

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER MO-4555-F

Appeal MA22-00347

York Regional Police Services Board

August 21, 2024

**Summary:** This final order follows Interim Order MO-4473-I, in which the adjudicator required the police to issue a new access decision in response to the appellant's request for a statement made by a third party who was later charged and convicted of assaulting the appellant. The police initially denied the request because they erroneously believed the *Act* prohibited them from disclosing the third party's personal information to her. In response to the interim order, the police reconsidered the appellant's access request, this time recognizing that the statement contains the personal information of the appellant as well as that of the third party. In their revised decision, the police rely on the personal privacy exemption at section 38(b) of the *Act*, which permits an institution to withhold a record that contains the personal information of both the requester and another party. In this final order, the adjudicator upholds the police's decision to withhold the statement in full under section 38(b). She dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 2 (definition of "personal information"), 4(2), 14, and 38(b).

**Orders and Investigation Reports Considered:** Interim Order MO-4473-I.

### OVERVIEW:

[1] This final order follows Interim Order MO-4473-I, in which I required the York Regional Police Services Board (the police) to issue a new access decision in response to a request for a statement made by a third party (the affected person) to the police. The affected person made the statement in the context of a police investigation of a complaint

of assault, in relation to which the affected person was later charged and convicted. The victim of the assault, who is the appellant in this appeal, sought access to the affected person's statement under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] In Interim Order MO-4473-I, I found that the statement contains the personal information of both the affected person (who gave the statement) and of the appellant (whose personal information in the statement includes, among other things, the affected person's personal opinions or views about her, and details of their relationship, as recounted by the affected person to the police). The result is that the appellant has a higher right of access under the *Act* to the statement than she would were the statement solely a record of personal information of the affected person.

[3] In the interim order, I found that the police had failed to recognize that the appellant exercises a right of access to her own personal information in seeking access to the affected person's statement. Because of this failure, the police mistakenly believed that the *Act* prohibited them from disclosing the statement to the appellant in response to her access request. The police thus failed to exercise the discretion given to them under the *Act* when a requester seeks access to a record of her own personal information that also contains the personal information of another individual. To remedy this failure, I returned the matter to the police for a proper exercise of their discretion under the *Act*. To assist the police, I provided some guidance in the interim order about relevant parts of the *Act* in addressing an access request from an individual for the individual's own personal information.

[4] In response to the interim order, the police issued a new access decision to the appellant, this time recognizing her higher right of access to the statement as a record of her own personal information. In the result, the police again denied access to the statement. The police explained the basis for their decision that disclosing the statement would be an unjustified invasion of the affected person's personal privacy, despite the fact the statement is also a record of the appellant's own personal information.

[5] In this final order, I find the police have now considered the appellant's access request under the appropriate part of the *Act*. I uphold the police's decision to withhold the statement in full on personal privacy grounds. I dismiss the appeal.

## **RECORD:**

[6] The record at issue is the affected person's statement to the police.

## **DISCUSSION:**

[7] The remaining issue for me to decide in this appeal is whether to uphold the police's revised decision to withhold the statement in full under the discretionary personal

privacy exemption at section 38(b) of the *Act*.

[8] It is not in dispute that the statement the appellant seeks contains personal information within the meaning of section 2(1) of the *Act*,<sup>1</sup> and that this personal information belongs both to the affected person and to the appellant. I made this finding in Interim Order MO-4473-I,<sup>2</sup> and the police accepted this finding in making their revised decision.

[9] In the interim order, I explained that by initially treating the statement as a record of personal information of the affected person only, the police failed to consider the appellant's request under the relevant sections of the *Act*.

[10] Section 4 of the *Act*, contained in Part I, gives an individual a right of access to a record in the custody or under the control of an institution like the police. The right of access in section 4 applies to general records that do not contain personal information. It also applies to records that contain the personal information of individuals other than the requester. Exemptions from this right of access are set out in sections 6 to 15 of the *Act*. One such exemption is found at section 14(1), which provides that an institution must not disclose to a requester a record containing the personal information of individuals other than the requester, except in specified circumstances.

