

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4496

Appeal MA21-00735

London Police Services Board

March 5, 2024

Summary: The appellant sought access to an occurrence report about an incident in which he was involved. The police granted partial access but withheld the personal information of an affected party under the personal privacy exemption in section 38(b). The adjudicator finds that disclosure of the affected party's personal information would constitute an unjustified invasion of their personal privacy and upholds the police's decision. She finds that the police exercised their discretion properly in withholding this information 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"), 14(2)(d), 14(2)(f), 14(2)(h), 14(3)(b) and 38(b).

OVERVIEW:

[1] The appellant seeks access to information contained in a police occurrence report and call record relating to an incident in which he was involved.

[2] The appellant filed a request for access to the London Police Services Board (the police). The police located responsive records and issued a decision granting partial access to them. The police denied access to portions of the records based on the law enforcement exemptions in sections 8(1)(c) (reveal investigative techniques), 8(1)(d) (confidential source of information) and 8(1)(l) (endanger the security of a building, vehicle or system). The police also claimed the exemptions in sections 38(a) (right to refuse requester's own information) and 38(b) (personal privacy). Finally, the police

claimed that the records were excluded from the *Act* by section 52(3)3 (employment or labour relations).

[3] The appellant appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC). A mediator was appointed to explore resolution with the parties.

[4] During mediation, the discretionary exemption in section 38(a), the discretionary law enforcement exemptions in sections 8(1)(c), (d) and (l), and the question of the exclusion from the *Act* in section 52(3) were removed as issues in this appeal.

[5] The police maintained that the information withheld under the personal privacy exemption in section 38(b) is exempt because its disclosure would constitute an unjustified invasion of another person's (the affected party's) personal privacy. The mediator notified the affected party of the appeal and sought their consent to disclosure of their personal information in the records. The affected party did not consent.

[6] The appellant continued to seek access to the affected party's personal information that the police withheld under section 38(b). With no further mediation possible, the appeal was transferred to the adjudication stage of the appeal process. I conducted an inquiry during which I received representations from the police and the appellant.

[7] In this order, I find that the records contain personal information belonging to the appellant and to the affected party. I find that disclosure of the affected party's personal information would constitute an unjustified invasion of their personal privacy, and that the police properly exercised their discretion in withholding this information under section 38(b). I uphold the police's decision and dismiss the appeal.

RECORDS:

[8] The records consist of a call dispatch (CAD) report and a general occurrence (GO) report. At issue is access to the information withheld by the police from page 3 of the CAD report and from pages 2, 3, 4, 6 and 11 of the GO report.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) of the *Act*, and if so, whose?
- B. Would disclosure of the information at issue constitute an unjustified invasion of personal privacy under section 38(b)? If so, should the police's exercise of discretion in denying access to this information be upheld?

DISCUSSION:

Issue A: Do the records contain “personal information” as defined in section 2(1) of the *Act*, and if so, whose?

[9] Before considering the personal privacy exemption in section 38(b) claimed by the police, I must determine whether the records contain “personal information.” If they do, I must determine whether the personal information belongs to the appellant, the affected party, or both.

[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, including paper and electronic records.

[11] Information is about the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them.¹ 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.² Section 2(1) of the *Act* contains examples of personal information.

[12] The police submit that the records relate to a call for service and a resulting investigation involving the appellant. They say that, as part of their investigation, the police spoke to the appellant and the affected party, and collected information such as addresses, telephone numbers, dates of birth, gender, places of employment and their statements. They submit that it is reasonable to expect that individuals may be identified by disclosure of this information. The appellant does not comment on the nature of personal information, if any, contained in the records.

[13] I have reviewed the records and the police’s representations and find that the records contain both the appellant’s and the affected party’s personal information as that term is defined in section 2(1) because they contain information relating to the race, gender, national or ethnic origin, age and sex of both the appellant and the affected party,³ information relating to criminal history,⁴ each of their personal views or opinions about the incident under investigation,⁵ and their names which I find would, if disclosed, reveal other personal information about them, including the nature of their respective involvement with police.⁶

¹ Generally, information about an individual in their professional, official or business capacity is not considered to be “about” any individual. See orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

³ Section 2(1)(a) of the *Act*.

⁴ Section 2(1)(b).

