



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1436

Appeal MA-000285-1

York Regional Police Services Board



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NATURE OF THE APPEAL:

This is an appeal under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a decision of the York Regional Police Services Board (the Police). The requester (now the appellant) sought access to the notebooks of a named police officer and his partner with respect to an investigation of an alleged assault against the appellant.

The Police located the notes responsive to the request and granted access to some of the records, but withheld others on the basis of the exemption in section 14 (personal privacy) in conjunction with section 38(b) of the *Act*.

The appellant had advised the Police that he required the information in the notebooks in order to institute a privately laid criminal charge and/or a civil action against the person who allegedly assaulted the appellant (the affected party).

I initially sent to the Police a Notice of Inquiry that set out the facts and issues in the appeal. The Police submitted representations which I sent in their entirety to the appellant. The appellant submitted representations in response.

The appellant, in his representations, advised the Police that he no longer required disclosure of the names and addresses of the witnesses. He also agreed to restrict his access request to the full name and address of the affected party, and if required, to accept the release of only the name of the affected party.

RECORDS:

The information at issue is the name and address of the affected party as contained in the notebooks of two police officers.

DISCUSSION:

PERSONAL INFORMATION

The first issue to be determined is whether the record contains personal information, and if so, to whom that personal information relates.

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual. An individual's name constitutes personal information, pursuant to section 2(1)(h), "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". The affected party's name appears in the record with information that meets the definition of personal information, including the affected party's address [section 2(1)(d)].

The Police have disclosed to the appellant most of the information related to the alleged assault that is contained in the notebooks. Disclosure of the name and address of the affected party at this point would reveal information about the affected party's involvement in the incident. This

would be information “about” the affected party. Accordingly, I find that the name and address of the affected party is personal information of the affected party.

As well, that part of the record disclosed by the Police contains the personal information of the appellant, including his name, address, date of birth, telephone number, and information about his involvement in the incident.

RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF OTHER INDIVIDUAL’S PRIVACY

Introduction

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. Section 38(b) provides:

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;

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.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester’s right of access to his or her own personal information against another individual’s right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual’s personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether section 38(b) applies, sections 14(2) and (3) of the *Act* provide guidance 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 section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Section 14(2) factors

Section 14(2)(d) - fair determination of rights

The appellant submits that he intends to bring a civil action and/or a private prosecution against the affected party concerning the alleged assault. In this regard, the appellant appears to be relying on section 14(2)(d) as a factor to be weighed in favour of disclosure. Section 14(2)(d) reads:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request.

In order for section 14(2)(d) 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 in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Orders P-312, PO-1815, and PO-1764]

With respect to the proposed civil action, I am satisfied that the name and address of the affected party is significant to a determination of the appellant's legal right to seek redress from the affected party. I am also satisfied that the appellant is seeking the information in order to obtain a determination of his common law rights and this information is required to prepare for the proceedings which the appellant intends to bring (Orders M-39, M-1146 and PO-1715). Accordingly, I find that the four criteria required to establish the relevance of section 14(2)(d) have been met as they relate to the contemplated civil proceeding. I therefore find that section 14(2)(d) is a relevant consideration with respect to the appellant's proposed civil action. In the circumstances, I assign this factor high weight in favour of disclosure.

With respect to the contemplated criminal prosecution, I find that section 14(2)(d) is not a relevant factor. For this factor to apply, the determination of rights must be those "affecting the

person who made the request”. By definition, the prosecution of an alleged offence under the *Criminal Code* engages the rights of the accused and “Her Majesty the Queen” or the Crown. In contrast to the proposed civil action, the criminal proceedings do not involve a determination of the rights of the party who initiates the prosecution, whether that party is the police, the alleged victim or any other individual. On this basis, I find that the appellant is not sufficiently affected by the proposed determination of rights in the criminal proceedings, and thus section 14(2)(d) cannot apply in this regard.

Unlisted factor - Alternate method of access (civil proceedings)

In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, pursuant to section 14(1)(f), a decision maker must consider all the relevant circumstances and not just the nine criteria listed in section 14(2). Certain unlisted factors relevant in the circumstances of this appeal will therefore also be considered.

Previous orders of this office have discussed alternative methods of obtaining access to personal information of an unidentified individual for the purpose of commencing or maintaining a civil action against the individual (Orders M-1146, PO-1728, P-689, and P-447). Adjudicator Laurel Cropley in Order M-1146 explained how a plaintiff can commence a civil action against an individual where the plaintiff does not know the defendant’s address. She states:

... 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 of the Rules of Civil Procedure] for the production of the record in question from the Health Unit, in order to obtain the address.