[11] A different section of the *Act*, section 36(1) contained in Part II, gives an individual a right of access to her own personal information held by an institution. Section 38 sets out exemptions from the right of access in section 36(1). 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.

[12] Thus, while the section 14(1) exemption is a mandatory prohibition against any disclosure that would constitute an "unjustified invasion" of another individual's personal privacy, the section 38(b) exemption is discretionary. This means that under section 38(b), the institution *may* 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>3</sup>

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<sup>1</sup> "Personal information" is defined in the *Act* to mean recorded information about an identifiable individual, including, among other things, the individual's personal opinions or views [paragraph (e) of the definition at section 2(1)], and the individual's name if it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual (paragraph (h) of the definition). The IPC has also found that the personal opinions or views of one individual about another individual can constitute the mixed personal information of both individuals: Order PO-3458.

<sup>2</sup> Order MO-4473-I, at paras 13-14.

<sup>3</sup> As I will discuss further below, an institution must exercise the discretion conferred on it by section 38(b), and it must do so in a proper manner.

[13] In Order MO-4473-I, I found that the police's decision to withhold the statement in full was based on the erroneous belief that the statement contained only the personal information of the affected person, so that the police were required, by the mandatory prohibition in section 14(1), to withhold the statement from the appellant. I ordered the police to reconsider the appellant's access request under the appropriate part of the *Act*, in view of the fact she is seeking her own personal information. The police did so. The police's revised decision is to withhold the statement in full, this time under section 38(b) of the *Act*.

[14] In deciding whether to apply the discretionary exemption in section 38(b), the police considered sections 14(1) to (4) of the *Act*. These sections provide guidance in deciding whether the personal information at issue is exempt under section 14(1) or 38(b), as the case may be.

[15] Section 14(3) of the *Act* lists a number of situations in which disclosure of personal information is presumed to be an unjustified invasion of personal privacy. In this case, the police found relevant the presumption against disclosure at section 14(3)(b) of the *Act*. Section 14(3)(b) provides that disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where that information was compiled and is identifiable as part of an investigation into a possible violation of law.<sup>4</sup> There is no dispute that the statement contains personal information that was compiled and is identifiable as part of the police's investigation into a possible violation of law. I agree that the section 14(3)(b) presumption against disclosure applies to the statement.

[16] Section 14(2) lists factors that help in deciding whether disclosure would be an unjustified invasion of personal privacy. The police explain that they found relevant the factor weighing against disclosure at section 14(2)(f) of the *Act*. Section 14(2)(f) applies where the personal information at issue is highly sensitive. For personal information to be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information were disclosed.<sup>5</sup> The IPC has found, for example, that personal information about witnesses, complainants, or suspects in a police investigation may be considered highly sensitive.<sup>6</sup>

[17] The police say that disclosing personal information obtained in the course of a police investigation into a complaint of assault could reasonably be expected to cause extreme distress, not only to the affected person but also to other individuals involved in the investigation. The appellant takes issue with the police's concern for the affected person, who committed a crime against her. She asserts that the police have failed to prove that disclosure would cause the affected person significant personal distress.

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<sup>4</sup> The section 14(3)(b) presumption does not apply "to the extent that disclosure is necessary to prosecute the violation or to continue the investigation." There is no claim that this exception applies in the circumstances.

<sup>5</sup> Orders PO-2518, PO-2617, MO-2262, and MO-2344.

<sup>6</sup> Order MO-2980.

[18] Considering the context in which the personal information was gathered, I am satisfied that its disclosure could reasonably be expected to cause significant personal distress, and is thus “highly sensitive” within the meaning of section 14(2)(f). This factor applies and weighs against disclosure of the statement.

[19] In her representations addressing the police’s revised decision, the appellant provides background to her access request, including about the events following the laying of criminal charges against the affected person, and about the lasting effects of these events on her health. The appellant asked that I also consider her representations made at an earlier stage of the inquiry, which I have done. Through these representations, the appellant asserts that disclosure of the statement could assist her in understanding and recovering from the trauma she experienced at the hands of the affected person. In addition, she suggests that a decision by the police to release the statement to her could help restore some of the faith she has lost in the criminal justice system through her experience. I have considered the interests described by the appellant as an unlisted factor weighing in favour of disclosure, which I have given some weight in the circumstances. They are also relevant considerations in assessing the police’s exercise of discretion under section 38(b).