⁵ Sections 2(1)(e) and (g).

⁶ Section 2(1)(h).

[14] Having found that the records contain both the appellant's and an affected party's personal information, I must consider the application of the discretionary personal privacy exemption in section 38(b) to the personal information at issue and to which the police have denied access.

Issue B: Would disclosure of the information at issue constitute an unjustified invasion of personal privacy under section 38(b)?

[15] 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 privacy.

[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 this 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).

[19] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of the other individual's personal privacy, as follows:

- 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 weigh for or against disclosure and that must be considered;
- section 14(3) lists circumstances in which disclosure of another's personal information is presumed to constitute an unjustified invasion of their personal privacy; and,
- section 14(4) lists circumstances where disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 14(3).

[20] The parties do not rely on paragraphs (a) to (e) of section 14(1) or on section 14(4), and I find that they do not apply in this appeal.

[21] Because the appellant seeks access to the affected party's personal information contained in the records, I will consider and weigh the factors and presumptions in section

14(2) and (3) and balance the interests of the parties in deciding whether disclosure would be an unjustified invasion of personal privacy under section 38(b).

Representations

The police's representations

[22] The police submit that the records were created as part of an investigation into a possible violation of law. They say that they received a call alleging an assault, and that officers responded and investigated. They submit that the presumption weighing against disclosure in section 14(3)(b) applies because the information at issue was collected during their investigation into a possible violation of law under the *Criminal Code* and that disclosure of the affected party's personal information provided to them during the investigation is therefore presumed to constitute an unjustified invasion of the affected party's personal privacy.

[23] The police also submit that the factor at section 14(2)(h) (supplied in confidence) applies and weighs against disclosure of the information at issue. They say that it is reasonable for any individual supplying information to the police in relation to an investigation to believe that that information is supplied in confidence and will not be disclosed. The police say that members of the public expect that the police will treat information they supply to the police confidentially and that the police must maintain the confidentiality of information provided to them by victims or witnesses to preserve the public's trust.

[24] The police say that they granted access to the appellant's own personal information and statements provided during the investigation, but not to the affected party's.

The appellant's representations

[25] The appellant's representations discuss remedies outside of the access provisions and relevant exemptions in the *Act* and therefore outside my jurisdiction on this appeal. The appellant claims that the police falsified the records and challenges the accuracy of the records' contents and the merits of both the allegations against him and of the police's investigation. He claims the records contain important omissions and that the police failed to document what happened correctly or comprehensively.

[26] The appellant also says that he has a right to know and confront his accuser and to be fully informed of the accusation against him. The appellant seeks access to the "original accusation" so that he may determine whether it includes information that he says it should.

Analysis and findings

[27] For the following reasons, I find that disclosure of the affected party's personal

information contained in the records would constitute an unjustified invasion of their personal privacy and that this information is exempt under section 38(b).

The presumption against disclosure in section 14(3)(b)

[28] As noted above, the police claim that the presumption in section 14(3)(b) applies to the information at issue and weighs against its disclosure in the circumstances. Section 14(3)(b) states that:

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

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

[29] Even if, as is the case here, no charges or criminal proceedings followed the investigation, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁷

[30] I have reviewed the records and find that the personal information in them was compiled and is identifiable as part of an investigation into a possible violation of law. The police were dispatched to and investigated an incident that began with a call alleging an assault that could have resulted in the laying of criminal charges. At the conclusion of their investigation, the police determined that the matter under investigation did not warrant charges, but their decision was the result of their investigation. The fact that no charges were laid does not alter my finding that the presumption in section 14(3)(b) applies, since, as noted above, the presumption only requires that there be an investigation into a possible violation of law. As a result, I find that disclosure of the personal information in the records would result in a presumed unjustified invasion of the affected party's personal privacy under section 14(3)(b).

[31] Under section 38(b), the presumption in section 14(3)(b) must also be weighed and balanced with any factors in section 14(2) that apply in the circumstances.

Do any of the factors in section 14(2) apply?

[32] Section 14(2) lists factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁸ The police submit that the factor in section 14(2)(h) is relevant to this appeal.

[33] Section 14(2)(h) states that:

⁷ Orders P-242 and MO-2235.

⁸ Order P-239.

