

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-4505

Appeal MA22-00286

Toronto Police Services Board

March 27, 2024

**Summary:** The Toronto Police Services Board (the police) received a request under the *Act* for all records and surveillance videos relating to an identified occurrence report and all associated police officer notes. The police denied access to portions of the responsive records, relying on the discretionary personal privacy exemption in section 38(b).

The appellant appealed the police's decision and claimed that additional responsive records should exist.

In this order, the adjudicator finds that the information at issue in the records is exempt by reason of section 38(b) and that the police have conducted a reasonable search for responsive records. Accordingly, she dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1) (definition of personal information), 14(3)(b), 17, and 38(b).

**Orders Considered:** Order M-352.

### OVERVIEW:

[1] This appeal considers access to records that document the police's response to a call from an individual stating they were being confronted by a person with a knife.

[2] The Toronto Police Services Board (the police) received a request under *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to

an identified occurrence report.

[3] The police issued an access decision granting partial access to the responsive report and police officer notes, citing section 38(b) (personal privacy) of the *Act* to deny access to the remaining information in these records.<sup>1</sup>

[4] The requester (now the appellant) appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[5] During mediation, the police conducted another search for surveillance videos and confirmed that they do not have any videos for the occurrence. The appellant did not accept the police's position that there are no surveillance videos. Accordingly, reasonable search is at issue in this appeal.

[6] Further mediation was not possible, and the appellant advised the mediator that he would like to move his appeal to the adjudication stage, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought and received representations from the police and the appellant.<sup>2</sup>

[7] In this order, I find that the information at issue in the records is exempt by reason of section 38(b) and that the police have conducted a reasonable search for responsive records. Accordingly, I dismiss the appeal.

## **RECORDS:**

[8] The records consist of a three-page Intergraph Computer Aided Dispatch (ICAD) report and 12 pages of five police officers' notes.

[9] The information remaining at issue was redacted from one page of the ICAD report (one redaction) and five pages of two police officer notes (six redactions).

## **ISSUES:**

- A. Do the records 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?

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<sup>1</sup> The police also withheld certain portions of the records as non-responsive. These portions are not at issue in this appeal.

<sup>2</sup> These representations were exchanged between the parties in accordance with the IPC's *Practice Direction 7*.

C. Did the police conduct a reasonable search for records?

## **DISCUSSION:**

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

[10] 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.

[11] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.”

[12] “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.<sup>3</sup>

[13] 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. Generally, information about an individual in their professional, official or business capacity is not considered to be “about” the individual.<sup>4</sup>

[14] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be “personal information” if it reveals something of a personal nature about the individual.<sup>5</sup>

[15] 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>6</sup>

[16] Section 2(1) of the *Act* gives a list of examples of personal information:

“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,

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<sup>3</sup> See the definition of “record” in section 2(1).

<sup>4</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>5</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>6</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

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

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

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

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

[17] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."<sup>7</sup>

### ***Representations***

[18] The police state that the records relate to a call to the police concerning a "person with a knife", as reported by the appellant and that at the scene, officers recorded names, dates of birth and contact information of bystander(s)/witness(es), reportee(s) and potential suspect(s).

[19] They state that these individuals can be identified by the personal information redacted from the records, as the records contain their names, dates of birth, and addresses. Further, these individuals may frequent the address, and may also be known to the appellant, by name or sight. As such, they submit that even a name alone may serve as enough to identify these individuals.

[20] The appellant did not address this issue in his representations.

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<sup>7</sup> Order 11.

## ***Findings***

[21] Severed from the ICAD report is the title or name of individuals who spoke to the police about the incident in the records. Also redacted from the records, are certain of these individuals' addresses, phone numbers and dates of birth, as well as their views or opinions.

[22] I find that the records contain the personal information of individuals who spoke to the police about the incident, acting in their personal capacity. This information includes their home addresses, phone numbers and dates of birth, as well as their names that appear with other personal information about them in accordance with paragraphs (a), (d), (e), and (h) of the definition of personal information in section 2(1).

[23] The records also contain the appellant's personal information as it contains certain individuals' views or opinions about the appellant, in accordance with paragraph (g) of the definition of personal information in section 2(1).

[24] As the records contain both the appellant's and other individuals' personal information, I will consider the application of the discretionary personal privacy exemption in section 38(b) to them.

[25] In making this finding, I recognize that, in their representations, the police rely on the mandatory personal privacy exemption in section 14(1) instead of section 38(b), as they state the information at issue is not the appellant's personal information. I disagree and have found that this information includes the appellant's personal information. In any event, Order M-352 establishes that whether a record contains the requester's personal information must be determined using a "record-by-record" approach, where the "unit of analysis is the record, rather than the individual paragraphs, sentences or words contained in a record." Taking this approach, section 38(b) would apply as the records as a whole contain both the appellant's and other individuals' personal information.

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

[26] 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.

[27] 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.

[28] 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.<sup>8</sup>

[29] 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).

