



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

# **ORDER MO-1741**

**Appeal MA-030057-1**

**Toronto Police Services Board**



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## **NATURE OF THE APPEAL:**

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), an individual asked the Toronto Police Services Board (the Police) for all of the information related to the allegations that his former spouse made against him about his conduct with his daughter.

The Police found a videotape and 26 pages of written records. They gave the individual partial access to some of the information. In denying him access to the remainder of the information, the Police relied on the following sections of the *Act*:

- section 38(a) in conjunction with section 8(1)(l)
- section 38(b) in conjunction with section 14(3)(b)

The Police also denied access to all information that was irrelevant or non-responsive to the individual's request.

The individual appealed the decision.

During mediation of the appeal one matter was clarified. The individual (now the appellant) provided proof that he has interim joint custody of the child. As a result, the Police reconsidered their decision and released more information to the appellant. Still dissatisfied with the degree of disclosure, the appellant asked that the appeal proceed to adjudication.

I sought and received representations from the Police. Apart from the small portions I deemed confidential, I shared the Police's representations with the appellant and he provided his response. I have carefully considered all of the representations before me.

## **RECORDS:**

There are 26 pages of written records remaining at issue as well as the videotape (Record 27). The written records can be described as

- police officers' memorandum notes
- portions of a numbered occurrence report

## **CONCLUSION:**

The information the Police withheld from the appellant is exempt from disclosure under section 38 of the *Act*.

## **ANALYSIS:**

### **PERSONAL INFORMATION**

The personal privacy exemptions in section 38 apply only to information that qualifies as personal information. Therefore, I must first assess whether the relevant records contain

personal information and, if so, to whom that information relates. The term “personal information” is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] and the individual’s name 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 [paragraph (h)].

I have considered the representations before me and examined all of the records at issue.

As already indicated, the records at issue document the police investigation into allegations that the appellant’s former spouse made against him about his conduct with his daughter. As such, they contain information about the appellant, his former spouse and their daughter, including personal information about them such as age, sex and family status [paragraph (a)], medical history [paragraph (b)], names and addresses [paragraphs (d) and (h)], and personal opinions and views [paragraphs (e) and (g)].

#### **DISCRETION TO REFUSE REQUESTER’S OWN INFORMATION**

While 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(a), the institution has the discretion to deny an individual access to his or her own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

Under section 38(b), 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.

In this case, the Police applied both sections 38(a) and (b) in refusing access to the records. In my analysis, I will consider first the applicability of section 38(a). I will then examine the applicability of section 38(b) and whether the disclosure of the personal information in the records would be an unjustified invasion of the personal privacy of other individuals and therefore exempt from disclosure.

#### **LAW ENFORCEMENT**

The Police rely on section 38(a) in conjunction with section 8(1)(l) to exempt the Police “ten-codes” found on pages 2, 6, 7 and 9 of the written records.

Section 8(1)(l) reads:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

While the appellant makes no specific arguments in this regard, the Police are adamant that were the “ten-codes” to become common knowledge, “such knowledge could reasonably be expected to facilitate the commission of an unlawful act or to hamper crime control.” They argue that the “ten-codes” are used to convey information “in such a manner that anyone intercepting the message will be unable to determine the content or import of the message.” They quote from Order PO-1665 where Adjudicator Laurel Cropley found that disclosure of the “ten-codes” would leave police officers more vulnerable and compromise their ability to provide effective policing as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of the officers themselves.

Numerous other orders of this office reiterate the findings of Adjudicator Cropley in Order PO-1665 (see Orders PO-1686, MO-1715 and MO-1672). Based on these orders, the representations of the Police and my review of the records, I am satisfied that disclosing the ten-codes in this case could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Therefore, I find that the Police have properly applied section 8(1)(l) to this information and I find it exempt under section 38(a) of the *Act*.

## **INVASION OF PRIVACY**

### **Introduction**

As noted earlier, section 38(b) provides an exception to the general right of access to one’s own personal information where a record contains the personal information of both the requester and other individuals. This section 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].

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.

In addition, if any of the exceptions to the section 14(1) exemption at paragraphs (a) through (e) applies, then disclosure would not be an unjustified invasion of privacy under section 38(b).

The Police applied section 38(b) in conjunction with section 14(3)(b) to the remainder of the pages of written records and to the videotape.

The section 14(3)(b) presumption 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.

### **Police's Representations**

The Police make these representations:

The personal information collected from the parties was compiled by members of the Police during an investigation into allegation that an offence under the Criminal Code of Canada may have been committed. The allegation in this case was sexual assault. The information collected and maintained in these records was used to investigate an offence and lead to the possible prosecution of the offender should criminal charges be warranted.

