such, I find that the section 14(3)(b) presumption applies to the emails.

#### Information supplied in confidence

[39] The police point to section 14(2)(h) as a factor weighing against disclosure. 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.<sup>9</sup>

[40] Previous adjudicators have found that personal information provided to the police is generally done so in confidence.<sup>10</sup> I agree with and adopt this reasoning in the present appeal. Additionally, in Order MO-3911 the adjudicator accepted the argument that disclosure of information voluntarily provided to police could discourage members of the public from providing information, engaging the section 14(2)(h) factor. I find that this analysis is applicable to the present appeal.

[41] I am not persuaded by the appellant's submission that there is no expectation of privacy because information collected by police is disclosed if criminal charges proceed. The fact that information provided to police may be disclosed by police in certain circumstances in separate proceedings does not mean that the information itself is not generally provided with an expectation of confidentiality. Additionally, whether such information is disclosed in the context of a criminal proceeding depends on the context

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<sup>8</sup> Orders P-242 and MO-2235.

<sup>9</sup> Order PO-1670.

<sup>10</sup> See, for example, Order MO-3028.



of the proceeding and the information at issue – it is not the case that all information collected by law enforcement is disclosed in criminal proceedings as a matter of course. As such, I find that the section 14(2)(h) factor applies and weighs against disclosure of the complainant’s personal information.

Unfair exposure to harm and highly sensitive information

[42] The police submit that the disclosure of the emails would result in the complainant suffering mental stress, but they did not provide further details regarding the nature of this stress. They submit that this engages the sections 14(2)(e) and (f) factors. Additionally, they submit that the appellant may commence a legal action against the complainant if the emails were to be disclosed, and they submit that the harm from this legal action would be unfair, engaging the 14(2)(e) factor.

[43] I agree with the police’s submission that information provided by complainants can generally be considered highly sensitive for the purposes of section 14(2)(f), as discussed in Orders MO-2980 and PO-3458, for example. In this case specifically, the information at issues consists of the specific complaints made by an individual to the police, regarding the appellant. From the context – an individual contacting the police because they are concerned about the behaviour of someone else towards them – I agree that the information is highly sensitive, favouring withholding the information.

[44] Additionally, although the police did not provide specific evidence of the harm, I agree that the potential mental distress that disclosure of the emails would lead to constitutes unfair harm within the meaning of section 14(2)(e). As discussed above, I agree that the emails were sent to the police with an expectation of confidentiality, and it is reasonable to expect that a breach of this confidentiality would be distressing.

[45] However, I do not agree with the police’s submission that any pecuniary harm that could potentially follow from legal action against the complainant by the appellant would be unfair. Even if the complainant were to suffer legal consequences for her complaint to the police (it is not clear what these consequences would be), such consequences would flow from a court decision and, even if undesirable, would not be unfair. Regardless, considering the nature of the information at issue and the possible mental distress it’s disclosure would result in, I find that the section 14(2)(e) factor favouring withholding the information applies.

Fair determination of rights

[46] The police noted in their representations that there was no evidence before them to suggest that the appellant required the emails for court purposes, and that if they did, there were other avenues available for them to achieve it. While it is not necessarily the case that the existence of other avenues for obtaining information negates the relevance of this factor (see, for example, MO-2980) based on the information before me, I agree with the police that this factor is not relevant. Although

the general context of the request suggests that the appellant is seeking the information at issue for broader legal action, it is not clear what legal right is at issue, what this action would be, or why the emails are significant for it.<sup>11</sup> As such, I find that this factor is not relevant to the appeal and does not weigh in favour of disclosure.

### Reputational damage

[47] The police also submitted generally that the information at issue could potentially damage the reputation of both the appellant and the complainant, engaging the factor in section 14(2)(i). The appellant disputes that disclosure would damage her reputation. In any case, I do not agree that the police should withhold information because its disclosure may damage the reputation of the person requesting it. It is not clear to me that the police are better suited to assessing the possible reputation harm of the appellant than the appellant would be. As such, I find that this does not weigh against disclosure of the information.

