

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4516

Appeal MA22-00676

Waterloo Regional Police Services Board

April 29, 2024

Summary: The appellant requested a copy of a police report concerning a specified occurrence that involved an affected party and herself. The police granted partial access to the report and withheld some information pursuant to sections 14(1) and 38(b) (personal privacy). The appellant appealed the decision taking the position that the personal information in the withheld information is her own and should be disclosed to her. In this order, the adjudicator upholds the police's claim that section 38(b) applies to the withheld personal information and dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders MO-3893, MO-3997, MO-4213 and PO-1912.

OVERVIEW:

[1] The Waterloo Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a police report regarding a specified occurrence.

[2] The police granted partial access to the responsive record withholding some information pursuant to sections 14(1) and 38(b) of the *Act*.

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

the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the police issued a revised access decision and released additional information to the appellant. The police continued to rely upon sections 14(1) and 38(b) of the *Act* to deny access to the remainder of the withheld information.

[5] The appellant stated that she is seeking full access to the withheld information.

[6] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry under the *Act*. As the adjudicator in this appeal, I sought representations from the police and the appellant. Representations were received and shared in accordance with the IPC's *Code of Procedure*.

[7] In this order, I uphold the section 38(b) exemption claim and dismiss the appeal.

RECORDS:

[8] The information at issue in this appeal consists of the withheld information contained in a three-page CAD Occurrence details document.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- C. Did the institution exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Background to the request

[9] In her representations, the appellant set out the background leading to her request. She explains that she is the owner of a specified business and at one time was a subcontractor to the affected party. The appellant states that she made a complaint to the police about the affected party's conduct toward her and her business. Subsequently, she received a cease and desist letter from the affected party, who asserted that the appellant was in a breach of agreement concerning the affected party's corporation. The appellant hired legal counsel in turn who responded to the cease and desist letter. In her

request, the appellant stated that she intends to bring legal proceedings against the affected party.

[10] The appellant explains that she was contacted by the police who were investigating after information was provided to them by the affected party. It is the information provided to the police by the affected party that is at issue in this appeal.

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

[11] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) that reads, in part:

“personal information” means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(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,

(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;

[12] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.

Representations

[13] The police submit that the withheld information contains the personal information of an affected party including their name, location and personal statements. The police note that the appellant is a “previous employee” of the affected party, and that the personal statement of the affected party discusses matters that occurred after the work

relationship had ended (as indicated above, the appellant states that she was a contractor to the affected party). Police submit that the correspondence and communications conducted between the appellant and the affected party are not within a professional capacity.

[14] The appellant submits that the withheld information contains only her personal information, as it relates to what was said by the affected party regarding the appellant that caused the police to open an investigation about her. The appellant points to and relies on paragraphs (e) and (g) of the definition of personal information in section 2(1) of the *Act*. The appellant states that the affected party in this instance was providing information to the police about her. She notes that the information was, according to the police, sufficient to cause them to commence an investigation. The appellant submits that the personal statements of the affected party relating to the appellant are clearly her personal information and not the personal information of the affected party.

[15] The appellant refers to Orders MO-2064 and MO-3556 where the personal privacy exemption was upheld and states that this instance is different because the appellant is aware of the identity of the affected party. She submits that in both orders the substance of the complaint was known to the person making the access request because it was provided by the various institutions.

[16] The appellant also submits that the line drawn between any work-related connection and/or relationship between the appellant in the affected party is not so clear. She notes that at one time she was a subcontractor to the affected party. She suggests that since the affected party was trying to assert commercial rights against her, as evidenced by a cease and desist letter sent to the appellant, without the ability to review the withheld information, it may well fall under the exceptions to personal information contained in sections 2(2.1) and 2(2.2).

[17] In addition, the appellant submits that the police did not meet its duty under section 4(2) to provide "as much of the record as can reasonably be severed without disclosing information that falls under one of the exemptions." She suggests that the information about her compliance with the law that caused the police to open an investigation about her do not fall within the exemptions in the *Act*, and that the institution failed to properly sever the record along with the definition of personal information in the *Act* so as to provide her access to that information.

