



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

# **ORDER MO-1303**

**Appeal MA-990262-1**

**St. Thomas Police Services Board**



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## **NATURE OF THE APPEAL:**

The appellants submitted an informal request to the St. Thomas Police Services Board (the Police) for access to the occurrence report relating to an incident at a tavern in which the appellants were involved. The Police provided the appellants with a severed copy of the report. The appellants later made a formal request to the Police under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the report.

The Police notified three affected persons of the request, and sought their views on disclosure. The Police did not receive a response to the notice from any of the affected persons, and decided to deny access to the withheld portions of the report pursuant to section 8(1)(b) (interference with law enforcement investigation) of the Act. The Police indicated that access was also being denied to portions of the report pursuant to section 14(1)(a) of the Act (unjustified invasion of personal privacy unless consent of the subject individual). In addition, the Police referred to section 38(b), which states that a head may refuse to disclose personal information to the individual to whom the information relates if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

The appellants then wrote to the Police stating that they required the information because they were assaulted and received injuries as a result of the incident in question. The appellants indicated that they intend "to commence a civil law suit, or alternatively, a claim with the Criminal Injuries Compensation Board, in respect of this injury." The appellants stated: "Obviously, we need to know the identity of the other individuals who are involved in this occurrence."

The appellants later appealed the decision of the Police to this office.

During the mediation stage of the appeal the Police released portions of a police officer's notebook pertaining to the incident in question.

Also during the mediation stage of the appeal, the Police issued a revised decision indicating that the Police were relying only on section 38(b), in conjunction with section 14(1)(a), to withhold portions of the report and the notebook.

The appellants also indicated in this stage of the appeal that they believe there is a compelling public interest in disclosure of the information at issue within the meaning of section 16 of the Act.

## **RECORDS:**

The records containing the information at issue in this appeal are a three page Police General Occurrence Report, and a five page excerpt from a police officer's notebook. The information at issue consists of names of individuals involved in the incident (as suspect and/or witness) (the affected persons) and other information about the affected persons, including addresses, ages and/or dates of birth.

## **DISCUSSION:**

### **PERSONAL PRIVACY**

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual. As indicated above, the withheld portions of the record consist of names of the affected persons and other information about those individuals, including their addresses, ages and/or dates of birth.

Under paragraph (h) of the definition, an individual’s name constitutes personal information “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.” The affected persons’ names appear in the records together with other information about them which falls within the definition of “personal information”, such as addresses [paragraph (d)], ages and dates of birth [paragraph (a)]. In addition, disclosure of the names alone in this context, in which most of the records have already been disclosed, would reveal information about the affected persons’ involvement in the incident, as suspect and/or witness. This is clearly information “about” these individuals and therefore paragraph (h) of the definition applies. As a result, I find that all of the withheld information constitutes personal information of the affected persons.

Similarly, the portions of the records already disclosed by the Police contain the personal information of the appellants, including their names, addresses, ages, dates of birth and information about their involvement in the incident.

### **RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF OTHER INDIVIDUALS’ PRIVACY**

Since I found above that the records contain the appellants’ personal information, section 36(1) applies. Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual’s personal privacy, the institution has the discretion to deny the requester access to that information.

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 the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) [Order P-1456, citing John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

In this case, section 38(b), together with the presumption in section 14(3)(b) could apply. Those sections read:

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

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

**14. (3)** 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;

The appellants submit:

. . . [I]t appears that it is section 14 or section 38 that applies, the questions that arises is whether disclosure of the information being sought constitutes an “unjustified invasion” of another individual's personal privacy. The difference between the two is that, in the case of reliance to the section 14(1)(f) “exception to the exemption” the appellant must establish that disclosure does not constitute an unjustified invasion of personal privacy, whereas under section 38(b) it appears to be incumbent on the head to establish that disclosure would constitute [an] unjustified invasion. There is a subtle, but not insignificant, shift in onus. In practical terms, this is justifiable because it is being recognized that, under section 38, we are dealing with a record that relates to and contains personal information of the requester as well as another party.

... [T]he police cannot meet the onus of establishing that disclosure of the information being sought constitutes an unjustified invasion of another person's privacy.

Furthermore ... the disclosure of the information being sought does not constitute an unjustified invasion of personal privacy within the meaning of Section 14(1)(f) of the Act.

