

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4563

Appeal MA22-00388

Niagara Regional Police Services Board

September 9, 2024

Summary: An individual requested access to general occurrence reports and officers' notes for incidents that occurred in 2018 on a specified street. The police provided her with some information but refused to provide certain information stating that its disclosure would be an unjustified invasion of another individual's personal privacy (38(b)). In this order the adjudicator upholds the police's decision not to disclose the information they withheld. She 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") and 38(b).

Orders Considered: Order MO-2081, MO-2980, and Interim Order MO-4430-I.

OVERVIEW:

[1] The Niagara Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

...reports and police notes of incidents that occurred in 2018, [street name],
Niagara Falls. Just general occurrence reports starting from January 2018
to December 2018.

[2] The police issued a decision advising that no responsive records were located.

[3] The requester, now the appellant, filed an appeal to the Information and Privacy Commissioner of Ontario (the IPC).

[4] At the outset of mediation, the police issued a revised decision letter, granting partial access to a "Call Hardcopy" (the call hardcopy report) and an officer's notes. The police relied on section 38(b) (personal privacy) and section 38(a), read with sections 8(1)(c) (reveal investigative techniques and procedures), 8(1)(e) (endanger life or safety) and 8(1)(l) (facilitate commission of an unlawful act), to withhold information in the call hardcopy report and the officer's notes.

[5] As mediation was not able to resolve the appeal, it was transferred to the adjudication stage of the appeal process, where I decided to conduct a written inquiry. I invited and received representations from the parties.¹

[6] During the inquiry, the police issued a further revised decision² in which they state that they are only relying on section 38(a), read with section 8(1)(c), to withhold information about police codes, statistical codes and investigative tools in the call hardcopy report and the officer's notes.³ As the appellant is not interested in information pertaining to police codes, statistical codes and investigative tools, section 38(a), read with section 8(1)(c), is no longer an issue in this appeal.

[7] The police attempted to notify two affected parties to obtain their consent to disclose their personal information but were unsuccessful.

[8] For the reasons that follow, I uphold the police's decision not to disclose the information they withheld. I dismiss the appeal.

RECORDS:

The information at issue is contained in a "Call Hardcopy" (3 pages) and an officer's notes (1 page).

ISSUES:

- A. Do the call hardcopy report and officer's notes 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 information?

¹ The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Code of Procedure*.

² Dated August 1, 2024.

³ The police is no longer relying on section 38(a), read with sections 8(1)(e) and (l).

- C. Did the police exercise their discretion under section 38(b)? If so, should I uphold their exercise of discretion?

DISCUSSION:

Issue A: Do the call hardcopy report and officer's notes contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[9] In order to decide whether section 38(b) applies, I must first decide whether the call hardcopy report and officer's notes contain "personal information," and if so, to whom this personal information relates.

[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.⁴

[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. Generally, information about an individual in their professional, official, or business capacity is not considered to be "about" the individual if it does not reveal something of a personal nature about them.⁵

[12] 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.⁶

[13] Section 2(1) of the *Act* gives a list of examples of personal information. All of the examples that are relevant to this appeal are set out below:

"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,

⁴ The definition of "records" in section 2(1) includes paper records, electronic records, digital photographs, videos, and maps. The record before me is a paper record located by searching a police database.

⁵ Orders P-1409, R-980015, PO-2225, and MO-2344.

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

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

(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.

[14] 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."⁷

[15] It is important to know whose personal information is in the records. If the records contain the requester's own personal information, their access rights are greater than if it does not.⁸ Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.⁹

[16] The police submit that the call hardcopy and the officer's notes contain personal information of identifiable individuals. Specifically, they contain the name, date of birth, phone number and address of the individual who called the police, the physical descriptors of the appellant, the physical descriptors of an unknown male and his statement. They explain that although the police do not know the identity of the unknown male who provided a statement, it is possible that the appellant may be able to identify the unknown male from the physical descriptors and through his statement. As such, the police submit that the physical descriptor of the unknown male and his statement is his personal information.

[17] The appellant submits that the content of what was said by the parties during this incident is not personal information. She also submits that the physical descriptor of an unknown male party is not his personal information as she may not necessarily be able to identify him.

