

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4484

Appeal MA22-00675

Halton Regional Police Services Board

January 29, 2024

Summary: The appellant sought access to police reports related to an incident she was involved in. The police granted partial access to the reports, withholding portions of them under section 38(b) (personal privacy) of the *Act*. In this order, the adjudicator finds that disclosure of the withheld information would be an unjustified invasion of personal privacy 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).

OVERVIEW:

[1] The Halton Regional Police Services Board (the police) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for records related to a telephone call by a named officer to the appellant on a specified date.

[2] The police identified responsive records, police reports about the call and underlying incident, and issued a decision granting partial access to them, citing section 38(a), read with sections 8(1)(e) and 8(1)(l) (law enforcement), and section 38(b) (personal privacy) of the *Act* to deny access to the remaining information. The requester (now the appellant) appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC).

[3] During mediation, the appellant was provided with the contact information of the police officer who made the report. Following a call between the appellant and the officer, the police issued a supplementary decision on an additional record, an email between the appellant and the officer, and the supplementary occurrence report that the officer created after the call. The police granted partial access to these records, citing sections 8(1)(e) and 8(1)(l) of the *Act* to deny access to the remaining information.

[4] The appellant confirmed that she is not seeking access to police codes or any information withheld in the records from the first and second decisions under sections 38(a), read with 8(1)(e), and 8(1)(l). Accordingly, the records disclosed in the supplementary decision and the information withheld under these sections are no longer at issue in this appeal. The appellant confirmed that she is continuing to seek access to the information withheld under section 38(b) in the one-page occurrence report and two-page general report.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process. I decided to conduct an inquiry and sought and received representations from the police and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

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

RECORDS:

[7] The records at issue are the withheld portions of a one-page occurrence report and a two-page general report (the reports). The reports contain information that other parties provided to the police about the incident underlying the request.

ISSUES:

- A. Do the reports contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the withheld portions of the reports?
- C. Did the police properly exercise their discretion in withholding the information in the reports?

DISCUSSION:

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

[8] Before I consider the exemptions claimed by the police, I must first determine whether the reports 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.”

[9] Information is “about” an 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.¹ Section 2(1) of the *Act* gives a list of examples of personal information.

[10] The police submit that the reports contain personal information about the appellant and other identifiable individuals, including their age, sex, relationship status, employment history, address, telephone number, and views or opinions. The appellant did not provide specific representations on whether the reports contain personal information.

[11] I have reviewed the reports and I find that they contain the personal information of the appellant and other individuals (the affected parties), with information such as their names, addresses, phone numbers, and statements to the police officers present. The affected parties are clearly identifiable from the information in the reports and the information is of a personal nature.

[12] Having found that the reports contain the personal information of both the appellant and affected parties, I will consider the application of the personal privacy exemption at section 38(b).

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

[13] 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.

[14] Under section 38(b), where a record contains personal information of both the appellant and another individual, and disclosure of the information would be an

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

“unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the appellant. This involves a weighing of the appellant’s right of access to their own personal information against the other individual’s right to protection of their privacy.

[15] 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.

[16] 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.²

[17] 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 reports. None of the parties refer to these exceptions and based on my review of the reports, I find that none of the exceptions are relevant to this appeal.

[18] 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. The police relied on the presumption against disclosure in section 14(3)(b) in withholding the information:

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

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

[19] Section 14(4) sets out certain types of information whose disclosure is not an unjustified invasion of personal privacy. Neither the police nor the appellant provided representations on these situations, but based on my review of the reports they are not relevant to the appeal.

[20] In determining whether the disclosure of the reports would be an unjustified invasion of personal privacy under section 38(b), therefore, I will consider and weigh the relevant factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.³

² Order PO-2560.

³ Order MO-2954.

Representations

[21] The police submit that the reports were compiled and are identifiable as part of an investigation into a possible violation of law, engaging the presumption in section 14(3)(b). They submit that they were investigating allegations of threats, which are an offence under the *Criminal Code*. Referring to Order MO-2235, they submit that the presumption only requires an investigation into a possible violation of law, and even if no criminal proceedings were commenced against any individuals, the section 14(3)(b) presumption may still apply. They state that upon investigation it was determined that no criminal offence had been committed, but the presumption weighing against disclosure still applies.

[22] The police did not refer to any other presumptions or factors in their representations, but state that withholding the information at issue would not lead to an absurd result. They cite Order MO-1378, where the adjudicator held that even if the appellant is aware of the nature of the information at issue, withholding it does not necessarily lead to an absurd result. They state that withholding the information in the reports would not be inconsistent with the purposes of the section 38(b) exemption.

[23] The appellant did not provide substantive representations, but generally submits that what was said to the police was false and that she would like access to the withheld information so that she knows what information about her was provided to the police. She states that being contacted by the police was distressing and that she wishes to pursue a defamation action for what was said about her, but she did not provide more specific representations about her intentions to do so.

Analysis and finding

[24] As stated above, the issue in this appeal is whether disclosure of the reports 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

[25] 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.