[20] No other factor listed in section 14(2), and no other unlisted factor, applies in the circumstances.

[21] Section 14(1) sets out a number of exceptions to the application of the personal privacy exemption. In addition, if any of the situations listed in section 14(4) is present, then disclosure of personal information is not an unjustified invasion of personal privacy, so that the exemption in section 38(b) cannot apply.

[22] The appellant proposes that the exception at section 14(1)(b) applies. This exception to the personal privacy exemption permits disclosure “in compelling circumstances affecting the health or safety of an individual.” The IPC has found such circumstances to exist in cases where the purpose of seeking personal information is a “matter of immediate and essential health or safety”— this was the case, for example, where a father sought significant and possibly life-saving medical information to aid his daughter.<sup>7</sup> To meet the threshold of “compelling circumstances,” it must either be self-evident, or established by the evidence, that disclosure of the personal information at issue could reasonably be expected to ameliorate these health or safety issues.<sup>8</sup>

[23] Here the appellant says that her health and safety have been significantly affected by the offender and by her experience with the criminal justice system. I do not doubt that the appellant has been significantly affected by her experience as a victim of crime. I am not persuaded, however, that these circumstances meet the high threshold of a “matter of immediate and essential health or safety.” In addition, it is not evident to me

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<sup>7</sup> Order PO-2541, cited in Order MO-2677.

<sup>8</sup> Order PO-2541.

how disclosure of the statement at issue in this appeal could reasonably be expected to ameliorate the health and safety issues the appellant has described.

[24] The appellant does not claim that any other exception in section 14(1) applies, and I find none does. In addition, none of the situations listed in section 14(4) is present here.

[25] Overall, weighing the factors and presumption in sections 14(2) and (3), and balancing the interests of the parties, I conclude that the personal privacy exemption at section 38(b) applies to the statement.

[26] Under section 38(b), the police have the discretion to disclose the statement to the appellant even though it qualifies for disclosure. On appeal, I must consider whether the police exercised their discretion under section 38(b), and did so in a proper manner. If I find the police failed to exercise their discretion, or erred in their exercise of discretion, I may send the matter back to the police for a re-exercise of their discretion.<sup>9</sup> However, I cannot substitute my own discretion for that of the police.<sup>10</sup>

[27] I am satisfied that the police have now exercised the discretion conferred to them under section 38(b), and have done so taking into account relevant considerations and not taking into account irrelevant considerations. The appellant has written movingly about her experiences as a victim of crime, and about her feeling that actors in the criminal justice system, including the police, have failed to demonstrate compassion and sensitivity in their dealings with her. The police acknowledge the appellant's significant interest in the statement as a record of her own personal information. However, they ultimately concluded that these interests are outweighed by the personal privacy interests of the affected person, which conclusion was open to them to make in the circumstances.

[28] In addition, while the appellant's representations largely focus on her distrust of the police's assertion that they cannot sever the statement for the purpose of granting partial access, I already found in the interim order that the personal information of the appellant is inextricably intertwined with that of the affected person. The result is that the statement cannot reasonably be severed to allow any disclosure under the *Act*.<sup>11</sup>

[29] In conclusion, I see no error in the police's exercise of discretion under section 38(b). I therefore uphold the police's decision to withhold the statement in full under section 38(b). I dismiss the appeal.

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<sup>9</sup> Order MO-1573.

<sup>10</sup> Section 43(2).

<sup>11</sup> Paragraph 15 of Interim Order MO-4473-I, considering the obligation on institutions in section 4(2) of the *Act* to disclose as much of a record as "can reasonably be severed without disclosing the information that falls under one of the exemptions."

**ORDER:**

I uphold the police's decision to withhold the statement in full under section 38(b). I dismiss the appeal.

Original signed by: \_\_\_\_\_  
Jenny Ryu  
Adjudicator

August 21, 2024 \_\_\_\_\_