



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2018

Appeal MA-040334-1

Belleville Police Service



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NATURE OF THE APPEAL:

The Belleville Police Service (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a list of documents covering a specified time that pertain to the requester.

The requester narrowed the request to four items; as follows:

- Item #1 All records regarding the last complaint filed for illegal entry into my home and investigated by [named police officer] (including the taped phone call from myself to the police).
- Item #2 The reports from occurrences when the police attended at [address #1] and [address #2] [for a specified period of time].
- Item #3 The video taped interview of [the requester] by [named individual #1] and [named individual #2].
- Item #4 All documents and emails [the requester] left and sent to [named police officer] and correspondence sent back to [the requester].

The Police located the responsive records and responded in a decision letter as follows:

Item 1

All records were denied as all records contained within a Public Complaint file fall outside the scope of the *Act* pursuant to section 52(3) of the *Act*.

Items 2 through 4

Partial access was granted to responsive information. Access was denied to certain information pursuant to subsections 8(2)(a), 38(b) read in conjunction with section 14(1)(f) and supported by the presumption at section 14(3)(b) of the *Act*. The Police also advised that some information had been removed as it was not responsive to the request and that certain pages (68, 69, 70 as well as 134 through 146) were duplicates of other records for which the requester had received full disclosure and that these pages were not copied nor charged to the requester.

The Police advised with respect to the latter portion of Item #4, "Correspondence sent back to you from the Officer" do not exist.

The requester, now the appellant, appealed the decision of the Police.

During mediation, the appellant advised that he has received the video taped interview referred to in Item #3 and that this video tape is no longer at issue. He also advised that he is not

interested in the non-responsive information that was withheld, nor in the duplicates of information he has already received.

Regarding item #4 of the request, the appellant advised that he has received a number of records from the Police and he is also not pursuing this part of the request.

Also during mediation, the appellant advised that he was interested in receiving as part of this appeal, the police officer's notes relating to the occurrences described in Item #2. The Police agreed to include the police officer's notes as part of this appeal and issued a supplementary decision letter releasing portions of the police officer's notes. Access to the remaining portions of the notes was denied under sections 8(1)(l) and 38(b), in conjunction with the presumptions at 14(3)(a) and 14(3)(b) of the *Act*. The appellant advised that he is not pursuing access to any records withheld pursuant to section 8(1)(l) of the *Act*.

To assist in the appeal process, the Police prepared an amended Index of Records at Issue in this appeal as well as an Index of Records at Issue from the supplementary decision letter. The Police have provided a copy of these indexes to the appellant.

No further mediation was possible and the file was moved to adjudication. I initially sent a Notice of Inquiry to the Police and an individual whose interests may be affected by the outcome of the appeal (the affected party).

The Police advised that they were contacted by the affected party and provided representations on behalf of this individual, as well as the Police Service.

I then sent a Notice of Inquiry to the appellant along with a copy of the non-confidential representations of the Police. The appellant also provided representations.

RECORDS:

The records consist of the following:

Record #24: Public Complaint (denied in full, section 52(3))

Record #25: Arrest Report (denied in part, sections 8(2)(a), 14(3)(a), 14(3)(b), 38(b))

Record #26: Supplementary Report (denied in full, sections 8(2)(a), 14(3)(a), 14(3)(b), 38(b))

Record #27: Videotaped Statement of Affected Party (denied in full, sections 14(3)(a), 14(3)(b), 38(b))

Record #28: General Occurrence Report (denied in part, sections 8(2)(a), 14(3)(b))

Record #29: General Occurrence Report (denied in part, sections 8(2)(a), 14(3)(b))

Record #30: General Occurrence Report (denied in part, sections 8(2)(a), 14(3)(b), 38(b))

Record #31: Internal E-mail messages (not responsive)

Record #32: Officer's Notes (denied in part, sections 8(1)(l), 14(3)(a), 14(3)(b), 38(b))

Record #33: Officer's Notes (denied in part, section 8(1)(l))

Record #34: Officer's Notes (denied in part, sections 8(1)(l), 14(3)(a), 14(3)(b))

Record #36: Officer's Notes (denied in part, section 14(3)(b))

As stated above, the appellant indicated to the mediator that he is not interested in obtaining access to the non-responsive information or the information severed by the Police under section 8(1)(l) of the *Act*. Consequently, Record #31 and parts of Records #32, #33 and #34 are no longer at issue.

