



Information and Privacy  
Commissioner/Ontario  
Commissaire à l'information  
et à la protection de la vie privée/Ontario

# **ORDER M-125**

**Appeals M-9200391 and M-9200392**

**Durham Region Board of Commissioners of Police**



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# ORDER

## BACKGROUND:

The Ministry of the Attorney General transferred to the Durham Region Board of Commissioners of Police (the Police) a request made under the Freedom of Information and Protection of Privacy Act for access to crown briefs related to an investigation of an assault allegation arising from an incident which occurred in November 1991. The requester is the individual who is alleged to have been assaulted.

The Police processed the request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). They identified 178 pages consisting of incident reports and confidential instructions for Crown counsel as the responsive records in their custody. Pursuant to section 21 of the Act, the Police notified the two persons alleged to have committed the assault of the request and invited one person to submit his views concerning disclosure of information on pages 1, 3, part of page 4 and part of page 14 of the records, and the other person respecting disclosure of information on part of page 14 of the records. Despite the objections of the persons alleged to have committed the assault, the Police decided to grant partial access to the information contained in these four pages of the records, and notified the requester and the persons alleged to have committed the assault of this decision.

The persons alleged to have committed the assault appealed the decision of the Police to grant access to parts of the four pages of the records.

Mediation of the appeals was not successful. Notice that an inquiry was being conducted to review the decision of the Police was sent to the appellants, the requester and the Police. Representations were received from the Police, but not from the appellant or the requester.

## ISSUES:

The issues in this appeal are:

- A. Whether the records contain personal information as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.
- C. If the answer to Issue A is yes, whether the Police properly exercised discretion under section 38(b) of the Act in deciding to grant partial access to the records.

**ISSUE A: Whether the records contain personal information as defined in section 2(1) of the Act.**

In section 2(1) of the Act, "personal information" is defined, in part, as:

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

Having reviewed the parts of the four pages of the records the Police decided to grant access to, I find that they contain information which satisfies the definition of personal information as described in the above subparagraphs of section 2(1) of the Act. In my view, the date of birth, address, telephone number, marital status, height, weight, hair and eye colour, employer, and the indication of whether a criminal record exists in relation to the appellants found on pages 1 and 3 contain the personal information of the appellants. In my view, the information found on pages 4 and 14 consists of the personal information of the appellants and the requester.

**ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.**

In Issue A, I found that the parts of pages 1 and 3 contain the personal information of the appellants. Once it has been determined that a record contains personal information, section 14 of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 14(1)(f) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

In order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

The only representations I have been provided with argue in favour of finding that the disclosure of the record would not be an unjustified invasion of personal privacy. Despite these representations, I have come to the conclusion that the requester should not be granted access to these parts of the record.

Section 14(3)(b) of the Act states:

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

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;

The record the requester is seeking access to was compiled as part of an investigation into a possible violation of law. In my view, disclosure of the personal information of the appellants which appears in parts of pages 1 and 3 is presumed to be an unjustified invasion of personal privacy pursuant to section 14(3)(b).

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy have been established, I must consider whether any other provision of the Act comes into play to rebut this presumption. Section 14(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 14(3). In my view, the records at issue in this appeal do not contain information relevant to section 14(4).

While the requester has not submitted representations, the correspondence and the representations of the Police indicate that the requester is seeking access to the records for use in a civil suit, arising from the aforementioned incidents, which he is bringing against the appellants. Section 14(2)(d) states that a head, in determining whether disclosure of information contained in a record would constitute an unjustified invasion of an affected person's personal privacy, must consider whether the personal information is relevant to a fair determination of rights affecting the person who made the request.

