



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

ORDER MO-1937

Appeal MA-040301-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

This appeal concerns a decision of the Toronto Police Services Board (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) requested information relating to a motor vehicle accident (the MVA) in which he was involved as a pedestrian. The appellant is a young child who, at the time of the accident, was buying ice cream from an ice cream truck parked at the side of a public road. The appellant alleges that he was struck by another motor vehicle during the course of either going to or coming from the ice cream truck.

The request was submitted by the appellant's lawyer and specifically sought the "...name, plate number, driver's license number, address, phone number etc., of the ice cream truck driver witness..." (the affected person).

The Police denied access to a responsive record, pursuant to section 38(b) (right of access to one's own personal information/personal privacy of another individual) of the *Act*, read in conjunction with section 14(1). In support of their position, the Police cited the application of section 14(3)(b) (information compiled as part of an investigation into a possible violation of law). The Police indicated that their decision followed notification of the affected person.

The appellant appealed the Police's decision. The appellant's lawyer included with the appeal letter a severed copy of a one-page document titled "Field Notes Collision" prepared by a named police officer regarding the MVA. The document contains a signed witness statement of the affected person, with personal identifiers removed.

I note that the record at issue consists of the aforementioned "Field Notes Collision" document, which the Police have denied access to in its entirety.

During the mediation stage of the appeal process, the mediator made attempts to obtain consent from the affected person to the disclosure of his personal identifiers. Consent was not obtained and no issues were resolved.

The file has been transferred to adjudication for an inquiry. Since the appellant's request is restricted to the affected person's personal identifiers and the appellant has obtained the remaining contents of the "Field Notes Collision" document, I intend to restrict my inquiry to the portion of the record that contains only the affected person's personal identifiers.

I first sought and received representations from the Police on the application of the section 38(b) exemption to the information at issue in this record. The Police agreed to share their representations with the appellant in their entirety. I then sought and received representations from the appellant's lawyer.

RECORDS:

The sole information remaining at issue is the affected person's name, address, telephone number, date of birth and licence plate number for his truck provided on the Field Notes Collision document.

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 if 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 appellant has made a request for information relating to an MVA in which he was involved and I am satisfied that the record at issue contains the appellant's personal information, within the meaning of section 2(1) of the *Act*. I also find that the record contains the personal information of the affected person. The record includes the affected person's name, address, telephone number, date of birth and the licence plate number of his truck, qualifying as his personal information, as defined in sections 2(1)(a), (d) and (h) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

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 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;

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 section 38(b) exemption was claimed to deny the appellant access to the personal information of the affected person. The Police state that disclosure of the information at issue would immediately reveal the affected person's identity to the appellant. The Police state that the information contained in the record was obtained during a law enforcement investigation. The Police indicate that attempts were made to contact the affected person regarding consent to the release of his personal information. However, since consent was not obtained the Police elected to not release his personal information in order to respect his privacy. The Police state that this is the approach it takes during a police investigation to ensure that witnesses are provided with the confidentiality they expect during such an investigation.

The Police state that they rely on the presumption in section 14(3)(b) to deny access to the information being sought by the appellant. The Police state that police officers responded to a motor vehicle accident in which a pedestrian was struck. The Police state that an investigation was undertaken at the scene to determine if charges should be laid.

The appellant's lawyer does not directly address the impact of the section 14(3)(b) presumption to the circumstances of this appeal in his representations. He focuses instead on the wording in section 200(1)(c) of the *Highway Traffic Act*, which states:

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,

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.

The appellant's lawyer then states that he requires the information at issue in order to pursue a civil remedy for his client who he says was injured during the course of the accident. He alleges

that the appellant was injured as a result of the affected person's negligent positioning and/or operation of his vehicle. The appellant's lawyer goes on to say that the Police's actions in withholding the affected person's personal information would have the "paradoxical effect of shielding tortfeasors from their victims and thereby thwarting the course of civil justice."