DISCUSSION:

APPLICATION OF THE ACT

The Police claimed section 52(3) applied to Record #24, the appellant's Public Complaint file.

General Principles

Section 52(3) states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

The term “in relation to” in section 52(3) means “for the purpose of, as a result of, or substantially connected to” [Order P-1223].

The term “employment of a person” refers to the relationship between an employer and an employee. The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 52(3)1: court or tribunal proceedings

Introduction

For section 52(3)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Part 1: collected, prepared, maintained or used

The Police submit:

This institution received a Public Complaint from the appellant on [a specified date]. Records were then collected and prepared for investigation by the internal investigator within the Professional Standards Bureau of the Belleville Police Service provided by the Police Services *Act*.

From my review of the records, I am satisfied that the records in the Public Complaint file were collected and prepared by the Police on its behalf. Therefore, the first part of the test under section 52(3)1 has been met.

Part 2: proceedings before a court or tribunal

The word “proceedings” means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223, PO-2105-F].

For proceedings to be “anticipated”, they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223, PO-2105-F].

The word “court” means a judicial body presided over by a judge [Order M-815].

A “tribunal” is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties’ legal rights or obligations [Order M-815].

“Other entity” means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an “other entity”, the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue [Order M-815].

The Police submit:

The records at issue were collected by the investigating officer of the Professional Standards Bureau to investigate a complaint of police misconduct. The Public Complaint Log, Pages 1 – 3 of Record #24 provides a history of the investigation... The collection, preparation, maintenance and usage of these records were in relation to an anticipated proceeding under the *Police Services Act*. This particular Public Complaint was resolved following discussions with the appellant, prior to any proceedings being initiated under the *Police Services Act*.

Again, based on my review of Record 24, I find that it was collected, prepared and used in relation to anticipated proceedings under Part V the *Police Services Act*. As such I find that the second part of the test under section 52(3)1 has been met with respect to Record 24.

Part 3: labour relations or employment

The Police submitted the following in regard to part 3 of the test under section 52(3)1:

This institution submits that Record #24 (pages 1 – 22) was an investigation conducted by the Professional Standard Bureau into the actions of two of their officers with respect to a complaint of misconduct.

Police relied on the findings in Orders M-899 and M-835 where it was held that proceedings under Part V of the *Police Services Act* do relate to employment. Any subsequent hearing before a board of inquiry, i.e. an appeal to OCCOPS regarding the findings of a Public Complaint investigation, also relates to employment.

Although there was no actual hearing in this case, this complaint was investigated with a reasonable belief that there could be a hearing into this matter.

In Orders M-835 and M-899, this office did find that proceedings under Part V of the *Police Services Act* relate to the employment of a police officer. As such I find that part three of the test under section 52(3)(1) has also been met.

In summary, I find that all of the elements for the application of section 52(3)1 have been satisfied. Further, I find that the exceptions set out in section 52(4) do not apply to Record 24 in this appeal. Accordingly, Record 24, the appellant's Public Complaint file, is not subject to the *Act*.

PERSONAL INFORMATION

General principles

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,

- (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,
- (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;

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 submitted the following.

The information contained within the occurrence reports, supplementary reports, videotaped statement, and the officer's notes, contain the personal information of both the appellant and other affected parties.

The institution submits that the records in question do contain recorded information about identifiable individuals, including information relating to age, addresses, sex and marital/family status of the individuals, as well as allegations of the affected party;

The reports contain information relating to the education, medical, psychiatric, psychological history of the individuals; and

I agree with the Police. I find that all of the records remaining at issue contain the personal information of the appellant and other individuals within the definition of section 2(1). Specifically, I find that the records contain information relating to the age, sex, marital or family status of an individual (paragraph (a)); information relating to the education, medical, psychiatric, psychological, criminal history of an individual (paragraph (b)); the address and telephone number of an individual; the personal opinions or views of an individual (paragraph (e)); the views or opinions of another individual about the individual (paragraph (g); and finally, the individual's name if it appears with other personal information relating to the individual (paragraph (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.

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 appellant’s right of access to his 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. Sections 14(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 38(b).

Section 14(2) provides some criteria for determining whether the personal privacy exemption applies. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue is caught by section 14(4) or if the “compelling public interest” override at section 16 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 14(3) applies, the institution must consider the factors listed in section 14(2), as well as all other relevant circumstances.