Finding

[18] The appellant argues that the redacted statement is about her and therefore qualifies only as her own personal information under paragraphs (e) and (g) of the section 2(1) definition of that term. However, after reviewing the redacted information, I do not agree. Without setting out any details of this withheld information, it is clear that the affected party's statement consists of their own personal information which at limited instances is interspersed with that of the appellant's personal information.

[19] I have considered whether the appellant's personal information can be severed from the record in a way that does not also reveal the affected party's personal information. This is not possible because the information is intermingled.

[20] Although there was a prior working (or business) relationship between the appellant and the affected party, after reviewing the withheld information, I find that the information about the affected party reveals something of a personal nature about the affected party and does not consist of information that identifies them in a professional or business capacity.

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

[21] Since I have found that the record contains the personal information of both the appellant and an affected party, section 36(1) applies to this appeal. 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 a number of exemptions from this right.

[22] 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 "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the appellant.

[23] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b). It is apparent that section 14(4) is not relevant in this appeal.

[24] In making this determination, the IPC will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.¹ 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). In this appeal sections 14(1)(a) to (e) are not relevant.

[25] If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[26] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.² Some of the factors listed in section 14(2), if present, weigh in factor of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are

¹ Order MO-2954.

² Order P-239.

relevant, even if they are not listed under section 14(2).³

Representations

The police's representations

[27] The police submit that all of the personal information relating to the appellant that could reasonably be severed from the record was released to her. The police state that the section 38(b) exemption was applied to the withheld information because it contains the personal information of an affected party.

[28] The police submit that the presumption at section 14(3)(b) (investigation into a possible violation of law) is relevant in this appeal as the affected party's personal information in the record was compiled as part of an investigation into unwanted communications. Although the police state that there were no grounds for charges and the appellant was advised to cease all contact with the affected party, they argue that the presumption only requires that there be an investigation into a possible violation of law.

[29] The police also submit that the factors at section 14(2)(e) (exposed unfairly to pecuniary or other harm) and 14(2)(h) (information supplied in confidence) are relevant in this appeal. They submit that section 14(2)(e) applies as it was decided that the relationship between the appellant and the affected party may be acrimonious and, as a result, the information relating to the affected party was protected.

[30] With regard to their claim that section 14(2)(h) is relevant, the police note that when victims, witnesses, and individuals under investigation provide information to police, there is an expectation that police will maintain confidentiality. They state that if they did not, members of the public would be wary of providing information to police. In this case, whether it was explicit or not, the police submit that the attending officer would have made assurances of confidentiality to the affected party when the report was being made. The police submit that due to the contentious nature of this event, and the lack of consent from the affected party, they determined it was in the best interest of the affected party to protect their personal information and statements.

The appellant's representations

[31] The appellant submits that section 14(2)(d) (fair determination of rights) is relevant in this appeal as she is preparing a legal claim against the affected party. She states that what the affected party said to the police about her that justified them opening an investigation is relevant to her theory of liability based on harassment.

[32] The appellant maintains the affected party "made-up" the reported allegations and that the affected party's call to the police was done in retaliation. Consequently, the

³ Order P-99.

appellant maintains that section 14(2)(g) (information unlikely to be accurate or reliable) also applies to the information as it is unlikely to be accurate or reliable and supports disclosure of the withheld information.

[33] The appellant suggests that section 14(2)(e) applies in this appeal and that it supports disclosure of the withheld information. She states that by withholding the information, it is the appellant who will unfairly suffer pecuniary or other harm in that she will not have a crucial piece of evidence for her court claim, which may impact the viability of her claim, or the award of damages and its quantum.

[34] The appellant submits that section 14(2)(h) does not apply in this appeal and that the police have provided no evidence that assurances of confidentiality were made to the affected party. She notes the police's position that assurances may have been provided on an implicit basis and suggests that the ordinary definition of the term "assurance" requires a positive statement, rather than arising in context.