If section 14 applies, it might be argued that where the record involved was compiled as part of a police investigation, the presumption that arises under Section 14(3)(b) is such that there is no need to have any regard to the other considerations set forth in sections 14(2) and (3).

However, it might be argued that the Section 14(3)(b) presumption only arises in cases to which section 14 applies, and is not intended to govern determinations pursuant to [section] 38. It might also be argued that other factors enumerated by section 14 as relevant might be considered, when determining the applicability of the section 16 “override”, particularly in the case of section 14(2)(d). The appellants, therefore, will address these factors as

potentially relevant considerations. In this regard, with specific reference to provisions of Section 14(2) and (3) the following should be noted ...

The appellants go on to make submissions on the applicability of sections 14(2)(d), (e), (f), (g), (h) and (i). The appellants further state with respect to section 14(3)(b):

It is recognized that under this section, a presumption arises, that disclosure is unjustifiable. It can be rebutted by demonstrating an overriding "compelling public interest," pursuant [to] section 16.

In Order MO-1192, Adjudicator Laurel Cropley stated, in the context of a request for police records concerning an alleged assault:

The Police indicate that the personal information pertaining to the suspect which is contained in the records was compiled as part of a law enforcement investigation into an alleged assault at a high school. The Police state further that the occurrence report consists of the facts in the case and the manner in which the officer concluded his investigation. Therefore, the Police submit that, since the personal information pertaining to individuals other than the appellant relates to records compiled as part of an investigation into an assault, the disclosure of the personal information is presumed to be an unjustified invasion of their personal privacy.

The appellant submits that since the Police made a judgment call not to lay charges against the suspect, they have not established the application of the presumption in section 14(3)(b).

I am satisfied that the Police investigated an alleged assault on the appellant at the named high school and that the investigation was conducted with a view to determining whether criminal charges were warranted. Accordingly, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law and its disclosure would constitute a presumed unjustified invasion of personal privacy. The presumption may still apply, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225). As I indicated above, once a determination has been made that the presumption in section 14(3)(b) applies, it cannot be rebutted by factors in section 14(2). Therefore, even if I were to find that section 14(2)(d) applies in the circumstances, it would not be sufficient to rebut the presumption in section 14(3)(b). I have considered section 14(4) and find that it does not apply in the circumstances of this appeal.

In my view, the principles articulated by Adjudicator Cropley in Order MO-1192 are applicable here. It is clear from the face of the records that the information in question was compiled and is identifiable as part of an investigation into a possible violation of law, in this case provisions of the Criminal Code. Therefore, the section 14(3)(b) presumption of an unjustified invasion of personal privacy applies to the withheld information. Since none of the exceptions under section 14(4) applies, disclosure of the information is

presumed to be an unjustified invasion of the affected persons' privacy, and the information is therefore exempt under section 38(b). In the circumstances, it is not necessary for me to consider the application of any of the factors weighing either for or against disclosure under section 14(2) [John Doe, cited above].

The appellants refer to Order M-1146 and Adjudicator Cropley's statement that "wherever possible, the Act should be interpreted and applied such that it is not used as a shield to prevent individuals from seeking justice against those who may be involved in a "wrongful" action of any nature." In that decision, the section 14(3)(b) presumption did not apply and, therefore, it was possible for Adjudicator Cropley to consider factors under section 14(2). Accordingly, Order M-1146 is not applicable in the circumstances of this case.

The appellants suggest that the section 14(3)(b) presumption is not applicable in the context of section 38(b). Many previous orders of this office have established that the presumptions listed in section 14(3) provide guidance in determining the "unjustified invasion of privacy" issue under section 38(b) [see, for example, Orders M-82 (upheld on judicial review in Hamilton (City) v. Ontario (Information and Privacy Commissioner) (February 9, 1995), Hamilton Doc. D246/93 (Ont. Div. Ct.), M-629 and MO-1297]. I find no merit in the argument that the provisions of sections 14(2), (3) and (4), which are designed to assist in determining whether or not disclosure of personal information would constitute an unjustified invasion of privacy, are not relevant in the context of section 38(b), which also requires a determination of whether or not disclosure would constitute an unjustified invasion of privacy.

