



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1971-F

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 exemption found at section 38(b), in conjunction with section 14(3)(b) of the *Act*, to deny access to the remainder.

On July 21, 2005, I issued Interim Order MO-1946-I, where I disposed of all but one of the issues in the appeal. Order provisions 1 through 3 addressed the remaining outstanding issue surrounding the exercise of discretion by the Police under section 38(b). These Order provisions state as follows:

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**.

By letter dated July 28, 2005 and received in this office on August 5, 2005, the Police provided this office with its representations respecting the exercise of discretion under section 38(b) as required by Order Provision 2. The Police provided their representations on the exercise of discretion to the appellant by letter dated August 9, 2005. The appellant provided me with her representations on this issue by way of letter dated August 15, 2005 and it was received in this office on August 17, 2005, pursuant to Order Provision 3.

This Final Order resolves the sole outstanding issue in this appeal as to whether the Police properly exercised its discretion under section 38(b) to deny the appellant access to certain information found to be exempt under that section in Order MO-1946-I.

DISCUSSION:

Representations of the parties

The Police provided the following representations in support of its position that it properly exercised its discretion not to disclose parts of the record to the appellant:

The majority of the exempted information was taken from the driver of the vehicle involved in order for the police to make a determination insofar as whether criminal liability formed any part of the incident. The name, address, telephone number, insurance information, place of birth and statement of the driver are included. However, even if the absence of such identifiers, the unique

perspective of the information provided in the statement negate any possibility of the statement having been made by an anonymous bystander. Thus, the disclosure of this information would clearly constitute an unjustified invasion of personal privacy in accordance with section 14(1)(f).

Section 38(b) permits the institution to refuse to disclose the personal information of an individual other than the requester if disclosure would represent an unjustified invasion of the privacy of the other individual. In my view, none of the information which could be considered as the personal information of the appellant could be disclosed without revealing the personal information of the witness. In exercising discretion to exempt the information in favour of protecting the privacy of the driver, the following were among the factors considered:

- a) Section 29 of the *Act* authorizes the indirect collection of personal information for the purpose of law enforcement. Section 28 introduces safeguards to the collection of personal information. In the case at issue, the balance between right of access and the protection of privacy must be given in favour of protecting the privacy of the third party.
- b) In assessing the value of protecting the privacy interests of an individual other than the requester, one needs to consider the nature of the institution. The nature of a law enforcement institution is in great part to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police. Law enforcement institution records are not simple business transaction records in which disclosure of another individual's personal information may not, on balance, be offensive. Given the unique status of law enforcement institutions within the *Act* and the unique status to authorize the collection of personal information, we generally view the spirit and content of the *Act* as placing a greater responsibility in safeguarding the privacy interests of individuals where personal information is being collected.

An important principle contained in the freedom of information legislation is that personal information held by institutions should be protected from unauthorized disclosure. The information collected from the two individuals and the vehicle driver was supplied to the investigating officer(s) as a result of a law enforcement activity. Police investigations imply an element of trust that the law enforcement

agency will act responsibly in the manner in which it deals with recorded personal information.

...

The mandate and, indeed, spirit of the Act is the balance of privacy protection with the public's right to know. This institution scrupulously weighs these factors in each and every access request file. As the majority of our records contain sensitive material, we must balance the access interests of the requester with the privacy rights of another person.

...

This Order [Order MO-1946-I] states that the adjudicator "appreciate[s] that the appellant was incapacitated and unable to get the information from the driver". It must be noted that the memorandum book entry of the attending officer specifically stated that Ambulance Service personnel advised that "[the appellant] has no bruising, no swelling and they believe no injuries at all. They don't believe she was struck by [vehicle]. (Seems to be corroborated by evidence)." The officer checked the vehicle, which had no damage and "does not appear [vehicle] made contact with pedestrian at all". Therefore, there is no sympathetic or compelling need for the information. The considered opinion of all the involved emergency personnel was that the appellant simply lost her balance, fell and, according to Ambulance Services personnel, did not sustain any injury as a result of the fall. The appellant was not struck by the vehicle and therefore, there is neither a sympathetic nor compelling cause for breaching the privacy of the other individual.

...

The ramifications of non-disclosure to the requester were carefully balanced against the possible harms to the third parties and the institution and, in light of the particular circumstances of this request, we have opted to withhold the information of the other individuals. No other factors or public interest considerations outweigh the privacy considerations of the individuals, especially the vehicle's driver, who would be affected by such disclosure. [emphasis in original]

The appellant provided extensive representations rebutting the Police's conclusion that she was not struck by a vehicle and submitted the following:

It is submitted that the Police have continued to fail to take into account all of the relevant considerations in exercising their discretion by denying [the appellant] access to the Police records. One additional factor which the Police should have

taken into account in its exercise of discretion which they failed to do, is to consider the power position of the individuals involved. On December 29, 2003, [the appellant's] injuries placed her in a very vulnerable position where she was not able to record any information with respect to the driver or the motor vehicle that hit her. [The appellant] laid her confidence in the Police to gather, collect and report on the incident in question. [The appellant] is now merely trying to pursue access to that information from the Police who should have filled out a motor vehicle accident report in the first place.

If the Police do not release any information to [the appellant] relating to the driver of the vehicle that hit her, [the appellant's] legal rights and medical treatment will be greatly prejudiced. The Police are in a position of relative power to [the appellant] and they must take into account the significant sympathetic and compelling interest of [the appellant] in the particular unique circumstances of her case and the resulting impact that denying the records will have on her health and legal rights.

Analysis

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 Commission 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)].

In this case, the appellant argues that the Police both took into account an irrelevant consideration (the police officer's conclusions on the day of the alleged incident) and failed to take into account a relevant consideration (the "power position" of the appellant, the vehicle driver and the Police themselves).

Based on the representations of the Police, I disagree with the appellant. In my view, the Police's representations reveal to me that they did indeed consider the appellant's position and circumstances in exercising their discretion not to disclose the information of the driver of the

vehicle. Furthermore, I do not find the consideration of the police officer's conclusions at the time of the alleged incident, when balanced against the appellant's circumstances and position, to be an irrelevant consideration. I find that the Police took into account relevant factors in weighing both for and against the disclosure of the driver's information. Accordingly, I uphold the Police's exercise of discretion not to disclose the personal information of the other identifiable individuals under section 38(b).

Before I leave this matter, I want to address the appellant's concerns that the denial of information will prevent her from access to medical treatment and her legal rights. Recently in Order MO-1937, Adjudicator Bernard Morrow dealt with a similar request for information. Adjudicator Morrow also found the information to be exempt under section 38(b), but then proceeded to state the following:

I acknowledge the appellant's interest in obtaining information relating to the affected person's identity. However, there are other methods available to the appellant's lawyer to obtain the information sought and/or to pursue the appellant's legal rights that he may wish to explore. 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.)].

I concur with the statement made by Adjudicator Morrow and include this information because it may be useful to the appellant.

ORDER:

I uphold the decision of the Police.

Original signed by:

Stephanie Haly
Adjudicator

September 28, 2005