[18] On my review of the call hardcopy report and officer's notes, I find that they all contain information that qualifies as the personal information of the appellant as well as that of identifiable individuals which would fall under paragraphs (a), (c), (d), and (h) of the definition of "personal information" under section 2(1) of the *Act*. Specifically, the call hardcopy report and officer's notes contain the caller's address, phone number, and date of birth. The officer's notes contain the name and date of birth of the appellant. The call hardcopy report also contains the physical descriptors of the unknown male while the officer's note contains his statement.¹⁰ I accept that disclosure of the physical descriptors

⁷ Order 11.

⁸ Under sections 47(1) and 49 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

⁹ See sections 21(1) and 49(b).

¹⁰ To be clear, the police have withheld only this statement in this appeal, which is contained in the officer's notes.

and the statement combined with other information could identify the unknown male.

[19] As I have found that the withheld information in the call hardcopy report and the officer's notes contain the personal information of the appellant along with other identifiable individuals, I will consider the appellant's access to the withheld information under Part II of the *Act*.

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

[20] Under section 38(b), where a record contains personal information of both the requester 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 requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[21] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of the exceptions in sections 14(1)(a) to (e), disclosure is not an unjustified invasion of personal privacy, and the information is not exempt under section 38(b).

[22] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). If any of sections 14(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). 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.¹¹ The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹²

[23] In determining whether the disclosure of the personal information would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.¹³

[24] Finally, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy, and the information is not exempt under section 38(b).

¹¹ Order P-239.

¹² Order P-99.

¹³ Order MO-2954.

Representations, analysis and findings

[25] I note that the withheld information does not fit within the exceptions set out in section 14(1)(a) to (e) nor the situations in section 14(4) of the *Act*. As such, I will consider whether any of the factors or presumptions under sections 14(2) and (3) apply.

[26] The appellant's representations do not address the section 38(b) personal privacy exemption except to state that it would be a moot issue if consent was obtained from the affected parties.

[27] The police submit that the factors listed in sections 14(2)(f) and (i) are relevant factors in this appeal. Sections 14(2)(f) and (i) state:

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 personal information is highly sensitive;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[28] With respect to section 14(2)(f), to be considered highly sensitive there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁴ The police submit that disclosing the withheld information about the caller without their consent could put them at risk of retaliation, which could jeopardize their personal safety.

[29] In Order MO-2980, the adjudicator found that whether an individual's name and address is highly sensitive depends on the context and should be assessed on a case-by-case basis. Specifically, the adjudicator wrote:

An individual's name and address is not always sensitive information. For example, the names and addresses of most individuals appear in publicly accessible telephone or online 411 directories and are clearly not highly sensitive in that context.

However, the names and addresses of individuals have greater sensitivity when this information is collected by the state or agencies of the state such as the police ...

[30] I agree and adopt the above reasoning for the purpose of this appeal.

[31] In this case, the caller's personal information is contained in the call hardcopy report. Due to this context, it suggests that the personal information is highly sensitive.

¹⁴ Orders PO-2518, PO-2617, MO-2262, and MO-2344.

As such, I accept that disclosure of their personal information may likely cause the caller significant personal distress as the factor in section 14(2)(f) requires. As a result, I give this factor some weight.

[32] The factor at section 14(2)(i), if it applies, weighs against disclosure. The analysis focuses on whether damage to reputation could arise from disclosure that would result in an unjustified invasion of the personal privacy of individuals other than the appellant. The applicability of section 14(2)(i) is not dependent solely on whether the damage or harm envisioned by this clause is present or foreseeable. This consideration is only relevant in circumstances where the damage or harm would be “unfair” to the individual involved.¹⁵

[33] While the police raised section 14(2)(i), they have not explained how the disclosure of the withheld information may damage the reputation of any of the affected parties (the caller and the unknown male) and why the damage would be unfair.

[34] Therefore, I find that the section 14(2)(i) factor does not apply and is not relevant to my consideration of whether disclosure of the withheld information would be an unjustified invasion of the affected parties’ personal privacy.

[35] The police also raised the presumption at section 14(3)(b), which 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.

[36] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.¹⁶ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁷

[37] Based on my review of the hardcopy call report and the officer’s notes, I find that the presumption at section 14(3)(b) applies to them. These records concern information about police investigations relating to a neighbours’ dispute. The withheld information was compiled and is identifiable as part of the investigations into possible violations of the *Criminal Code of Canada*¹⁸ which did not result in charges being laid. Although no charges were laid, there need only have been an investigation into a possible violation of

¹⁵ Order M-608.