The appellants also submit that under section 38(b), the onus is on the Police to establish that disclosure would constitute an unjustified invasion of privacy, while under section 14(1), the onus is on the requestor to establish that disclosure would not constitute an unjustified invasion of privacy. I accept the appellants' submission, but find that the onus of establishing that disclosure would constitute an unjustified invasion of privacy has been established based on the material before me.

Because the information at issue is exempt under section 38(b), the appellants do not have a right of access to this information unless I find that the section 16 "public interest override" applies.

## **PUBLIC INTEREST IN DISCLOSURE**

Section 16 of the Act reads:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

If I find that section 16 applies, section 14 and, in turn, section 38(b), would not apply and the appellants would have a right of access to the information at issue.

In order for the section 16 "public interest override" to apply, two requirements must be met: there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in Ontario (Minister of Finance) v.

Ontario (Information and Privacy Commissioner) (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398, cited above].

The appellants submit:

... [A]s noted in [Order] M-1146 ... the Act [should] not be interpreted in a manner that would permit it to be used as a shield by wrong doers, so as “to prevent individuals from seeking justice against those who may be involved in a ‘wrongful’ action of any nature.” There is clearly a “compelling public interest” in preventing the Act from being used in a manner that will protect wrongdoers from the civil consequences of their actions.

It must be recognized that in situations such as a breach of the peace, the police record may in fact be the only source of information as to the identity of individuals involved. In the case of a public disturbance it is highly unlikely that the people involved in an altercation will be in a position to conduct an investigation into the identity of the other parties involved prior to the parties dispersing, particularly if the individual who would want to obtain that information has been injured and is being taken to the hospital. Furthermore, in a case where there has been a breach of peace, it [is] highly unlikely that the officers attending to quell the disturbance will permit parties involved in the altercation to take steps at that time to ascertain the identity of the other individuals. Instead, the officers are going to want to separate the parties, obtain statements, and if no detention is deemed to be necessary will want to ensure that the parties disperse in opposite directions as soon as possible. The Police will gather the information they require, but are likely to actively discourage participants from doing the same thing. They alone will gather the relevant information. If they refuse to release it, then the parties who have been injured are deprived of their civil remedy. The ability to not be deprived of one’s civil remedies is clearly a “compelling public interest”.

The appellants’ interest in gaining access to the information is primarily private in nature. The appellants seek the information for the purpose of obtaining a private civil remedy. While there is to some extent a public interest in ensuring that individuals are not deprived of their civil remedies, in my view, the appellants have not provided sufficient information to persuade me that disclosure of the records at issue here would advance the public interest to the extent that the “compelling” threshold would be met. Therefore, I find that section 16 does not apply in the circumstances.

I note that on the issue of alternative methods of gaining access to personal information of an unidentified individual for the purpose of commencing or maintaining a civil action against the individual, Adjudicator Laurel Cropley in her Order M-1146 made the following comments which may be relevant in these circumstances:

I will now consider the extent to which the dog owner's address may be available by other means. First, with regard to the court, I have reviewed the relevant provisions of the Rules of Civil Procedure. I have also taken into account court practices of the [Ontario Superior Court of Justice] with respect to the commencement of civil actions.

The appellant could commence an action against the dog owner by way of a statement of claim under rules 14.03 and 14.07, even in the absence of a defendant's address. While form 14A of the Rules of Civil Procedure indicates that a plaintiff should include the name and address of each defendant in the statement of claim, in practice, the registrar will issue a statement of claim without a defendant's address, or with an "address unknown" notation ...

Once the claim is issued, the appellant, as plaintiff, could bring a motion under rule [30.10] for the production of the record in question from the Health Unit, in order to obtain the address ...

As I noted in my Order PO-1728:

These principles could apply where the name as well as the address of the potential defendant is unknown, by use of a pseudonym such as "John Doe" [see Randeno v. Standevan (1987), 61 O.R. (2d) 726 (H.C.), and Hogan v. Great Central Publishing Ltd. (1994), 16 O.R. (3d) 808 (Gen. Div.)].

While it is possible that the appellants would not be successful in obtaining the information they seek through the court process, this does not negate the application of the privacy provisions at sections 38(b) and 14(3)(b) of the Act.

**ORDER:**

I uphold the decision of the Police to withhold portions of the records at issue.

Original signed by: \_\_\_\_\_  
David Goodis  
Senior Adjudicator

\_\_\_\_\_ May 11, 2000