

INTERIM ORDER MO-1757-I

Appeal MA-030146-1

Ottawa Police Services Board

NATURE OF THE APPEAL:

The requester made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ottawa Police Services Board (the Police) for a copy of the notes a named police officer made with respect to a specific motor-vehicle accident. The requester's wife was killed in the accident.

The Police issued a decision to the requester, granting partial access to the record. The Police denied access to the remaining information, relying on section 14 (invasion of privacy) with specific reference to section 14(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law).

The requester (now the appellant) appealed the Police's decision to deny access to the remaining information.

During mediation, the Mediator notified a number of witnesses identified in the record to ask if they would consent to the disclosure of their contact information. Four witnesses responded and provided their consent. Accordingly, the Police disclosed the contact information for these four witnesses to the appellant.

Also during mediation, the Mediator raised the possibility that section 38(b) (invasion of privacy) might apply, as the appellant's name appears in the record.

Finally, the Mediator added section 8(1)(l) (facilitate commission of an unlawful act) as an issue based on the exemptions cited in the Police's Index of Records.

Mediation did not resolve this appeal, and the file was transferred to adjudication. Because the record may contain the personal information of both the appellant and other individuals, I added the discretionary exemption at section 38(a) (discretion to refuse requester's own information) as an issue in this appeal. I sent a Notice of Inquiry to the Police, initially, outlining the facts and issues and inviting the Police to make written representations. The Police submitted representations in response to the Notice. I then sent a Notice of Inquiry to the appellant, together with a copy of the Police's representations. The appellant did not make any representations in response to the Notice; he did, however, provide me with a letter earlier in the inquiry, which I will treat as his representations for the purpose of this appeal.

RECORD:

The record consists of six pages of a police officer's notebook entries.

BRIEF CONCLUSION:

Some of the information at issue is not exempt from disclosure and must be disclosed. The remaining information qualifies for exemption under sections 38(a) or 38(b), but because these exemptions are discretionary, the Police must still consider whether to disclose this information to the appellant.

DISCUSSION:

PERSONAL INFORMATION

The first issue I must decide is whether the record contains personal information, and if so, whose. This initial finding will determine whether I must review the Police's "invasion of privacy" claim under section 38(b) (a discretionary exemption) or section 14 (a mandatory one). It will also determine whether I review the Police's "law enforcement" claim under section 8(1)(l) alone or in conjunction with section 38(a).

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 age (section 2(1)(a)) or address (section 2(1)(d)), any identifying number, symbol or other particular assigned to the individual (section 2(1)(c)), information relating to the individual's medical history (section 2(1)(b)), or 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 (section 2(1)(h)).

The Police submit that the information at issue contains the personal information of the deceased individual, the driver of the vehicle and the witnesses to the accident. The Police submit that the appellant has already obtained access to his own personal information in the record and that none of the information still at issue constitutes the appellant's personal information.

The appellant does not specifically make representations on this issue.

I will first address the Police's submission that the information at issue does not qualify as the appellant's personal information. Where an institution has previously disclosed portions of a record to the requester (as in this case), the correct approach is to review the entire record – not only the portions remaining at issue – to determine whether it contains the requester's personal information. This record-by-record analysis is significant because it determines whether the record as a whole (rather than only certain portions of it) must be reviewed under Part I or Part II of the *Act* (see, for example, Order M-352). Some exemptions, including the invasion of privacy exemption, are mandatory under Part I but discretionary under Part II, and thus in the latter case an institution may disclose information that it could not disclose if Part I applied.

Accordingly, I have reviewed the record and I find that it contains the personal information of both the appellant and other individuals, namely, the deceased individual, the driver and the witnesses.

In addition, I find that certain information on page 5 does not constitute personal information, either because it is not about an identifiable individual, or because it relates to police officers in their professional capacity.

LAW ENFORCEMENT

The Police claim that the “ten-codes” in the record are exempt under section 8(1)(l). Because I have found that the record contains personal information of the appellant and other individuals, however, I must determine whether the “ten-codes” qualify for exemption under section 38(a) in conjunction with section 8(1)(l), rather than under section 8(1)(l) alone. These sections read:

38. A head may refuse to disclose to the individual to whom the information relates personal information,

- (a) if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

8. (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (l) facilitate the commission of an unlawful act or hamper the control of crime.

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 exemptions from disclosure that limit this general right.

Under section 38(a), where a record relates to the requester but section 8 (law enforcement) would apply to the disclosure of personal information in the record, the institution may refuse to disclose that personal information to the requester.

Because section 38(a) is a discretionary exemption, even if the information falls within the scope of this section, the institution must nevertheless consider whether to disclose the information to the requester.

OPP officers use “ten-codes” in their radio communications with each other. Ten-codes appear in the record at issue on pages 5 and 6.

The Police submit, among other things:

The release of these codes would leave officers more vulnerable and compromise their ability to provide effective policing services. If individuals were aware of the ten-codes they could engage in illegal activities, therefore circumventing police processes by placing false calls to the police.

The appellant does not specifically make representations on this issue.

This office has consistently found that section 8(1)(l) applies to “ten-codes” (for example, Orders M-393, M-757, PO-1665). Based on these earlier orders, I find that disclosing the ten-codes at issue could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. As Adjudicator Laurel Cropley stated in Order PO-1665, “disclosure of the ‘ten-codes’ would leave ... officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of ... officers who communicate with each other on publicly accessible radio transmission space.” I therefore find that the ten-codes qualify for exemption under section 38(a) in conjunction with section 8(1)(l).