(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,

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

[34] For the factor at section 14(2)(h) to apply, I must be satisfied that the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that this expectation is reasonable in the circumstances. Section 14(2)(h) requires an objective assessment of the reasonableness of the expectation of confidentiality.⁹

[35] I find that it was reasonable in the circumstances for the affected party to expect that they provided their personal information to the police in confidence. In my view, the context of the affected party's statements to the police and the surrounding circumstances are such that a reasonable person would expect that the information they were providing to the police would be subject to a degree of confidentiality. I have reviewed the summary of the affected party's statements contained in the records and, while I have not summarized those statements here because to do so would disclose their contents, I accept the police's representations that they were provided in circumstances where there existed a reasonable expectation of confidentiality. The records contain the affected party's views and opinions of the incident under investigation and were collected out of the presence of the appellant. I find that the factor in section 14(2)(h) applies in the circumstances and weighs against disclosure of the affected party's personal information.

[36] I have also considered whether any other factors apply to weigh either in favour of disclosure or against it.

[37] First, I understand the appellant's argument that he has a right to confront his accuser and be fully informed of the accusation against him to suggest that the factor in section 14(2)(d) (fair determination of rights) applies and weighs in favour of disclosure of the information at issue.

[38] Section 14(2)(d) requires an institution, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, to consider whether "the personal information is relevant to a fair determination of rights affecting the person who made the request." If found to apply, this factor weighs in favour of disclosing the personal information.

[39] The IPC has found that for section 14(2)(d) to apply, however, the appellant must establish that the right in question is a legal right; that it is related to a proceeding that has not already been completed but that is either existing or contemplated; that the

⁹ Order PO-1670.

information has some bearing or is significant to the determination of the right in question, and that it is required in order to prepare for the proceeding or to ensure an impartial hearing.

[40] I find that the appellant has not established any of the four parts required for section 14(2)(d) to apply. The appellant's broad allegation to confront his accuser relates to knowing what another individual said to the police about an incident in the context of a closed investigation, and not to any legal proceeding that exists or is contemplated. In the circumstances, I find that section 14(2)(d) does not apply.

[41] Second, I have considered the nature of the information at issue and the alleged incident that the police were called to investigate. I find that disclosure of personal information provided to police by a complainant in the circumstances described in the records could reasonably be expected to cause that person significant personal distress, a requirement for the factor in section 14(2)(f) to apply.¹⁰ In the circumstances, I find that the information at issue is highly sensitive and that the factor in section 14(2)(f) applies to it and weighs against its disclosure.

[42] I have also considered whether any additional unlisted factors apply to weigh in favour of disclosure of the affected party's personal information in the records, and I find that none do.

[43] I find that no factors, listed or unlisted, weigh in favour of disclosing the affected party's personal information contained in the records. Having weighed the relevant factors in section 14(2) and the presumption in section 14(3)(b) and balanced the interests of the parties, I uphold the police's decision to deny access to the information at issue.

The police exercised their discretion under section 38(b) appropriately

[44] The police submit that they considered that the records contain the appellant's personal information, and that they weighed the appellant's right of access to information against the affected party's right to the protection of their privacy. They say that they considered that the affected party's personal information was obtained in confidence, that no factors applied to weigh in favour of disclosure of the affected party's personal information to the appellant, and that they made efforts to disclose as much information to the appellant without disclosing the affected party's personal information.

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

¹⁰ Section 14(2)(f) states that:

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,

(f) the information is highly sensitive[.]

representations.

[46] I am satisfied that the police considered relevant factors in exercising their discretion to deny access to the affected party's personal information under section 38(b). I find that the police considered that the records contain the appellant's own personal information and weighed this against the fact that the information at issue belonging to the affected party would, if disclosed, identify the affected party and reveal other personal information about them, including their involvement in an incident about which the police were called. I find that the police disclosed the appellant's personal information contained in the record without disclosing material that is exempt, and I find no basis to conclude that the police exercised their discretion in bad faith or that they took into account irrelevant considerations. I uphold the police's exercise of discretion to deny access to the information at issue as reasonable.

[47] For these reasons, I find that the information at issue is exempt from disclosure under section 38(b). I uphold the police's decision and dismiss this appeal.

ORDER:

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

Original signed by: _____
Jessica Kowalski
Adjudicator

_____ March 5, 2024