



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1932**

**Appeal MA-040364-1**

**Durham Regional Police Services Board**



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## **NATURE OF THE APPEAL:**

The Durham Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of an Incident Report relating to a dog attack. The Police located the responsive record and granted partial access to it. Access to the remainder of the record was denied under section 38(a) of the *Act* (discretion to refuse requester's own information) in conjunction with section 8(2)(a) (law enforcement) and section 38(b) of the *Act* (invasion of privacy) in conjunction with section 14(3)(b) (information compiled as part of an investigation into a possible violation of law).

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

During mediation, the appellant narrowed the scope of the request to include only the dog owner's name, address and telephone number on the Incident Report. The Police also indicated that they were no longer relying on the application of sections 38(a) and 8(2)(a) to deny access. I provided the Police and the dog owner with a Notice of Inquiry setting out the facts and issues in the appeal. I received representations from the Police, which were shared with the appellant, in their entirety. The Notice sent to the dog owner was returned to this office as undeliverable. The appellant also made representations in response to the Notice. The Police were given the opportunity to make additional representations by way of reply and declined to do so.

## **RECORDS:**

The sole information remaining at issue is the dog owner's name, address and telephone number listed on the Incident Report.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,

- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

I find that the record which contains the information remaining at issue includes the personal information of the dog owner and the appellant. The record includes their name, race, address, telephone number and employer, thereby qualifying as personal information under sections 2(1)(a), (d) and (h).

## **INVASION OF 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 exemptions from this right. The Police take the position that the undisclosed portions of the record are exempt under the discretionary exemption in section 38(b). Under section 38(b), where a record contains 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. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met. If the presumptions contained in paragraphs (a) to (h) of section 14(3) apply, the disclosure of the information is presumed to constitute an unjustified invasion of privacy, unless the information falls within the ambit of the exceptions in section 14(4), if or the "public interest override" in section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In the circumstances, it appears that the presumption at section 14(3)(b) may apply. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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;

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

### **The representations of the parties**

The Police submit that the record was created by the investigating officers following their receipt of a complaint that two dogs were running loose in the Durham Regional Forest Centre. The Police also indicate that the presumption in section 14(3)(b) applies because the "entire record was compiled as a result of that complaint to determine if any offences contrary to the *Criminal Code*, or any other statute had been committed."

The Police rely on the decision in Order M-924 in which Adjudicator Mumtaz Jiwan found that the personal information contained in a record relating to a dog attack that had been prepared by a police officer was compiled and was identifiable as part of an investigation into a possible violation of a municipal by-law and the *Dog Owner's Liability Act*. The Police conclude that Adjudicator Jiwan found that the presumption in section 14(3)(b) applied and the information was, therefore, exempt under section 38(b).

The appellant agrees that the dog owner's personal information was compiled as part of an investigation into a possible violation of municipal "leash bylaws" for the purpose of section 14(3)(b); however, she adds that the exception clause in that section also applies because the "disclosure is necessary to prosecute the violation". The representations of the Police address

this issue and contain several alternative methods of obtaining disclosure of the information that the appellant is seeking, involving various applications to court. The appellant is of the view that these alternatives are too expensive and time consuming to pursue.

In Order M-718, Adjudicator Anita Fineberg addressed similar arguments made in favour of the disclosure of the address of an individual involved in a motor vehicle accident where the appellant in that case had been injured. She found that:

However, the appellant submits that the exception clause in section 14(3)(b) applies in this case. He states that disclosure of the address of the witness is necessary to “prosecute the violation or to continue the investigation”. He submits that the address of the witness is “necessary” for the determination of the alleged *Highway Traffic Act* violation against the driver.

*The Concise Oxford Dictionary*, 8th Edition, defines “prosecute” as “institute proceedings against (a person)”. In this case, proceedings under the *Highway Traffic Act* have already commenced against the driver. Therefore, it cannot be said that the information is necessary to “prosecute” the alleged violation. Moreover, it cannot be said that the appellant will use the address of the witness to “prosecute” the violation. Rather it will be used to assist the appellant in defending the charges against the driver.

The appellant also suggests that the address of the witness is necessary in order for him to “continue the investigation” as he will use it in an attempt to locate the witness for the purposes of testifying at the trial. This interpretation of the exception assumes that the “investigation” referred to in the exception need not be confined to the Police investigation but could include any investigation conducted by any party, including the investigative activity of a private party seeking to enforce its legal rights.

In Order M-249, I considered this issue and made the following comment:

In my view, the exception contained in the phrase “continue the investigation” refers to the investigation for which the personal information was compiled, i.e. the investigation “into a possible violation of law”.

There is nothing in the appellant’s submissions which persuade me that this interpretation should not apply in this case. It is, therefore, my view that the personal information requirements for a presumed unjustified invasion of personal privacy under section 14(3)(b) have been established and that, in the circumstances of this appeal, the exception does not apply.