In Order P-312, former Assistant Commissioner Tom Mitchinson, in discussing the provincial equivalent of section 14(2)(d), stated the following:

In my view, in order for section 21(2)(d) [section 14(2)(d) of the municipal Act] to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right or question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

I accept the reasoning of former Assistant Commissioner Mitchinson as expressed in Order P-312. I have not received any representations from the requester, and I am not satisfied that the personal information of the appellants which is contained in parts of pages 1 and 3 of the records is required by the requester in order to enable him to prepare for the proceeding or to ensure an impartial hearing. Accordingly, I find that section 14(2)(d) is not a relevant consideration. Consequently, I find that the presumption set out in section 14(3)(b) applies, and the disclosure of the date of birth, address, telephone number, marital status, height, weight, hair and eye colour, employer, and the indication of whether a criminal record exists in relation to the appellants found in parts of pages 1 and 3 is prohibited by section 14.

**ISSUE C: If the answer to Issue A is yes, whether the Police properly exercised their discretion under section 38(b) of the Act in deciding to grant partial access to the requester.**

In Issue A, I found that pages 4 and 14 of the records contain the personal information of the appellants and the requester. Section 36(1) of the Act gives individuals a general right of access to personal information about themselves which is in the custody or under the control of the Police. However, this right of access is not absolute; section 38 provides a number of exceptions to this general right of access, including section 38(b), which states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) introduces a balancing principle. The Police must look at the information and weigh the requester's right to his/her own personal information against another individual's right to the protection of his/her privacy. Although the Police may determine that release of personal information would constitute an unjustified invasion of the other individual's personal privacy, section 38(b) gives the Police the discretion to grant or deny access to the information to the requester.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the requester. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The Police have not stated that section 14(3) applies to the records at issue. In my view, consideration of section 14(3)(b) of the Act is appropriate in the circumstances of this appeal. Section 14(3)(b) reads:

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

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;

I am satisfied that the personal information contained in the records at issue was compiled and is identifiable as part of an investigation into a possible violation of law. Accordingly, the requirements for a presumed unjustified invasion of personal privacy under section 14(3)(b) have been satisfied.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy have been established, I must consider whether any other provision of the Act comes into play to rebut this presumption. Section 14(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 14(3). In my view, the records at issue in this appeal do not contain information relevant to section 14(4).

I have also carefully considered the provisions of section 14(2) and, in my view, there is no combination of factors listed in section 14(2) which would operate to rebut the presumption of an unjustified invasion of personal privacy. Therefore, the presumption raised by section 14(3)(b) applies and disclosure of the information would constitute an unjustified invasion of the privacy of the appellants.

As I have stated, section 38(b) is a discretionary exemption. Section 38(b) gives the Police the discretion to grant or deny access to the requester, even if doing so would constitute an unjustified invasion of another individual's personal privacy. That is what the Police have chosen to do in this case. The Police submit that the requester and the appellants lived together, know each other, were all present at the time of the assault, and all matters pertaining to the assault were dealt with in court.

I have reviewed the representations provided by the Police, and I find nothing to indicate that the exercise of discretion was improper and would not alter it on appeal.

As noted by Commissioner Tom Wright in Order M-54, when dealing with a similar situation under section 38(b) of the Act:

The result in this appeal highlights an important aspect of section 38 of the Act. Section 38 is a discretionary exemption and even if, as in this case, the disclosure of the information would be an unjustified invasion of another individual's privacy, discretion can be exercised in favour of disclosure. In my view, the availability of discretion under section 38 is consistent with one of the purposes of the Act which is to "... provide individuals with a right of access to (their own) information".

ORDER:

1. I uphold the decision of the Police to disclose the parts of pages 4 and 14 which concern the appellants.
2. I order the Police to disclose the parts of the records referred to in Provision 1 to the requester within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
3. I order the Police **not** to disclose the date of birth, address, telephone number, marital status, height, weight, hair and eye colour, employer, and the indication of whether a criminal record exists in relation to the appellants found on parts of pages 1 and 3.
4. In order to verify compliance with the provisions of this order, I order the Police to provide me with a copy of the records which are disclosed to the requester pursuant to Provisions 1, 2 and 3, **only** upon my request.

Original signed by: \_\_\_\_\_

April 23, 1993

Holly Big Canoe  
Inquiry Officer