



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1946-I**

**Appeal MA-040172-1**

**Toronto Police Services Board**



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## **NATURE OF THE APPEAL:**

The Toronto Police Services Board (the Police) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the “officers’ memo book notes, and any witness contact information” related to a motor vehicle incident occurring on December 29, 2003 in which the requester was involved.

The Police granted partial access to the records and applied the exemptions found at section 38(b), in conjunction with section 14(3)(b) of the *Act*, to deny access to the remainder. Furthermore, the Police denied access to certain portions of the record as non-responsive to the request.

The requester, now the appellant, appealed the Police’s decision.

During mediation, the mediator contacted an individual whose interests may be affected by the outcome of the appeal (the affected person). The mediator sought the affected person’s consent to the release of their personal information to the appellant. The affected person did not consent to the disclosure.

Further mediation was not possible and the file was sent to adjudication.

I sent a Notice of Inquiry initially to the Police. The Police provided representations in response. I then sent a Notice of Inquiry to the appellant along with a copy of the non-confidential portions of the Police’s representations. The appellant also provided representations.

I provided the Police with a copy of the appellant’s representations in order that they may respond to any of the issues raised by the appellant. The Police provided brief representations in reply. I then provided the appellant with the Police’s representations. The appellant provided further representations.

I also sent a Notice of Inquiry to the affected person along with a copy of the appellant’s representations. The affected person did not provide representations.

## **RECORD:**

The record consists of three pages of notes from a police officer’s memo book.

## **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.)].

The Police submit that the record contains the personal information of a number of individuals including the appellant.

I agree. I find that the record at issue contains the personal information of the appellant and a number of other individuals (witnesses) including:

- information relating to the race, national or ethnic origin of an individual (paragraph (a) of the definition of personal information)

- the address and telephone number of individuals (paragraph (d) of the definition of personal information)
- the views or opinions of another individual about the individual (paragraph (g) of the definition of personal information)
- the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual (paragraph (h) of the definition of personal information)

## 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.

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), the institution may choose to exercise its discretion to disclose the information to the requester.

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. 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].

In addition, if any of the exceptions to the section 14(1) exemption at paragraphs (a) through (e) apply, then disclosure would not be an unjustified invasion of privacy under section 38(b).

The appellant submits that section 14(1)(d) applies to the personal information remaining at issue, which states as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

### **Parties' representations**

The appellant submits the following in support of her position that section 14(1)(d) applies.

Furthermore, under Section 199 of the Ontario *Highway Traffic Act*, a copy of which is attached, the driver of a motor vehicle involved directly or indirectly in an accident resulting in personal injuries is under an obligation to report the accident to a police officer and the police officer is under an obligation to complete a written report in the form approved by the Minister. For some reason, in the circumstances of this case, [named Police Constable] decided not to prepare a written report in the appropriate form. If he had done so, [the appellant] could have obtained the particulars about the unidentified driver from obtaining a copy of that motor vehicle report. Upon requesting that report from the Police, the Toronto Police Service Records Release Unit advised us that no report was ever filed, as evidenced from the attached correspondence...

Furthermore, I would like to draw your attention to Section 200(1)(c) of the *Highway Traffic Act*, a copy of which is attached, which obligates a driver of a vehicle to provide "to anyone sustaining loss or injury" full particulars including "his or her name, address, driver's licence number and jurisdiction of issuance, motor vehicle liability insurance policy insurer and policy number, name and address of the registered owner of the vehicle and the vehicle permit number". It is our submission that since [the appellant] was in no condition to record any particulars about the unidentified driver's motor vehicle or identity at the accident scene, this is an "unjustified invasion" of the unidentified individual's personal privacy, in light of their obligations under the *Highway Traffic Act* to submit their name and vehicle particulars to an injured party.

As such, we strongly believe that Section 14(1)(d) of the *Municipal Freedom of Information and Protection of Privacy Act* applies to the circumstances of this case, i.e. that an Act of Ontario expressly authorizes the disclosure, that being the Ontario *Highway Traffic Act*, which mandates the disclosure of the driver's particulars.

The Police state the following in support of their position that the *Highway Traffic Act* does not apply.

As it was determined that the victim fell, rather than having come into contact with the vehicle, the incident was not a vehicular accident and, therefore, did not warrant an accident report and does not fall under the jurisdiction of the *Highway Traffic Act*.

## **Analysis and finding**

### **Section 14(1)(d)**

The phrase “under an Act of Ontario or Canada that expressly authorizes the disclosure” in section 14(1)(d) closely mirrors the phrase “expressly authorized by statute” in section 38(2) of the *Act* [Order PO-1933]. This office has stated the following with respect to the latter phrase in section 38(2):

The phrase “expressly authorized by statute” in subsection 38(2) of the *Act* requires either that specific types of personal information be expressly described in the statute, or a general reference to the activity be set out in the statute, together with a specific reference to the personal information...[Compliance Investigation Report I90-29P].

Section 200(1)(c) of the *Highway Traffic Act* states as follows:

Where an accident occurs on a highway, *every person in charge of a vehicle or street car* that is directly or indirectly involved in the accident shall,

- (c) upon request, give in writing to anyone sustaining loss or injury or to any police officer or to any witness his or her name, address, driver’s licence number and jurisdiction of issuance, motor vehicle liability insurance policy insurer and policy number, name and address of the registered owner of the vehicle and the vehicle permit number. [emphasis added]

Recently, in Order MO-1937, Adjudicator Bernard Morrow dealt with this issue and found the following:

In this case, although section 200(1)(c) of the *Highway Traffic Act* refers to specific information, it authorizes disclosure by *individuals who are involved in the accident*, not by the Police. In my view, this is fatal to the possible application of section 14(1)(d).