The Police rely on section 38(b) to deny access to the records. Specifically the Police rely on the “presumed unjustified invasion of personal privacy” at sections 14(3)(a) and (b) and the factors favouring privacy protection at 14(2)(e) and (f). The appellant disputes the Police’s position that those sections apply and submits that the factor weighing in favour of disclosure at section 14(2)(a) is relevant. These sections read:

38 (b) A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual’s personal privacy

14 (2) 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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) 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;

Section 14(3)

With respect to sections 14(3)(a) and (b) the Police submits:

Section 14(3)(a) of the *Act* states that disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. Allegations of the third party, as well as statements provided to the police do contain personal information about the psychiatric/psychological history, diagnosis and current medical condition of the affected party.

Section 14(3)(b) is presumed to be an unjustified invasion of personal privacy if the 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 affected party provided information to the Police in confidence at the time of the investigations into violations of the law. It is clear from the reports that these violations mostly relate to investigations into ongoing domestic related issues, including investigations into allegations made by the affected party of Spousal Assault.

In response the appellant submits that he already has knowledge of the medical, psychiatric and psychological history, diagnosis, condition, treatment and evaluation of the affected party that

are reflected in the record. The appellant's knowledge apparently comes from medical records which he has in his possession relating to the affected party. The appellant also submits that the records collected for the investigation contain false statements and information about him that he cannot defend himself against.

I agree with the Police that the presumptions in sections 14(3)(a) and 14(3)(b) apply to the records at issue. Record 26, a supplementary occurrence report, contains the medical history and treatment of one affected party. The appellant's submission that he has prior knowledge of medical information relating to the affected party does not satisfy me that he has knowledge of the specific information contained in this record. As such I find that the presumption at section 14(3)(a) applies to part of the information in Record 26.

The rest of the records, including the arrest report, the supplementary occurrence report, videotaped statement, general occurrence reports, and officers' notes, all contain information that was compiled and is identifiable as part of an investigation into a possible violation of law; specifically, the Police's investigation of allegations made by the affected party against the appellant. I find that disclosure of these records is presumed to constitute an unjustified invasion of the personal privacy of the affected party under section 14(3)(b).

I find that none of the exceptions in section 14(4) are applicable and the appellant has not raised the possible application of the "public interest override" at section 16. I find that the disclosure of the personal information would result in an unjustified invasion of the personal privacy of another individual. Accordingly, the undisclosed portions of the records are exempt from disclosure under section 38(b).

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.

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)].

The Police made the following representations in support of their exercise of discretion.

As the appellant is seeking access to his estranged spouse's information as well as his own, this institution had to consider whether or not the records could be severed in such a way that would allow disclosure of the requester's personal information without disclosing the personal information of other affected parties. We were able to sever the majority of the records, but due to the intertwined nature of some of the records, we found that severances were not possible.

We then considered the provisions of section 14 of the Act in deciding whether or not disclosure of the personal information of the affected parties would constitute

an unjustified invasion of their privacy. We concluded that in this case, section 14(3)(a) & 14(3)(b) were relevant in the circumstances of the request.

...

As a final step in exercising discretion, police considered the individual circumstances of the request and carefully balanced both the appellant's right to know, and the affected party's right to privacy.

In reaching our decision to exercise discretion in favour of privacy protection, the following factors were carefully considered as they applied to the particular circumstances of the request: Section 14(2)(f) – this institution takes the view that the personal information is highly sensitive as it contains...current medical conditions, as well as the psychiatric and psychological history of the affected party; and Section 14(2)(h) – the personal information [has] been supplied by the individual to whom the information relates in confidence. The affected party would surely not have provided statements to the police, had she been informed prior that her information would be disclosed to the appellant.

Based on the Police representations and all of the circumstances in this appeal, along with the fact that the appellant has received portions of the records where possible, I am satisfied that the Police properly exercised their discretion in refusing to disclose the remaining records under section 38(b).

ORDER:

1. I uphold the Police decision that the *Act* does not apply to Record #24.
2. I uphold the Police's decision to deny access to the undisclosed portions of Records #25, #28, #29, #30, #32, #33, #34 and #36 and Records #26 and #27.

Original signed by: _____
Stephanie Haly
Adjudicator

February 9, 2006 _____