INVASION OF PRIVACY

The Police rely on section 14 to support their denial of access to the remaining information at issue. More specifically, they rely on the “presumed unjustified invasion of personal privacy” at section 14(3)(b). Again, because I have found that the record contains personal information of the appellant and other individuals, I must determine whether the information at issue qualifies for exemption under section 38(b). These sections read:

- 38. 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;
- 14. (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
 - (b) 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;

As noted above, section 38 provides a number of exemptions from disclosure that limit the general right of access under section 36(1) to one’s own personal information held by an institution.

Under section 38(b), where a record relates to the requester but disclosure of the information would constitute an unjustified invasion of another individual’s personal privacy, the institution may refuse to disclose that information to the requester.

Like section 38(a), section 38(b) is a discretionary exemption. Even if the requirements of section 38(b) are met, the institution must nevertheless consider whether to disclose the information to the requester. In this case, section 38(b) requires the Police to exercise their

discretion in this regard by balancing the appellant's right of access to his own personal information against other individuals' right to the protection of their privacy.

Sections 14(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 38(b). Sections 14(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 38(b).

Section 14(2) provides some criteria for determining whether the personal privacy exemption applies. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled 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). A section 14(3) presumption can be overcome, however, if the personal information at issue is caught by section 14(4) or if the "compelling public interest" override at section 16 applies (*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 factors listed in section 14(2), as well as all other relevant circumstances.

I have concluded that none of the exceptions at sections 14(1)(a) through (e) applies in this case.

The Police do not specifically make any representations on either section 14 or section 38(b).

The appellant submits that information resulting from the Police's investigation should be public because the Police are "funded by public tax dollars." He further submits that "this whole process ... is circuitous [because] upon serving a Summons on the police officer all of this information and more will be obliged to be disclosed by the police."

Whether or not the same or similar information may be obtained through avenues outside the *Act* such as civil litigation, as the appellant appears to suggest, is irrelevant to whether the Police must disclose the information at issue in the record under the *Act*. Information that may be exempt under the *Act* may be available through other avenues, and vice versa (see, for example, section 64 of the *Act* and Order PO-1688).

In order for section 14(3)(b) to apply, the information must have been compiled and must be identifiable as part of an investigation into a possible violation of law.

Based on the record's contents and the surrounding circumstances, I am satisfied that the personal information at issue was compiled as part of an investigation into a possible violation of law, thereby triggering the presumption of an unjustified invasion of privacy at section 14(3)(b).

The presumption is not rebutted by section 14(4) or the “compelling public interest” override at section 16, which was not raised in this case. I therefore find that the personal information at issue qualifies for exemption under section 38(b) in conjunction with section 14(3)(b).

I found, above, that certain information on page 5 does not constitute personal information. This information does not qualify for exemption under section 38(b). As this information is also not exempt under any other provision in the *Act*, the Police must disclose it. I am enclosing with the copy of this interim order being sent to the Police a copy of page 5 highlighting those portions that the Police must not disclose at this time. I will order the Police to disclose the remaining information on page 5.

POLICE’S EXERCISE OF DISCRETION

The section 38(a) and (b) exemptions are discretionary, and permit the Police to disclose information, despite the fact that they could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, 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; or
- it fails to take into account relevant considerations.

In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution (section 43(2)).

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; and

- the privacy of individuals should be protected.
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her 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.

As discussed above, the Police erred in relying on section 8(1)(l) (rather than section 38(a) in conjunction with section 8(1)(l)) and section 14 (rather than section 38(b) in conjunction with section 14) in refusing to disclose the information at issue. As a result, the Police have not exercised their discretion under either section 38(a) or section 38(b) in this case. I will therefore remit this matter to the Police for a proper exercise of discretion under sections 38(a) and 38(b). As indicated above, the Police must take into account all relevant factors and circumstances, including the appellant's relationship to the deceased individual whose personal information appears in the record.

ORDER:

1. I order the Police to disclose to the appellant the information on page 5 that is not exempt from disclosure by **March 12, 2004**. I am providing the Police with a highlighted version of page 5 with this interim order, identifying the portions that they must not disclose at this time. The Police must disclose the remaining information on page 5.
2. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Police to provide me with a copy of page 5 that is disclosed to the appellant.

3. I uphold the Police's decision to deny access to the remaining information at issue in the record, subject to the Police's exercise of discretion under sections 38(a) and 38(b) as set out below.
4. I order the Police to exercise their discretion under section 38(a) with respect to the ten-codes in the record.
5. I order the Police to exercise their discretion under section 38(b) with respect to the remaining information.
6. In exercising their discretion pursuant to Provisions 4 and 5, the Police must take into account all relevant factors and circumstances of this case, with reference to the principles articulated in Orders PO-2129-F and MO-1498.
7. I order the Police to provide the appellant and me with representations on their exercise of discretion no later than **March 5, 2004**.
8. The appellant may submit responding representations on the exercise of discretion issue no later than **March 19, 2004**.
9. I remain seized of this appeal in order to deal with the exercise of discretion issue and any other outstanding issues.

Original signed by: _____
Shirley Senoff
Adjudicator

February 20, 2004 _____