In Order PO-1728, Senior Adjudicator David Goodis, agreed that “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.)]”.

Based on the above, I am satisfied that the appellant would be able to commence his proposed civil action against the affected person as an unnamed defendant, by use of a pseudonym, and then use the civil court process to obtain the affected person’s name and address from the Police. I find this unlisted factor to be a relevant consideration and assign it moderate weight against disclosure.

Unlisted Factor - Criminal proceedings

Although I found above that the section 14(2)(d) factor weighing in favour of disclosure cannot apply in the context of the proposed criminal proceedings, I will consider as an unlisted factor whether the appellant needs the information at issue in order to commence criminal proceedings.

As a general rule, private citizens have the same right to bring criminal court proceedings as does a Crown Attorney on behalf of the Attorney General. However, it appears that criminal

proceedings cannot be brought against an unnamed person. In *R. v. Unnamed Person* (1985), 10 O.A.C. 229 (C.A.), where an information had been sworn against “unknown person that can be pointed out”, the issue was whether the information was fatally defective in failing to name or describe the accused. The court held that:

an information cannot be laid against an unknown person and must be sworn against a named person or against a person who can be sufficiently described as to be identifiable.

It appears that, unlike in the civil court context, the appellant cannot commence a criminal proceeding and later use the criminal court process to obtain the name and address of the affected person. As a result, I am satisfied that the appellant requires the information at issue in order to commence his proposed criminal proceedings, and that this unlisted factor is a relevant consideration weighing in favour of disclosure.

In spite of the appellant’s inability to obtain the affected party’s name and address by using the criminal court process, the appellant can still accomplish his objective of bringing a criminal proceeding against the affected party by first commencing a civil suit. Earlier, I found that the appellant can use the civil process to get the affected party’s name and address from the Police. After the appellant has the name and address, he can then commence criminal proceedings against the affected party. I am satisfied that it would not be onerous for the appellant to structure the proceedings in this way, especially since he has indicated his intention to bring both a civil suit and a criminal proceeding against the affected party. Since the appellant can obtain the information at issue without undue effort, I assign this unlisted factor low weight.

Section 14(2)(f)

Having reviewed the record and the representations of the parties, I find that the factor in section 14(2)(f) is also relevant. This section states:

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,

the personal information is highly sensitive.

For information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual (Orders M-1053, P-1681, PO-1736). This factor has been found to apply, for example, to a request for the names of police officers charged with professional misconduct (Order M-1053), in circumstances involving the identity of an individual with respect to a specific birth registration (Order P-1681), and to a request for the names and addresses of deceased persons and names of possible inheritors (Order PO-1736).

Assistant Commissioner Mitchinson in Order P-1618 found that the personal information of “complainants, witnesses or **suspects**” [emphasis added] in their contacts with the police is highly sensitive.

In my view, the findings in prior orders are applicable in this case. Taking into consideration the nature of the incident, the possibility that the affected party may be exposed to unwanted contact with the appellant, and the surrounding circumstances, I am satisfied that disclosure of the affected party’s identity and/or home address could reasonably be expected to cause excessive personal distress to the affected party. Due to the circumstances, I find the factor in section 14(2)(f) to be compelling, and assign it high weight against disclosure.

Having weighed the factors favouring privacy protection against the appellant’s right to access, I find that the factors favouring privacy protection are more compelling in the circumstances of this appeal. Although the appellant requires the information for the purpose of the proposed civil proceedings, the weight of this factor is reduced by the fact that he can obtain this information by alternative means as described above. In addition, as I found above, the fact that the appellant needs the information for the purpose of criminal proceedings carries low weight. By comparison, the highly sensitive factor carries higher weight than the combination of factors favouring disclosure. I conclude that disclosure of the name and address of the affected party would constitute an unjustified invasion of personal privacy of that individual within the meaning of section 14(2) of the *Act* and this information is exempt under section 38(b).

Because of my finding that the information is exempt under section 14(2), it is not necessary for me to consider whether the presumption in section 14(3)(b), relied on by the Police, might also apply to the information at issue.

I have reviewed the Ministry’s representations respecting their exercise of discretion to withhold this information and find nothing improper in this regard.

ORDER:

I uphold the decision of the Police to withhold the name and address of the affected party.

Original signed by: _____
Dawn Maruno
Adjudicator

_____ June 04, 2001