



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1468**

**Appeal MA-010099-1**

**Windsor Police Services Board**



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## **NATURE OF THE APPEAL:**

The Windsor Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of two Police reports: one relating to a complaint made against the requester; the other concerning a complaint by the requester against the complainants in the first report.

The Police located the report relating to the complaint against the requester and granted partial access to it, applying the discretionary exemption found in section 38(b) of the *Act* (invasion of privacy), with reference to the presumption in section 14(3)(b) (information gathered as part of a law enforcement investigation) to deny access to the remainder.

The Police informed the requester that only the report concerning the complaint made against him exists.

The requester, now the appellant, appealed the decision of the Police: a) to deny access to the undisclosed portions of the identified report, and; b) with regard to their failure to locate any records about his own complaint.

I decided to seek the representations of the Police, initially. The submissions of the Police were then shared with the appellant, who was also provided with a Notice of Inquiry. The appellant also made representations in response to the Notice.

## **RECORDS:**

The records remaining at issue consist of the undisclosed portions of a two-page Investigation Report and a one-page follow up report. Access to two one-page witness statements was denied in their entirety.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where 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.

Based on my review of the records, I am satisfied that they contain the personal information of identifiable individuals other than the appellant. The records contain the names of the individuals who provided information to the Police about the complaint against the appellant, along with other personal information relating to them (section 2(1)(h)) which were contained in statements taken by the Police from the complainants. In addition, the records include the views of these individuals about the appellant (section 2(1)(e)) and the addresses and telephone numbers of the individuals (section 2(1)(d)).

The records also contain the personal information of the appellant, including information about his national origin, age, sex and marital status (section 2(1)(a)), his address and telephone number (section 2(1)(d)), the views or opinions of another individual about the appellant (section 2(1)(g)) and the appellant's name along with other personal information relating to him (section 2(1)(h)).

## **INVASION OF PRIVACY**

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access.

Section 38(b) of the *Act* provides:

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;

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 to the records, sections 14(2), (3) and (4) 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 head to consider in making a determination as to 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(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 14(3), the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to in favour of disclosure.

In the present appeal, the Police have relied on section 14(3)(b), which provides:

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 Police submit that the information in the records was collected in the course of their investigation into allegations that a theft had occurred, contrary to the *Criminal Code*. The Police submit, accordingly, that the information was compiled and is identified as part of an investigation into a possible violation of law.

It does not appear that any criminal charges have been laid as a result of the investigation. However, previous decisions have stated that the absence of charges does not negate the application of section 14(3)(b) [PO-1715 and MO-1451]. I am satisfied that section 14(3)(b) applies in that the information in the records was compiled and is identifiable as part of an investigation into a possible violation of law. It is, therefore, presumed that the disclosure of the personal information of the individuals referred to in the records would be an unjustified invasion of their personal privacy.

A finding that section 14(3)(b) applies does not necessarily end the matter, for section 38(b) grants the Police a discretion to disclose personal information of an identifiable individual which is contained in a record also containing the personal information of the requester, *even* if it would be an unjustified invasion of that individual's privacy. It has been said that the exercise of discretion under section 38(b) to disclose personal information of an individual other than the requester would be rare; however, the decision is a discretionary one that must be made by balancing the competing interests present in a particular fact situation [Order M-532].

I have reviewed the submissions of the Police with respect to their reasons for deciding against the release of all of the information in the records. I am satisfied that the Police properly exercised their discretion under section 38(b) of the *Act*, in deciding against disclosing those portions of the records which contain the personal information of individuals other than the appellant.

## **REASONABLENESS OF SEARCH**

During the mediation stage of the appeal, the appellant indicated that he wished to appeal the decision of the Police that they were unable to locate records responsive to a portion of his request. The Police advised that they were only able to locate records relating to the complaint made against him but were unable to obtain any records relating to the complaints initiated by the appellant about certain other individuals. Also during mediation, the appellant was asked by the Police to provide details concerning the circumstances surrounding the filing of his complaint and how these records may have been delivered to the Police.

By letter dated May 14, 2001, the appellant described in great detail the circumstances surrounding the creation of the records he is seeking and their delivery to the Police. The appellant indicated how and when he hand-delivered certain documents to the Police, leaving them at a reception area with a member of the clerical staff on duty at the time. This communication was shared with the Police who stated that they are still unable to locate any records responsive to this part of the appellant's request.

In their submissions to me, the Police explained how they conducted the search for responsive records both before and after the initiation of the appellant's appeal. The first search undertaken by the Police involved a query of its computerized record-holdings which revealed the existence of one incident, described in the records addressed above, involving the appellant.

Following the submission of the appellant's appeal, the Freedom of Information and Protection of Privacy Coordinator for the Police contacted the officer responsible for the conduct of the investigation into the complaints against the appellant. The investigator advised the Coordinator that he was not aware of the existence of any additional records beyond those reflected in the Police's computerized record-holdings.

During the mediation stage and again following the receipt of the Notice of Inquiry, the investigator was again asked to conduct a search for responsive records. In each case, he was unable to locate the records sought by the appellant. The investigator also advised that if he had received the documents which the appellant delivered, he simply would have inserted them into the existing investigation file as they were related.

In addition, inquiries were made by the Coordinator of the clerical staff present in the reception area on the day when the appellant indicates he delivered the documents which he is now seeking. These staff persons could not recall either the appellant or the submission of any documents on the day in question.

Based on the submissions of the Police with respect to the searches undertaken for records responsive to the request, I find that the Police have demonstrated that the efforts which they have made to locate the records sought by the appellant were reasonable in the circumstances.

**ORDER:**

1. I find that the searches undertaken by the Police for records responsive to his request were reasonable and I dismiss this portion of the appeal.
2. I uphold the decision of the Police not to disclose the remaining portions of the records to the appellant.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

September 20, 2001 \_\_\_\_\_