



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1818**

**Appeal MA-030292-1**

**South Bruce Grey Police Services Board**



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## **NATURE OF THE APPEAL:**

This appeal concerns a decision of the South Bruce Grey Police Service (the Police) (now the Hanover Police Service) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) requested records relating to an incident that occurred at a named bank (the bank) on April 25, 2003 and any preceding action taken by the bank regarding the appellant.

The Police issued a decision providing partial access to the records, citing the application of section 14 of the *Act* (personal privacy) to deny access to the severed portions.

The appellant appealed this decision.

During the mediation stage, the Police reconsidered their decision and, subsequently, issued a new decision letter disclosing additional records. Also during mediation, the mediator raised the possible application of section 38 (b) to the records at issue. No further mediation was possible, and the file was transferred to adjudication.

The information at issue is the names of two employees of the bank (the affected persons) that appear in the three records set out below. The issues for me to consider are whether this information qualifies as “personal information” under section 2(1) of the *Act* and, if so, whether this information is exempt from disclosure pursuant to the section 38(b)/14 exemption or under section 14 alone.

I first sought and received representations from the Police. The Police agreed to share the non-confidential portions of their representations with the appellant. The appellant was provided with a copy of the Police’s non-confidential representations and invited to submit representations. The appellant made representations. I then determined that the appellant’s representations raised issues that the Police should be given an opportunity to address and so I sought and received reply representations from the Police.

## **RECORDS:**

The following three records are at issue:

- General Occurrence Report BG30000905, dated March 28, 2003 (1 page)
- General Occurrence Report BG03001209, dated April 25, 2003 (1 page)
- police officer’s note (1 page).

## **DISCUSSION:**

### **PERSONAL INFORMATION**

The exemptions under section 38(b)/14 or 14 alone apply only to information that qualifies as “personal information”, as defined under section 2(1) of the *Act*. “Personal information” is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)], the individual’s address [paragraph (d)] 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)].

The Police indicate that the information severed from the occurrence reports and the police officer’s notes meets the definition of personal information under paragraph (h) as it contains the names of the affected persons and discloses the position at the bank held by one of the affected persons. The Police state that disclosure of this information could reveal other personal information about the affected persons as referenced in paragraph (h) of the definition of personal information.

The appellant does not address this issue directly. His representations are focused on his desire to acquire the information at issue so that he can be as precise as possible in addressing issues relating to this incident with senior personnel of the bank.

Based on my review of the records and the Police’s representations, I am satisfied that the records contain the personal information of the appellant, including his name and information relating to outstanding criminal charges against him, and the affected persons, including their names, the job title for one of them and details of their concerns regarding the appellant.

### **DISCRETION TO REFUSE ACCESS TO APPELLANT’S INFORMATION/INVASION OF PRIVACY**

#### **Introduction**

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,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

In this case I have determined that the records contain the personal information of both the appellant and other individuals. As a result, I will consider whether the disclosure of the personal information at issue would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under section 38(b).

Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant 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 appellant. On appeal, I must be satisfied that disclosure *would* constitute an unjustified invasion of another individual’s personal privacy (see Order M-1146).

If the information falls within the scope of section 38(b), that does not end the matter 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 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.

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).

### **Unjustified invasion of another individual's personal privacy**

In this case, the Police are relying on the presumptions at section 14(3)(b) and (d) to support their decision to deny access to the information at issue. Those sections read:

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;
- (d) relates to employment or educational history;

I will first examine the possible application of section 14(3)(b).

The Police state that the personal information which pertains to the affected persons was compiled as part of a law enforcement investigation into "an unwanted party and trespass to property" matter involving the appellant. The Police indicate that that the affected persons contacted the Police on two occasions because they were "frightened and felt threatened by the appellant". The Police remain convinced that for "safety" reasons the names of the affected persons should not be revealed to the appellant.

The appellant does not provide representations that directly address the application of section 14(3)(b). As indicated above, the appellant states that he is interested in the information so that he can best address his issues relating to this matter with senior personnel of the bank. He suggests that the affected persons' allegations that were the subject of the occurrence reports stem from "gossip about [his] being charged with eleven indictable offences." The appellant indicates that these charges have since been withdrawn. The appellant states that he is "61 years of age and [has] no intention [of] causing any physical harm to the [affected persons]."

I acknowledge the appellant's interests and intentions; however, I find that section 14(3)(b) applies. On my review of the Police's representations and the records, it is clear that the personal information was compiled as part of an investigation into a possible violation of the *Criminal Code*.

It is not clear whether criminal proceedings were commenced in respect of these occurrences. However, whether or not they were commenced does not have a bearing on this issue since section 14(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849).

While the appellant has not specifically raised the application of any of the factors in section 14(2), his representations strongly hint at the application of section 14(2)(d) (fair determination of rights). He suggests that the information is relevant to a fair determination of his rights,

specifically, his desire to clear his name with the bank. However, having found that section 14(3)(b) applies, I am precluded from considering any of the factors weighing for or against disclosure under section 14(2), because of the *John Doe* decision. 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.

In conclusion, due to the application of section 14(3)(b), I find that disclosure of the personal information at issue would be an unjustified invasion of personal privacy. Therefore, the information is exempt 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 released without disclosing material which is exempt.

The parties did not submit representations on severance.

The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information.

The Police have disclosed all of the information in the two occurrence reports and the police officer’s notes to the appellant with the exception of the exempt information.

Therefore, I am satisfied that the Police have properly completed the severing exercise.

### **EXERCISE OF DISCRETION UNDER SECTION 38(b)**

The section 38(b) exemption is discretionary, and permits 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.

The exercise of discretion under section 38(b) involves a balancing principle. The institution must weigh the appellant’s right of access to his or her own personal information against the other individual’s right to the protection of their privacy. If the institution determines that the 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 appellant.

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 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)].

In this case, the Police have stated that they have withheld the personal information of the affected persons due to the circumstances surrounding this investigation, in particular, the existence of criminal charges against the appellant and the affected persons' fears of reprisal by the appellant if their identity is revealed to him.

I am satisfied that the Police have properly balanced the appellant's right of access against privacy considerations. Accordingly, I find that the Police have not erred in the exercise of their discretion to deny the appellant access to the withheld information.

**ORDER:**

I uphold the Police's decision that the withheld portions of the records at issue are exempt under section 38(b) of the *Act*.

Original signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

\_\_\_\_\_  
July 27, 2004