[35] The appellant also submits that witnesses routinely provide information to police that is used for law enforcement purposes, and in open courts where the witness may well be expected, or compelled, to testify.

[36] Finally, the appellant submits that given her position that some of the information in the record is her own personal information and not that of the affected party, section 14(2)(h) does not apply to that information.

[37] The appellant submits that the personal information at issue is about her and not the affected party and, therefore, section 14(3)(b) is not relevant to any of her own personal information.

Analysis and finding

[38] The appellant's representations are premised on the assumption that the redacted information consists only of her own personal information, however, I have found that it contains the both the appellant's and the affected party's personal information.

Section 14(3)(b): investigation into a possible violation of law

[39] The police claim that section 14(3)(b) is relevant. If this presumption applies to the withheld information, then disclosure is presumed to be an unjustified invasion of personal privacy. This section states:

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;

[40] I have reviewed the record and find that the section 14(3)(b) presumption applies to the withheld personal information, which was compiled and is identifiable as part of an investigation into a possible violation of law. Even if criminal proceedings were never ultimately pursued and/or completed, this presumption requires only that there be an investigation into a *possible* violation of law.⁴

[41] Under section 38(b), the presumption in section 14(3)(b) must be weighed and balanced with any factors in section 14(2) that are relevant.

Section 14(2) factors

[42] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. The listed factors relevant to this appeal as raised by the parties are section 14(2)(d), (e), (g) and (h), which state:

(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,

...

(d) The personal information is relevant to a fair determination of rights affecting the person who made the request;

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

...

(g) the personal information is unlikely to be accurate or reliable;

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

...

[43] The appellant relies on section 14(2)(d), (e) and (g) to support disclosure of the withheld information.

[44] Section 14(2)(d) supports disclosure to the appellant of the affected party's personal information where the information is relevant to a fair determination of the appellant's rights. The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four of the following questions must be answered yes:

⁴ Orders P-242 and MO-2235.

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information significant to the determination of the right in question?
4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?⁵

[45] The appellant has indicated an intention to start a legal claim against the affected party. She submits that what the affected party said about her is relevant to her theory of liability based on harassment. Therefore, the first two parts of the test are met.

[46] However, even if I was satisfied that parts 1, 2, and 4 of the four-part test have been met, I find that the appellant's evidence does not establish that part 3 of the test is met. Based on my review of the record and the appellant's representations, I find that the personal information at issue is not significant to a determination to the right in question. In my view, the right identified by the appellant is not significantly impacted if the appellant is not granted disclosure to the personal information at issue that relates to another individual. In making this finding I note that the appellant is aware of the identity of the affected party and the disclosed portion of the record sets out the allegations made against her.

[47] As a result, I find that the section 14(2)(d) factor does not apply in this appeal, and I give this factor no weight.

[48] The appellant also submits that the factor at section 14(2)(e) is relevant in this appeal and support disclosure of the withheld information to the appellant. The police also claim this factor is relevant and supports non-disclosure. Despite the appellant's submission that most of the withheld information belongs to the appellant, I have found that it consists of the affected party's personal information mixed with that of the appellant. As a result, I find that this factor does not apply to support disclosure to the appellant. The appellant submits that this factor applies because without the withheld information, she will unfairly suffer pecuniary or other harm in not having a crucial piece of evidence for her court claim. However, I am unconvinced that this factor applies to support disclosure of the affected party's personal information.

[49] Generally, section 14(2)(e) is considered a factor that weighs against disclosure when the evidence shows that financial damage or other harm from disclosure is either present or foreseeable, and that this damage or harm would be "unfair" to the individual

⁵ 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.).

(other than the requester) whose personal information is in the record. Given my finding that the withheld information constitutes the personal information of the affected party, I find that this factor could only apply to support non-disclosure in this appeal. However, after reviewing the police's representations on this factor, I am not convinced that it applies given that the risk of harm to the affected party is because of the risk of a lawsuit. The fact that disclosure may subject an individual to litigation is not, itself, exposing them unfairly, since the case would be determined by an independent trier of fact.⁶

[50] Accordingly, I find that the factor in section 14(2)(e) does not weigh in favour of privacy protection in this appeal.