Analysis and findings

The appellant has suggested that section 200(1)(c) of the *Highway Traffic Act* imposes an obligation on the Police to disclose the information at issue to the appellant. However, the appellant does not indicate under what section of the *Act* disclosure is mandated on this basis. The appellant could have raised the application of section 14(1)(d) (disclosure expressly authorized under an Act of Ontario or Canada) as a basis for disclosure under the *Act* of the information at issue.

Previous orders of this office have said that the interpretation of the words "expressly authorizes" in section 14(1)(d) of the *Act* closely mirrors the interpretation of similar words in section 28(2) of the *Act* and its provincial counterpart, section 38(2) of the *Freedom of Information and Protection of Privacy Act* [Orders M-292, M-1154, MO-1366, MO-1693]. In the Commissioner's Compliance Investigation Report I90-29P, the following comments are made about the latter section:

The phrase "expressly authorized by statute" in subsection 38(2) of the [provincial] *Act* requires either that the specific types of personal information collected 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 to be collected in a regulation made under the statute, i.e., in the form or in the text of the regulation.

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).

The appellant has not raised, and I am not aware of, any other manner in which section 200(1)(c) of the *Highway Traffic Act* could impact a decision under the *Act* in the circumstances of this appeal.

Accordingly, I am required to make a determination according to the principles set out in sections 38(b) and 14 of the *Act*.

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 law under the *Highway Traffic Act*. Therefore, I find that section 14(3)(b) applies.

It is not clear whether proceedings were commenced in respect of this accident. 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].

In addition, while the appellant's lawyer has not directly 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). This section 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 relevant to a fair determination of rights affecting the person who made the request;

The appellant's lawyer suggests that the information is relevant to a fair determination of the appellant's rights, specifically, a desire to pursue civil damages for injuries suffered by the appellant as a result of the accident. However, having found that section 14(3)(b) presumption applies, I am precluded from considering any of the factors weighing for or against disclosure under section 14(2). This result is dictated by the findings of the Divisional Court in *John Doe* [noted above]. Where one of the presumptions in section 14(3) applies, it can only be rebutted if section 14(4) or section 16 is found to apply. 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 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 Police state that it reviewed the circumstances of this appeal and properly applied the section 38(b) exemption, in conjunction with section 14(1), to provide access to as much of the record as possible without releasing exempt information. The appellant 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 record at issue 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 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 summarized its approach to this issue as follows:

The main issue is this: do the access rights of the appellant supersede those of the third party who was interviewed as part of the motor vehicle accident investigation?

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, which in great part entails gathering and recording information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require intervention and assistance by the Police. A law enforcement institution's 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 its ability 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 (including those directly and indirectly involved in the events) where personal information is being collected.

In order to strike a balance between right of access and protection of privacy, this institution considered and carefully weighed all factors. It was conscientiously determined that pursuant to sections 14 and 38 of the *Act*, disclosure of the personal information of persons other than the appellant was determined to be an unjustified invasion of personal privacy.

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 at issue to the appellant merits review. Accordingly, I uphold the decision of the Police in this regard.

The appellant's lawyer disputes the position taken by the Police that the affected person's privacy rights ought to outweigh the appellant's right of access to the information sought. He alludes to the affected person's duty under section 200(1)(c) of the *Highway Traffic Act* to provide information relating to his identity and circumstances of the accident. He does not view the factors considered by the Police as being relevant where the affected person has an obligation to provide information to the Police.

Addressing the appellant's lawyer's argument regarding the impact of section 200(1)(c) of the *Highway Traffic Act* on the appellant's access rights under the *Act*, the obligation of a person involved in a motor vehicle accident to provide information, including their name, address, driver's licence and insurance particulars, is not in dispute. However, I have found above that this obligation does not give rise to a right of access to such information under the *Act* in the circumstances of this appeal.

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.)].

ORDER:

I uphold the decision of the Police.

Original Signed by: _____
Bernard Morrow
Adjudicator

_____ June 29, 2005