[48] With respect to the potential damage against the complainant's reputation, this, if established, would weigh against disclosure. However, based on my review of the emails and the police's submissions on the subject, I am unable to conclude that disclosure would damage the complainant's reputation. The police submit that if the emails were disclosed, the appellant could potentially show them to other people who may have similar opinions. In my view, the fact that like-minded individuals may also exist and may see the emails is not sufficient to establish that reputational damage would occur. I find that this factor is not relevant to the appeal.

### *Balancing the factors and absurd result*

[49] Balancing the interests of the parties with the section 14(3)(b) presumption and factors favouring withholding the information in sections 14(2)(e), (f), and (h), I find that the balance is in favour of protecting the complainant's personal privacy, rather than the appellant's access rights. I therefore find that disclosure would constitute an unjustified invasion of the complainant's personal privacy and I find that this information should be withheld.

[50] However, an institution might not be able to rely on the section 38(b) exemption in cases where the requester originally supplied the information in the record or is otherwise aware of the information contained in the record. In such a situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.<sup>12</sup>

[51] For example, the "absurd result" principle has been applied when:

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<sup>11</sup> For more details about the four-part test the IPC uses, 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.).

<sup>12</sup> Orders M-444 and MO-1323.

- the requester sought access to their own witness statement,<sup>13</sup>
- the requester was present when the information was provided to the institution,<sup>14</sup> and
- the information was or is clearly within the requester's knowledge.<sup>15</sup>

[52] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.<sup>16</sup>

[53] The police stated in their representations that they would be willing to disclose information that the appellant was already aware of to the police if the IPC ordered them to do so. Although it is clear that, based on the context of the request, that the appellant is generally aware of the complaint, she is not aware of the specifics of it, and she was not present when the complaint was made to the police. I find that withholding this information is consistent with the purpose of the section 38(b) exemption, and the absurd result principle does not apply. Accordingly, I will not order the police to disclose this information to the appellant.

[54] As I have found that the emails are exempt from disclosure under section 38(b), I do not need to consider if they are also exempt under section 38(a), read with section 8(1)(e). I uphold the police's decision to deny access to the records, subject to my review of their exercise of discretion, below.

### **Issue C: Did the police exercise their discretion under section 38(b)?**

[55] The section 38(b) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. Having found that the emails are exempt from disclosure under section 38(b), I must next determine if the police properly exercised their discretion in withholding the information. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[56] The IPC may find that an institution erred in exercising its discretion where, for example,

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

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<sup>13</sup> Orders M-444 and M-451.

<sup>14</sup> Orders M-444 and P-1414.

<sup>15</sup> Orders MO-1196, PO-1679 and MO-1755.

<sup>16</sup> Orders M-757, MO-1323 and MO-1378.

[57] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>17</sup> The IPC may not, however, substitute its own discretion for that of the institution.<sup>18</sup>

***Representations, analysis and finding***

[58] The police submit that they did not exercise their discretion to withhold the emails in bad faith or for an improper purpose. They state that the appellant received access to some records responsive to the request, along with access to police notebook pages. The police state that they transcribed one of the officer's notebook pages and read it to the appellant's lawyer over the phone. They submit that they considered the purposes of the *Act* and disclosed some information to the appellant while protecting the privacy rights of the complainant, considering the tumultuous relationship between the parties and the sensitivity of the information. They state that they did not take any irrelevant circumstances into account.

[59] The appellant did not provide specific representations on the police's exercise of discretion.

[60] I have reviewed the considerations relied upon by the police and I find that they properly exercised their discretion in response to the access request. The police's consideration of the relationship between the appellant and the complainant was an appropriate one in the circumstances. Based on the police's representations, it is clear that they considered the purposes of the *Act* and sought to balance the appellant's interest in accessing the full records with the protection of the complainant's privacy when making their access decision. Indeed, in their representations, they considered disclosing additional information that, in my view, is exempt from disclosure.

[61] I find that the police did not exercise their discretion to withhold the complainant's personal information for any improper purpose or in bad faith, and that there is no evidence that they failed to take relevant factors into account or that they considered irrelevant factors. I uphold the police's exercise of discretion in denying access to the emails.

**ORDER:**

I uphold the decision of the police and dismiss the appeal.

Original signed by: \_\_\_\_\_

Chris Anzenberger  
Adjudicator

December 21, 2023 \_\_\_\_\_

<sup>17</sup> Order MO-1573.

<sup>18</sup> Section 43(2) of the *Act*.