I adopt the approach taken by Adjudicator Fineberg in Order M-718 for the purposes of the present appeal and conclude that, in the absence of any representations indicating that the appellant is directly involved in the prosecution of the dog owner and requires the information to pursue that prosecution, the presumption in section 14(3)(b) has been established by the Police.

The appellant also has provided submissions which refer me to the consideration listed in section 14(2)(d) of the *Act*. This section reads as follows:

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 relevant to a fair determination of rights affecting the person who made the request;

For section 14(2)(d) to be apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

Based on the representations of the appellant and my understanding of the circumstances surrounding the creation of the record, I find that the appellant has provided sufficient evidence to allow me to find that the consideration in section 14(2)(d) applies. However, as noted above, where one of the presumptions in section 14(3) applies, it can only be rebutted if section 14(4) or 16 are found to apply. This result is dictated by the findings of the Divisional Court in *John Doe* [noted above]. I have considered the application of the exceptions contained in section 14(4) of the *Act* and find that the personal information at issue does not fall within the ambit of this provision. In addition, the appellant has not raised the application of section 16 of the *Act*.

I find that the disclosure of the personal information at issue relating to the address of the dog owner would constitute an unjustified invasion of the personal privacy of this individual and therefore, the exemption in section 38(b) of the *Act* applies.

### **EXERCISE OF DISCRETION**

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it 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
- 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]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

### **Relevant considerations**

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
  - 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
- the historic practice of the institution with respect to similar information

The Police have succinctly summarized its approach to this issue as follows:

This appeal boils down to one issue: Whether the access right of the appellant prevails over the privacy rights of a third party. This institution carefully reviewed the issues surrounding this situation, and read numerous IPC Orders relating to similar type records/appeals.

The Police then indicate that the considerations listed in section 14(2)(e) (the disclosure could unfairly expose and individual to pecuniary harm), section 14(2)(h) (the personal information was supplied in confidence by the individual to whom it relates) and the application of the presumption in section 14(3)(b). The Police also point out that Order MO-1197 identifies a number of other avenues of obtaining the information sought through various court proceedings. The Police conclude by stating that “[B]alancing all of these considerations, it has been concluded that the privacy presumption has more weight than the factors favouring disclosure.”

The appellant disputes the position taken by the Police that the dog owner’s privacy rights ought to outweigh her right of access to the information sought. She refers to the consideration listed in section 14(2)(a) (disclosure is desirable in order to subject the activities of the institution to public scrutiny) as having relevance to the balancing of these competing interests. The appellant points out that other people she has spoken to about this situation are surprised and disappointed that she is unable to obtain access to the information she is seeking and agree with her position that the Police ought not to be protecting the personal information of someone who is obviously in the wrong. In my view, section 14(2)(a) is not a consideration meriting much weight as the activities of the Police are not the subject matter of the request. I find that the disclosure of the information in the record will have no bearing on the public’s ability to oversee the activity of the Police.



Based on the representations of the Police, I find that the exercise of discretion was properly undertaken and I am not persuaded that the decision not to disclose the information to the appellant merits review. Accordingly, I uphold the decision of the Police in this regard.

I have a great deal of sympathy for the appellant. In this situation, she has been the victim of another person's carelessness and she now seeks to redress that injustice. I note that in Order MO-1197, Senior Adjudicator David Goodis set out some alternative methods of obtaining access to an address or serving legal documents in situations where an individual seeks to assert their legal rights. Referring to an earlier decision of Adjudicator Cropley in Order M-1146, he states:

I note that on the issue of alternative methods of gaining access to personal information of an unidentified individual for the purpose of commencing or maintaining a civil action against the individual, Adjudicator Laurel Cropley in her Order M-1146 made the following comments which the appellant may find useful:

I will now consider the extent to which the dog owner's address may be available by other means. First, with regard to the court, I have reviewed the relevant provisions of the Rules of Civil Procedure. I have also taken into account court practices of the Ontario Court (General Division) with respect to the commencement of civil actions.

The appellant could commence an action against the dog owner by way of a statement of claim under rules 14.03 and 14.07, even in the absence of a defendant's address. While form 14A of the Rules of Civil Procedure indicates that a plaintiff should include the name and address of each defendant in the statement of claim, in practice, the registrar will issue a statement of claim without a defendant's address, or with an "address unknown" notation . . .

Once the claim is issued, the appellant, as plaintiff, could bring a motion under rule [30.10] for the production of the record in question from the Health Unit, in order to obtain the address . . .

These principles could apply where the name as well as the address of the potential defendant is unknown, by use of a pseudonym such as "John Doe" [see *Randeno v. Standevan* (1987), 61 O.R. (2d) 726 (H.C.), and *Hogan v. Great Central Publishing Ltd.* (1994), 16 O.R. (3d) 808 (Gen. Div.)].

**ORDER:**

I uphold the decision of the Police.

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Donald Hale  
Adjudicator

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June 2, 2005