¹⁶ Orders P-242 and MO-2235.

¹⁷ Orders MO-2213, PO-1849, and PO-2608.

¹⁸ R.S.C., 1985, c. C-46.

law for the presumption at section 14(3)(b) to apply.¹⁹ Section 14(3)(b) therefore weighs in favour of non-disclosure of the withheld information in the hardcopy report and the officer's notes.

[38] In balancing the factors for and against disclosure, I note that section 14(2)(f) and section 14(3)(b) weigh against disclosure of the withheld information. As noted above, I will give this factor and this presumption some weight. As no other factors (listed or unlisted) weighing in favour of disclosure have been raised, and from my review, none of them apply, when I weigh the interests of the parties, I find that disclosure of the withheld information would be an unjustified invasion of the affected parties' personal privacy. Accordingly, I find that the withheld information in the call hardcopy report and the officer's notes are exempt under section 38(b) subject to my finding on absurd result and the police's exercise of discretion.

Absurd result principle

[39] The appellant argues that the withheld information, if not disclosed, would lead to an absurd result. She argues that she was present when the information was provided to the police, and, therefore, the information was clearly within her knowledge. As such, not disclosing the withheld information would be absurd and inconsistent with the purpose of the section 38(b) exemption.

[40] The absurd result principle has been applied in appeals where, for example, the requester was seeking access to his or her own witness statement;²⁰ where the requester was present when the information was provided to the institution;²¹ or where the information was clearly within the requester's knowledge.²² However, the absurd result principle may not apply even if the information was supplied by the requester or is clearly within the requester's knowledge, if disclosure would be inconsistent with the purpose of the section 14(1) exemption or section 38(b) exemption.²³

[41] On my review of the withheld information, I find that the absurd result principle does not apply to the unknown male's statement. This statement was made to the police when they questioned the unknown male immediately after they questioned the appellant. Although the appellant states that the unknown male made his statement to the police in her presence, the call hardcopy report and the officer's notes do not confirm this is the case. As a result, it is not clear that the unknown male's statement was made in the appellant's presence and is within her knowledge. Therefore, I find that disclosure of this statement would be inconsistent with the purpose of the section 38(b) exemption. As such, I find that the absurd result principle does not apply to the statement made by

¹⁹ Orders P-242 and MO-2235.

²⁰ Orders M-444 and M-451.

²¹ Orders M-444 and P-1414.

²² Orders MO-1196, PO-1679, and MO- 1755.

²³ Orders M-757, MO-1323, MO-1378.

the unknown male.

Issue C: Did the police exercise their discretion under section 38(b)? If so, should I uphold the exercise of discretion?

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

[43] The IPC may find the institution erred in exercising its discretion where, for example: it does so in bad faith or for an improper purpose; or it takes into account irrelevant considerations or fails to take into account relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁴ However, the IPC may not substitute its own discretion for that of the institution.²⁵

[44] The police state that they properly exercised their discretion under section 38(b), and took into consideration all relevant factors, including the fact that the withheld information is highly sensitive, and that disclosure may unfairly damage the reputation of an affected party referred to in the call hardcopy report and the officer's notes. The police further state that the information was withheld in good faith and the information was severed from the call hardcopy report and officer's notes for a proper purpose.

[45] The appellant states that the police did not properly exercise their discretion. She states that she requires access to the withheld information in case she need to request a correction to it. The appellant explains that she has previously experienced issues where incorrect or inaccurate information contained in her police files were used against her in subsequent interactions with the police.

[46] After considering the police's representations and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to the exempt information under section 38(b) of the *Act*. I am satisfied that the police considered relevant factors and did not consider irrelevant factors in their exercise of discretion. In particular, I am satisfied that the police considered the appellant's right to access her own information but also the interests of the affected parties that are protected by the personal privacy exemption. I am also satisfied that the police did not act in bad faith or for an improper purpose. Accordingly, I uphold the police's exercise of discretion in deciding to withhold information pursuant to section 38(b).

²⁴ Order MO-1573.

²⁵ Section 43(2) of the *Act*.

ORDER:

I uphold the police's decision.

Original signed by: _____

Lan An
Adjudicator

September 9, 2024