The records at issue in the officer's memorandum book notes and contained on pages 1, 2, 3, 5, 6, 7, 8, 10, 12, 13, 15, 16, 22, 23, and 26 all are identifiable as the personal information of the estranged spouse of the appellant. Note that the records at issue contain the information relating to the appellant's daughter and former spouse, but not the personal information of the appellant. The information she provided was in the context of an investigation, and done for the purpose of

protecting her child and to report what she felt was a violation of the law. The information was not provided for ready dissemination upon the conclusion of the investigation, and as the joint custodial parent in this custody issue, the likelihood of her granting permission for the release of her information is negligible. The police officer's notes, the occurrence report and the videotape of the alleged victim were compiled in the course of a law enforcement investigation, and therefore, in accordance with section 14(3)(b), disclosure is presumed to constitute an unjustified invasion of personal privacy.

### **Appellant's Representations**

The Appellant disagrees with the representations of the Police and provides these brief representations in response:

I believe that the information is my personal information since this involves the views or opinions of another individual about myself. Personal information as defined in 2(1) e of the Act as "the personal opinions or views of the individual except if they relate to another individual". With this in mind, I do not believe that there is an unjustified invasion of privacy in disclosing such information to me.

I believe that the concern expressed by Judge Himmel & the Office of the Children's Lawyer was focused upon the mother's behaviour. The attached order from Judge Himmel & subsequent letter from the Office of the Children's Lawyer do not indicate any concerns as to my behaviour. Now as the father with joint custody, I believe that I have a duty to acquaint myself with any factors, which may be detrimental to the well being of my daughter.

Since my primary concern is for the welfare of my daughter Emily for the long-term, I need the full background in order to represent her adequately in the future & that our relationship remains sound.

### **Findings**

While I agree with the appellant in part, it is still the case that the Police properly applied the section 14(3)(b) presumption to withhold the information at issue from the appellant.

First, it is true that portions of the information withheld do constitute the personal information of the appellant because they are the views or opinions of another individual about him. For example, portions of the withheld information in pages 10, 14, 15, 22, 23 and 24 qualify as the appellant's personal information on this basis. However, here, the appellant's personal information is so intertwined with the personal information of others that access to this information could result in an unjustified invasion of the personal privacy of others.

Second, it is evident from an examination of all of the records and the circumstances of this appeal that the Police compiled this information during the course of their investigation into a possible violation of the *Criminal Code*. If a record contains personal information and that information was compiled during the course of an investigation and is identifiable as such, the presumption at 14(3)(b) applies even where charges are not laid (Orders P-223, P-237, P-1225, MO-1181, MO-1443), as is the case here.

I acknowledge the appellant's desire to have as much information as possible in these circumstances but, given the particular facts of this appeal, disclosure of the information he seeks is presumed to constitute an unjustified invasion of personal privacy, and thus these records qualify for exemption under section 38(b).

As indicated above, the section 14(3)(b) presumption cannot be overcome by any factors, listed or unlisted, under section 14(2). In addition, I find that no exceptions under section 14(4) apply.

### **SEVERANCE**

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

In the circumstances, I am satisfied that the Police carefully considered the records and reasonably severed the records under section 10(2), providing the appellant with as much information as possible, while withholding other information on the basis of the applicable exemptions.

### **EXERCISE OF DISCRETION**

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under any of the *Act's* discretionary exemptions.

The sections 38(a) and (b) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. Therefore, I must also review the Police's exercise of discretion in deciding to withhold the information.

I have examined the Police's specific representations on the exercise of their discretion, which are found dispersed throughout the representations they filed. I find that the exercise of their discretion was based on proper considerations such as

- the purposes of the *Act*
- the wording of the exemption and the interests it seeks to protect
- whether the appellant has a sympathetic or compelling need to receive the information

- the relationship between the appellant and the affected persons
- the nature of the information and the extent to which it is significant and sensitive to the Police, the appellant and the affected persons

Furthermore, I find that the Police took into account other relevant factors and did not base their decision on irrelevant factors. Finally, there is no evidence before me that the Police exercised their discretion in bad faith or for an improper purpose

Therefore, I am satisfied that the Police properly exercised their discretion in reaching their decision in this case.

**ORDER:**

I uphold the decision of the Police.

Original Signed by: \_\_\_\_\_  
Rosemary Muzzi  
Adjudicator

\_\_\_\_\_  
January 19, 2004