



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

INTERIM ORDER MO-1720-I

Appeal MA-030143-1

Guelph Police Service



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NATURE OF THE APPEAL:

The Guelph Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the names and addresses of those persons who had been detained concerning, as well as any witnesses to, a break and enter at a property owned by the requester. The Police located several records relating to the arrest and release of certain persons who were investigated about the break and enter and denied access to portions of them on the basis that the undisclosed information was exempt from disclosure under sections 8(2)(a) (law enforcement report) and 38(b) (invasion of privacy) of the *Act*.

The requester, now the appellant, appealed the decision to deny access to all of the information contained in the records.

During the mediation stage of the appeal, the Police withdrew their reliance on section 8(2)(a) as a basis for denying access to the requested information. The Police further indicated that the records may contain information which is excluded from the operation of the *Act* because of the application of the doctrine of federal legislative paramourcy. The Police rely on the operation of the non-disclosure provisions in the applicable federal legislation as the basis for denying access to some of the information contained in the records.

As further mediation was not possible, the appeal was moved into the adjudication stage of the process. I decided to seek the representations of the Police, initially. The Police declined to make submissions in this appeal. I then provided a Notice of Inquiry to the appellant and did not receive any representations from him either.

RECORDS:

The records at issue consist of the undisclosed portions of an occurrence report and a break and enter report prepared by the Police.

DISCUSSION:

JURISDICTION

Because federal legislation applies to the undisclosed information contained in the third severance in Record 8, I find that I have no jurisdiction to consider it due to the constitutional doctrine of paramourcy. [Order PO-1659]

PERSONAL INFORMATION/INVASION OF PRIVACY

Do the records contain “personal information” and if so, to whom does it relate?

The section 38(b) personal privacy exemption applies only to information which qualifies as “personal information”, as defined in 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 [paragraph (h)].

I have reviewed the contents of the records and find that they contain personal information within the definition of that term in section 2(1). The personal information relates to the appellant and to a number of other identifiable individuals, including their dates of birth, sex, addresses, telephone numbers and other personal information appearing in conjunction with the names of these individuals.

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.

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 the exemption in section 38(b) applies, 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 institution to consider in making this determination. 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.

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].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [See Order PO-1764]

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The Police have relied on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act* which 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;

The records at issue are occurrence reports prepared by police officers in the course of their investigation into allegations made on the appellant's behalf that his property had been broken into. In my view, the records were clearly compiled and are identifiable as part of an investigation into a possible violation of law. As a result, I find that the presumption in section 14(3)(b) applies to this information. The appellant has not raised the possible application of section 16 and the exceptions in section 14(4) have no application in this appeal. Accordingly, I find that the information qualifies for exemption under the discretionary exemption in section 38(b).

Exercise of discretion under section 38(b)

As noted above, the Police have not provided me with any representations and have not, therefore, addressed the question of the manner in which they exercised their discretion under section 38(b) not to grant access to the personal information contained in the records.

In Order PO-2129-F, Senior Adjudicator David Goodis reviewed the obligations of an institution when deciding whether to exercise its discretion to disclose information that may be subject to a discretionary exemption, in that case section 49(b) of the provincial *Act*, the equivalent provision to section 38(b) of the municipal *Act*. He found that:

The section 49(b) exemption is discretionary, and permits the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry's decision to determine whether it exercised discretion and, if so, to determine whether it erred in doing so. However, this office may not substitute its own discretion for that of the institution [see section 54(2)]. This office may find that an institution erred in its exercise of discretion where, for example:

- it does so in bad faith or for an improper purpose;

- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

In that event, this office may send the matter back to the institution for a re-exercise of discretion, based on proper considerations [Order MO-1573].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that:
 - information should be available to the public;
 - individuals should have a right of access to their own personal information;
 - exemptions from the right of access should be limited and specific;
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking their own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and

- the historic practice of the institution with respect to similar information.

I adopt the reasoning of the Senior Adjudicator for the purposes of the present appeal. I find that, in the absence of any representations from the Police with respect to the manner in which they exercised their discretion not to disclose the records which are subject to exemption under section 38(b), I am unable to determine whether the Police exercised their discretion properly. As a result, I will remit the matter back to the Police for a re-exercise of their discretion, taking into account only those considerations which are relevant.

INTERIM ORDER:

1. I uphold the decision of the Police to deny access to the undisclosed portions of Records 6, 7, 8 and 9 with the exception of the third severance in Record 8 which is subject to federal legislative paramouncy.
2. I order the Police to consider the exercise of discretion under section 38(b) of the *Act* with respect to the undisclosed portions of Records 6, 7, 8 and 9, and to provide me with representations as to the factors considered in doing so by **December 22, 2003**. The representations concerning the exercise of discretion should be forward to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor St., West, Suite 1700, Toronto, Ontario, M5S 2V1.
3. I remain seized of this appeal in order to deal with the exercise of discretion issue and any other issues that remain outstanding.

Original signed by: _____
Donald Hale
Adjudicator

_____ December 2, 2003