[26] 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.⁴

[27] The information in the reports consists of notes made by a police officer investigating a possible violation of law, and although the appellant submits that the information is false, there is no basis for me to find that it was not compiled as part of a police investigation. Accordingly, I am satisfied that the section 14(3)(b) presumption against disclosure applies.

Information supplied in confidence

[28] Neither the police nor appellant referenced this factor in their representations, but based on my review of the reports I find that the section 14(2)(h) (information supplied in confidence) factor is relevant to the appeal. 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.⁵

[29] Previous decisions have found that personal information provided to the police is generally done so in confidence.⁶ I agree with and adopt this reasoning in the present appeal. Considering the context of the information at issue, where the withheld portions are information provided by affected parties to the police as part of an investigation, I find that the section 14(2)(h) factor applies and weighs against disclosure.

Fair determination of rights and inherent fairness issues

[30] The appellant did not specifically raise these factors, but stated that the information provided to the police was false and that she wants to pursue legal action related to the false information, potentially engaging the section 14(2)(d) (fair determination of rights) factor, favouring disclosure. Additionally, she states that she believes that the police were told false information about her and she wants to know what information the police have, potentially raising inherent fairness issues.

[31] However, based on the information before me, I am unable to find that the section 14(2)(d) factor is relevant to my consideration of the issues in this appeal. The appellant has only generally stated that she wants to pursue some form of defamation action. She has not explained what the specific legal right in question is, provided any specific information about the potential legal proceedings, or explained why the withheld personal information is required to bring the action.

[32] With respect to inherent fairness issues, I understand that the appellant is upset that the police contacted her after being provided with, in her view, false information

⁴ Orders P-242 and MO-2235.

⁵ Order PO-1670.

⁶ See, for example, Order MO-3028.

and, as explained below, I give this factor modest weight.

Balancing the factors and absurd result

[33] Having found that the 14(3)(b) presumption and 14(2)(h) factor, both of which weigh against disclosure, and after considering the interests of the parties and the inherent fairness considerations raised by the appellant, which I give modest weight to, I find that the balance weighs in favour of protecting the privacy of the affected parties, rather than the appellant's access rights. I therefore find that disclosure would constitute an unjustified invasion of the affected parties' personal privacy.

[34] I understand that the appellant believes that false information was told to the police about her. However, I do not find that this is sufficient to outweigh the presumption that the information is exempt from disclosure because it was compiled as part of an investigation into a possible violation of law, particularly given the expectation of confidentiality of parties when communicating with the police.

[35] 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 this situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.⁷ The police referenced this in their representations, stating that this did not apply, even if the appellant is generally aware of the information in the reports. The appellant did not provide representations on this issue.

[36] Based on my review of the reports, I am unable to conclude that the appellant is aware of the withheld information. While the reports contain information that the appellant would have some knowledge of, there also appears to be information, supplied by the affected parties, that the appellant is not aware of.

[37] In any case, as the police submitted, withholding information that a requester is generally aware of does not always lead to an absurd result.⁸ In the present appeal, even if the appellant were aware of the general substance of the withheld information, it does not necessarily follow that she is aware of what was specifically told to the police by the affected parties or what the police compiled as part of their investigation. Therefore, I find that withholding this information is not inconsistent with the purposes of the personal privacy exemption and would not lead to an absurd result. I uphold the police's access decision, subject to my review of their exercise of discretion below.

Issue C: Did the police properly exercise their discretion in withholding the information in the reports?

[38] The section 38(b) exemption is discretionary and permits an institution to

⁷ Orders M-444 and MO-1323.

⁸ See for example Order MO-1378.

disclose information, despite the fact that it could withhold it. Having found that portions of the reports 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.

[39] 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.

[40] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ The IPC may not, however, substitute its own discretion for that of the institution.¹⁰

Representations, analysis and finding

[41] The police submit that they considered the following factors when exercising their discretion to withhold the information:

- the appellant has a right to access her own personal information,
- the exemptions from the right of access were limited and specific,
- the privacy of individuals should be protected,
- the wording of the exemption and the interest it seeks to protect,
- whether the appellant was seeking her own personal information,
- whether the appellant had a sympathetic or compelling need to receive the information,
- the relationship between the appellant and any affected parties,
- the nature and sensitivity of the information, and
- the age of the information.

[42] The police submit that access was granted to the majority of the appellant's

⁹ Order MO-1573.

¹⁰ Section 43(2) of the *Act*.

personal information and the information that was withheld was intertwined with the personal information of affected parties. They submit that even if personal identifiers (such as names and addresses) were removed, the affected parties would still be identified if their views or opinions were to be released to the appellant.

[43] 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. Based on their overall 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 affected parties' privacy when making their access decision.

[44] I find that the police did not exercise their discretion to withhold the affected parties' 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. Accordingly, I uphold the police's exercise of discretion in denying access to the withheld information.

ORDER:

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

Original Signed By: _____
Chris Anzenberger
Adjudicator

January 29, 2024