[30] Also, 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>9</sup>

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

[32] 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). None of these exceptions apply.

[33] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). 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. None of the paragraphs in section 14(4) apply.

[34] 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-maker<sup>10</sup> must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>11</sup>

[35] The police rely on the presumption in section 14(3)(b), which requires only that there be an investigation into a possible violation of law.<sup>12</sup> So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.<sup>13</sup> This section reads:

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

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<sup>8</sup> See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 38(b).

<sup>9</sup> Order PO-2560.

<sup>10</sup> The institution or, on appeal, the IPC.

<sup>11</sup> Order MO-2954.

<sup>12</sup> Orders P-242 and MO-2235.

<sup>13</sup> 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).

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.

### **Findings**

[36] As indicated above, the incident in the records documents the police's response to a call from the appellant about being confronted by a person with a knife. The police responded and several officers investigated this incident resulting in the creation of the records.

[37] I find that the presumption against disclosure section 14(3)(b) applies. In this appeal, both parties agree that an investigation into possible violations of law took place. The appellant even identifies the possible violations of laws in his representations, as being possible charges of assault or criminal harassment against the alleged assailant, contrary to the *Criminal Code of Canada*. As referred to above, although criminal proceedings were never started against the alleged assailant, section 14(3)(b) can apply.

[38] 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.<sup>14</sup> Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[39] 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 not listed under section 14(2).<sup>15</sup>

[40] Neither party raised the application of any factors that either favour or do not favour disclosure of the information at issue in the records. From my review, I find that none of them apply.

[41] As I have found that the presumption against disclosure in section 14(3)(b) applies and that no factors weighing in favour of disclosure apply, I find that the information at issue in the records is exempt by reason of section 38(b). In making this determination, I have considered the police's exercise of discretion.

[42] The section 38(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[43] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

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<sup>14</sup> Order P-239.

<sup>15</sup> Order P-99.

- 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.

[44] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>16</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>17</sup>

[45] In exercising its discretion, the police redacted the personal information of individuals other than the appellant however, the appellant received full access to what these individuals told the police in their investigation, including what these individuals told the police about the appellant.

[46] Based on my review of the police's representations and the very limited information redacted from the records, I find in exercising their discretion, the police took into relevant considerations, including the appellant's right of access to his own personal information, that exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected.

[47] Accordingly, I am upholding the police's exercise of discretion and find that the information at issue in the records is exempt by reason of section 38(b).

### **Issue C: Did the police conduct a reasonable search for records?**

[48] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.<sup>18</sup> If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[49] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.<sup>19</sup> The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>20</sup>

[50] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has

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<sup>16</sup> Order MO-1573.

<sup>17</sup> Section 43(2).

<sup>18</sup> Orders P-85, P-221 and PO-1954-I.

<sup>19</sup> Orders M-909, PO-2469 and PO-2592.

<sup>20</sup> Order MO-2185.



made a reasonable effort to identify and locate responsive records;<sup>21</sup> that is, records that are "reasonably related" to the request.<sup>22</sup>

[51] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.<sup>23</sup>

### ***Representations***

[52] The police state that multiple steps were undertaken in their search for responsive record and provided a detailed chronological account of the actions performed, consisting of the searches that were done, the parties that had conducted the various searches, the places that were searched, what records were searched, and the results of the searches.

[53] Regarding any video evidence that the appellant alleged at mediation should have been located, the police state:

Upon thorough review of the ICAD report, the responsive handwritten notes of the involved officers and the investigatory steps/actions and outcome recorded in these notes, no reference was found of a video being viewed or obtained in relation to this incident.

Additionally, the assigned analyst also conducted queries of their Video Asset Management System for all of the attending officers and no videos were located for these officers' badge numbers and the date of September 22, 2020.

[54] In response, the appellant acknowledges that the police did not take any videos, therefore, no videos would be responsive. As well he acknowledges that the police did not collect videos from other sources regarding the incident in the records. Therefore, the existence of responsive videos is no longer at issue in this appeal.

[55] The appellant also submits that there are notes missing of other police officers, but he does not indicate who these officers are.

### ***Findings***

[56] Based on my review of the police's detailed representations as to the numerous searches they undertook for responsive records, I find that they conducted a reasonable search.

[57] The appellant has indicated that there should be more responsive police officer

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<sup>21</sup> Orders P-624 and PO-2559.

<sup>22</sup> Order PO-2554.

<sup>23</sup> Order MO-2246.

notes. He did not identify which officers' notes are missing.

[58] The police have advised that they requested and reviewed the notes of the five police officers that responded to the incident in the records, which included the three officers outlined in the appellant's request. The police disclosed to the appellant all these officers' notes that contained information about this incident (less the portions that were redacted as referred to above).

[59] I find that the appellant has not provided a reasonable basis for me to conclude that additional responsive records exist that are in the police's custody or control. Accordingly, I am upholding the police's search for responsive records.

**ORDER:**

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

Original Signed By: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ March 27, 2024