



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1816

Appeal MA-030406-1

Niagara Regional Police Service



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NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), a private individual asked the Niagara Regional Police Services Board (the Police) for a copy of a specific general incident report pertaining to him.

The Police decided to grant the individual access to some portions of the report only. The Police denied the individual access to two types of information contained in the report

- the police codes [on the basis of section 8(1)(l) - facilitate commission of unlawful act]
- other information [on the basis of section 38(b) in conjunction with section 14(3)(b) – unjustified invasion of another individual’s personal privacy]

The individual appealed the decision.

During mediation, the individual (now the appellant) confirmed that he was not seeking access to the police codes. The other information remained in dispute, so the appeal then moved to the adjudication stage.

First, I sought and received the representations of the Police. I shared the non-confidential portions of their representations with the appellant. The appellant did not provide written representations in response. Instead, he offered some oral representations to the Adjudication Review Officer assigned to the appeal. The Adjudication Review Officer wrote down the appellant’s comments and placed them on the file.

ANALYSIS:

PERSONAL INFORMATION

The first issue for me to determine is whether the record at issue in this appeal, the general incident report, contains 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 and 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 examined the record. I find that it contains the personal information of the appellant and of another identifiable individual, including such things as their

- names
- addresses
- telephone numbers
- personal opinions or views

Hence, the information meets the definition of “personal information” set out in paragraphs (c), (d), (e), and (h) of the section 2(1) definition.

UNJUSTIFIED INVASION OF ANOTHER INDIVIDUAL’S PERSONAL PRIVACY

General principles

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 another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. If the information falls within the scope of section 38(b), that does not end the matter, however, as the institution may exercise its discretion to disclose the information to the requester. I will review the Police’s exercise of discretion under section 38(b) later in this order, after I have decided whether the exemption applies.

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] though it 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.

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).

In this case, the Police relied on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act* to withhold the portions of the record.

Section 14(3)(b) 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 submit that the personal information in the record was compiled and is identifiable as part of an investigation into a possible violation of law.

The record in question was created by the Police as part of their investigation into the circumstances surrounding a possible violation under the *Criminal Code*, namely: harassment. As stated in Orders M-289 and M-293 the fact that no criminal proceedings were commenced by the Police does not negate the applicability of section 14(3)(b). This section only requires that there be an investigation into a possible violation of law.

Appellant's representations

The appellant's argument is based on the *Canadian Charter of Rights and Freedoms* (the *Charter*). The appellant submits that the *Charter* guarantees him a right to be free of discrimination whereas privacy rights of individuals are not enshrined in the *Charter*. He asserts that the Police denied him the information he seeks because of his relationship with the individual whose personal information is contained in the record at issue. Therefore, he claims, the application of section 14(3)(b) in these circumstances is discriminatory and violates his rights under the *Charter*.

Findings

I find that the section 14(3)(b) exemption applies to the information in the record at issue.

It is evident from an examination of this record and the circumstances of this appeal that the Police compiled this information during the course of their investigation into an incident of harassment, which was 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.

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.

The application of the “public interest override” at section 16 of the *Act* was not raised, and I find that it has no application in the circumstances of this appeal. Moreover, the appellant’s *Charter* argument, as framed, is insufficient and unpersuasive. The argument apparently relates to the right to equality before the law guaranteed by section 15 of the *Charter*, but the appellant does not explain how his right has been infringed.

All of the records, therefore, qualify for exemption under section 38(b).

SEVERANCE

Section 4(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 4(2), providing the appellant with as much information as possible, while withholding other information on the basis of the applicable exemptions.

EXERCISE OF DISCRETION UNDER SECTION 38(b)

As indicated, section 38(b) is a discretionary exemption. Therefore, once it is determined that a record qualifies for exemption under this section, the Police must exercise their discretion in deciding whether or not to disclose it.

The Commissioner may find that the institution erred in exercising its discretion where, for example

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573].

On this issue, the Police say:

In exercising my discretion I considered the relationship between the appellant and the [other individual].

Another relevant consideration for me was the age of the information. As this investigation was only conducted within this last year and the [other individual] is still dealing with this issue today because the appellant continues to pursue it, I consider the record to be current.

...

Also, the appellant has not presented me with any evidence to support a claim that there is a sympathetic or compelling need for the release of this information.

For these reasons, I feel obligated to protect the privacy of the [other individual] in this matter. I feel the [other individual's] right to privacy outweighs the right of access of the appellant because I believe it is one of the fundamental principles of the *Act* to protect the privacy of individuals.

Having considered the representations of the Police, I am satisfied that the Police did not err in the exercise of their discretion by taking into account irrelevant considerations, failing to take into account relevant considerations, or in any other respect. I am satisfied that the Police bore in mind the purposes of the *Act* by disclosing as much as possible of the information sought by the appellant, exempting only a fraction of the information in order to protect personal privacy.

CONCLUSION

All of the information the Police withheld from the appellant qualifies for exemption under section 38(b). In addition, the Police did not err in exercising discretion under section 38(b).

ORDER:

I uphold the decision of the Police.

Original Signed by: _____
Rosemary Muzzi
Adjudicator

July 21, 2004 _____