I agree with Adjudicator Morrow’s finding and adopt it here. I appreciate that the appellant was incapacitated and unable to get the information from the driver of the vehicle. That being said, section 200(1)(c) of the *Highway Traffic Act* does not expressly authorize the Police to disclose

the personal information of the driver and the exception at section 14(1)(d) therefore does not apply in this appeal.

### **Section 14(3)(b)**

In this case, the Police submit that section 14(3)(b) applies as the personal information was compiled as part of an investigation into a possible violation of law, namely the *Highway Traffic Act*. The fact that the driver of the vehicle was not eventually charged does not matter.

The appellant makes no representation on this issue.

I agree with the Police. The information in the officer's notes consists of information collected when the police officer investigated the accident involving the appellant. I am satisfied that this was an "investigation into a possible violation of law".

As a result I find that section 14(3)(b) applies such that disclosure of the remaining personal information at issue would be presumed to be an unjustified invasion of personal privacy.

Since sections 14(4) and 16 do not apply, I find that disclosure of the remaining personal information would be an unjustified invasion of privacy and is exempt from disclosure under section 38(b). This finding is subject to my discussion of "absurd result" below.

### **Absurd Result**

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]
- the requester was present when the information was provided to the institution [Order P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

In this case, the personal information on page 3 of the record relates to the appellant's boyfriend and it is evident that the appellant provided the police officer with that information and/or that information would clearly be within the appellant's knowledge (name and age of the appellant's boyfriend). Regarding the other information relating to the appellant's boyfriend on that page, I find it likely that the appellant was likely a witness to her boyfriend's statement.

As a result, I find that not disclosing the personal information relating to the appellant's boyfriend would result in an absurd result and as such section 38(b) in conjunction with section 14(3)(b) does not apply to the boyfriend's personal information, which should be disclosed.

### **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

### **Representations of the Parties**

The Police stated the following:

Section 14(1)(f) applies in so far that the rights of other involved parties to talk freely and confidentially to investigative police officers outweighs the appellant's right of access to any personal information that may pertain to them contained within the record.

The appellant's representations on the Police's exercise of discretion is as follows:

We believe that the Freedom of Information and Protection of Privacy Unit failed to exercise its discretion appropriately under Section 38(b) and in doing so failed to consider the "sympathetic and compelling need" of [the appellant] to receive the information relating to the person who injured her. [The appellant] is unable to access justified and appropriate medical care and treatment without the motor vehicle insurance particulars of the unidentified driver of the motor vehicle that hit her. For these reasons and the reasons set out above..., the institution's discretion was exercised inappropriately and instead should have been applied in favour of [the appellant].

### **Analysis and finding**

In Order MO-1277-I, former Assistant Commissioner Tom Mitchinson outlined the steps an institution should take in properly exercising its discretion as follows:

In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the head to reconsider the exercise of his or her discretion if he feels it has not

been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed.

In Order P-344, I considered the question of the proper exercise of discretion as follows:

... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.

In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

The former Assistant Commissioner went on to find that regarding the representations provided by the institution in Order MO-1277-I, all the relevant circumstances had not been considered, and returned the matter to the institution for a proper exercise of discretion. [See also Orders MO-1287-I and MO-1318-I]

I adopt the steps set out by the former Assistant Commissioner to the current appeal. The Police's representations do not constitute a proper exercise of discretion. The Police have not indicated to me that they have considered the personal factors of the appellant or the nature of the personal information remaining at issue in their exercise of discretion under section 38(b) of the *Act*.

The former Assistant Commissioner in Order MO-1277-I goes on to state:

The *Act* recognizes a higher right of access to records containing a requester's personal information, and it is not acceptable for an institution, such as the Ministry in this case, to simply establish the requirements of an exemption claim without taking the additional step of deciding whether or not it will disclose the record despite the fact that it qualifies for exemption.

I agree with the former Assistant Commissioner's comments and find them appropriate here. While I agree with the Police that the ability of witnesses to speak freely to investigating police officers is a relevant consideration, it should not be the Police's only consideration in their exercise of discretion. The appellant has raised many considerations which are relevant to the Police's exercise of discretion.

Accordingly, I will include a provision in this interim order returning the matter to the Police for a proper exercise of discretion under section 38(b) of the *Act*.

**ORDER:**

1. I order the Police to re-exercise their discretion under section 38(b) of the *Act* with respect to the record at issue in this appeal, taking into account all of the relevant factors and circumstances of this case and using the above principles as a guide.
2. I order the Police to provide me and the appellant with representations on its exercise of discretion no later than **August 5, 2005**.
3. The appellant may submit responding representations on the exercise of discretion issue no later than **August 19, 2005**.
4. I order the Police to disclose to the appellant the information that I have highlighted on the copy of the record provided to the Police with this order by sending the appellant a copy by **August 26, 2005**. To be clear, the Police are to disclose only the highlighted information to the appellant.
5. To verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the records disclosed to the appellant pursuant to Provision 4.
6. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues arising from this order.

Original Signed By: \_\_\_\_\_

Stephanie Haly  
Adjudicator

July 21, 2005 \_\_\_\_\_