[51] The appellant also argues that the factor at section 14(2)(g) is relevant in this appeal because the withheld information was "made-up" by the affected party and is therefore unlikely to be accurate or reliable. After considering the appellant's representations, I am unconvinced that one party's belief that information is "made-up" is relevant for a finding that the factor at section 14(2)(g) applies. I find that this factor is not applicable in this appeal.

[52] Finally, the police rely on the factor at section 14(2)(h) which weighs against disclosure if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. This requires an objective assessment of whether the expectation of confidentiality is "reasonable."⁷ In my view, whether an individual supplied his or her personal information to the police in confidence during an investigation is contingent on the particular facts, and such a determination must be made on a case-by-case basis.

[53] In the particular circumstances of this appeal, the personal information of the affected party is found in the summary of the statement they made to the police. I am satisfied that the affected party and the police expected that this personal information would be treated confidentially, and that this expectation of confidentiality was reasonable in the circumstances. I find, therefore, that the factor weighing in favour of privacy in section 14(2)(h) applies to the personal information of the affected party in the withheld information. I give this factor significant weight.

[54] In conclusion, I find that the presumption at section 14(3)(b) and the factor at section 14(2)(h) apply to the information at issue, which supports non-disclosure of the withheld information. I also find that there are no factors that support disclosure of the information. As a result, I find that the withheld personal information qualifies for exemption under section 38(b), because its disclosure would constitute an unjustified invasion of the affected party's personal privacy. Next, I will review the police's exercise of discretion.

⁶ See Orders PO-1912, MO-3893 and MO-3997.

⁷ Order PO-1670.

Issue C: Did the institution exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

[55] The section 38(b) exemption is discretionary, 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.

[56] In addition, the IPC may find that the 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.

[57] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁸ The IPC cannot, however, substitute its own discretion for that of the institution.⁹

Representations

[58] The police submit that they made “appropriate and just use of the discretion” as contemplated under the *Act*. They state that their decisions were made in good faith while upholding the institution’s responsibilities to the appellant, affected party and the public in consideration of the spirit and the meaning of the *Act*. They note that the appellant was given access to her own personal information that could reasonably be severed from the records and denied access only to the personal information of the affected party.

[59] The police state that they gave the following factors consideration in deciding not to disclose some of the information relating to the affected party to the appellant:

- The requester was provided access to their own personal information
- The requester explicitly indicated within their request that they did not wish for the institution to seek third party consent
- Information relating to the affected party was denied because consent was not obtained and the privacy of the individual was protected.

[60] Much of the appellant’s arguments about the police’s exercise of discretion relate to her position that the police misapplied the personal privacy exemption. These

⁸ Order MO-1573.

⁹ Section 43(2).

arguments have been addressed at Issue B above and I will not restate these arguments here.

[61] Reading the appellant's arguments as a whole, I understand the appellant to argue that the police acted in a way that was more favourable to the affected party than to her and that the police did not sufficiently consider her interests in obtaining access to her own personal information.

Finding

[62] In my view, the police's exercise of discretion to withhold the personal information of the affected party under section 38(b) is consistent with the purposes of the *Act* and previous IPC jurisprudence. In exercising their discretion to apply that exemption and withhold the affected party's personal information, the police properly weighed the appellant's right of access to her own personal information against the affected party's right to privacy.

[63] In the circumstances, I am satisfied that the police exercised their discretion in denying access to the affected party's personal information under section 38(b) and did so appropriately. I find that they took relevant factors into account in exercising their discretion, and given the content of the withheld information, there is no basis for me to conclude that they exercised their discretion in bad faith or for an improper purpose or that they took into account irrelevant considerations.

[64] Accordingly, I uphold the police's exercise of discretion under section 38(b).

ORDER:

The appeal is dismissed.

Original signed by: _____
Alec Fadel
Adjudicator

_____ April 29, 2024