



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

ORDER MO-1807

Appeal MA-030313-1

Niagara Regional Police Services Board



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NATURE OF THE APPEAL:

The Niagara Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all information from August 24, 2002 through October 31, 2002 relating to an incident which occurred on a particular date at a specific address.

In response to the request, the Police issued a decision providing partial access to the records, and denying access to portions of the records on the basis of sections 8(1)(l) (facilitate commission of unlawful act) and 38(b) (invasion of privacy), with reference to sections 14(1)(a) and (f), and 14(3)(b).

The requester (now the appellant) appealed the decision of the Police.

Mediation did not resolve the issues, and this file was transferred to the adjudication stage of the process. I sent a Notice of Inquiry to the Police, initially, and I included section 38(a) (discretion to refuse requester's own information) as a possible issue in this appeal.

The Police provided representations in response to the Notice of Inquiry. They also identified that they were prepared to disclose additional portions of certain records to the appellant, and this additional information (portions of pages 6 and 7 of Record 3) was provided to the appellant.

I then sent the Notice of Inquiry, along with the non-confidential portions of the Police's representations, to the appellant. I did not receive representations from the appellant.

RECORDS:

The records remaining at issue are: the severed portions of a general incident report including supplementary reports (Record 3), the severed portions of police officers' notes (Records 4 and 5), a witness statement (Record 6) and a letter (Record 7).

DISCUSSION:

PERSONAL INFORMATION

The personal privacy exemption in section 38(b) applies only to information that qualifies as personal information. 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 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)].

I have reviewed the contents of the records and have determined that each of them contains the personal information of both the appellant and other identifiable individuals within the meaning of section 2(1). The personal information includes the names, addresses, telephone numbers and age, as well as other personal information relating to 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 deciding 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. [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.

Operation of the presumption in section 14(3)(b)

In this appeal the Police rely on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act*, which states:

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 representations of the Police state:

Records 3 through 6 were compiled and are identifiable as part of an investigation into a possible violation of law.

On [a specified date], the appellant was charged with assault. Further investigation into this incident resulted in additional charges... being laid.

[These records] were all compiled ... as part of the investigation into this matter.

Records 3 through 6 consist of a General Incident Report (with attached supplementary reports), police officers' notes containing witness statements, and a witness statement. In my view, the information in these records was compiled and is identifiable as part of a law enforcement investigation undertaken by the Police into a possible violation of the *Criminal Code*. As such, I find that the presumption in section 14(3)(b) applies to all of the undisclosed information contained in these records, for which the section 38(b) claim has been made.

As noted above, as a result of the decision in *John Doe*, it has been well-established that a presumption under section 14(3) cannot be rebutted by any of the factors under section 14(2), either alone or taken together. Accordingly, I find that the disclosure of the personal information contained in the records would constitute a presumed unjustified invasion of the personal privacy of the individuals referred to in these documents. The records are, therefore, exempt from disclosure under section 38(b).

The Police also identify that Record 7 was compiled after the investigation was completed, and that section 14(3)(b) does not apply to this record. I agree with the position taken by the Police that the presumption in section 14(3)(b) does not apply to Record 7.

Section 21(2): factors weighing in favour of or against disclosure

Introduction

In order to determine whether disclosure of Record 7 would constitute an unjustified invasion of privacy under section 38(b), I must consider whether any of the factors under section 14(2) apply.

Section 14(2)(f) reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is highly sensitive;

Previous orders of this office have stated that, for information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual. (See Orders M-1053, P-1681 and PO-1736)

I have reviewed Record 7 and find that it contains information which is “highly sensitive” information relating to an identifiable individual other than the appellant. In my view the factor in section 14(2)(f) applies to this information.

As identified above, the appellant has not provided representations in this matter. In the absence of any factors favouring disclosure of Record 7, I find that its disclosure would constitute an unjustified invasion of privacy.

Accordingly, all of the information remaining at issue qualifies for exemption under section 38(b).

EXERCISE OF DISCRETION

As noted, section 38(b) is a discretionary exemption. Once it is found that records qualify for exemption under this section, the Police must exercise their discretion in deciding whether or not to disclose it.

I have reviewed the representations of the Police with respect to the considerations they took into account when initially deciding not to disclose the information in the records to the appellant. Based on the representations of the Police, I am satisfied that the Police properly exercised their discretion in responding to this request.

Because of the manner in which I have addressed the application of section 38(b) to the records, it is unnecessary for me to determine whether they are also exempt from disclosure under sections 8(1)(l) or 38(a).

ORDER:

I uphold the decision of the Police.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ June 30, 2004