



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-2073**

## **Appeal MA-050323-1**

### **Sault Ste. Marie Police Service**



Tribunal Services Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Sault Ste. Marie Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for a copy of a specific police report from July 2005. This report concerns the investigation of a complaint of harassment by a named individual (the affected person) against the requester. The Police located the requested report, along with other records compiled in the course of the investigation of this complaint. Despite having initially consented to the disclosure of the personal information relating to her that may be contained in the Police file, the affected person revoked her consent and requested that access not be provided to the requester. As a result, the Police granted only partial access to the file. The Police denied access to the remainder of the file on the basis that these records were exempt from disclosure under section 38(b) of the Act (invasion of privacy).

The requester, now the appellant, appealed the decision to deny access to the records. In his appeal letter, the appellant sought complete access to the Police file concerning the harassment complaint against him. He also raised in his appeal letter certain concerns about whether the individual who issued the decision denying access to the record is in a “conflict of interest” as a result of a “personal relationship” with the affected person.

During the mediation stage of the appeal, the affected person confirmed that she objected to the disclosure of the file to the appellant. Further mediation was not possible and the appeal was moved to the adjudication stage of the process.

This office began the adjudication by sending a Notice of Inquiry to the Police, inviting their representations. The Police responded with representations. This office then sent the Notice of Inquiry, along with the non-confidential portions of the representations of the Police, to the appellant, and invited the appellant to provide representations. The appellant did not provide any representations in response to the Notice of Inquiry. The file was subsequently assigned to me.

## **RECORDS:**

The records consist of a statement taken from the affected person, along with a two-page occurrence report and a one-page supplementary occurrence report.

## **DISCUSSION:**

### **CONFLICT OF INTEREST**

The appellant claimed that the Freedom of Information Co-ordinator for the Police (the Co-ordinator) was in a conflict of interest owing to a possible “personal relationship” with the affected person. In his appeal letter, the appellant claims that he was told by the Co-ordinator in a telephone call that she was a friend of the affected person’s family.

### **Representations of the Police**

In the representations provided by the Police, the Co-ordinator stated that:

My decision was in no way tainted due to a personal relationship. I do not have a

personal relationship with the affected person. I would not know her if she was standing in front of me.

The Co-ordinator's representations on this issue were shared with the appellant. In the Notice of Inquiry the appellant was asked to specifically address whether the decision made by the Police was in any way 'tainted' as a result of the Co-ordinator's alleged "personal relationship" with the affected person.

I have considered this issue based on all of the evidence and representations before me.

In previous orders, the issue of conflict of interest or bias on the part of the Freedom of Information decision maker has been considered. In determining whether there is a conflict of interest, these orders examined:

- whether the decision-maker had a personal or special interest in the records, and
- whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example: Orders M-640 and MO-1285).

I am not persuaded that any conflict of interest exists in this case, either real or reasonably perceived. It is clear that the Co-ordinator has no pecuniary or other special interest in the records. Other than the appellant's bald assertion of a conflict of interest, there is nothing before me to suggest that the Co-ordinator approached the decision-making process with a closed mind. In my view, therefore, based on the information presented to me, a well-informed person, considering all of the circumstances, could not reasonably perceive a conflict of interest. For these reasons, I am not persuaded that the Co-ordinator was in a conflict of interest position in responding to the appellant's request.

## **PERSONAL INFORMATION**

In order to determine which sections of the *Act* may apply, it is necessary to determine 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 where 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, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

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.)].

In the non-confidential portion of their representations, the Police describe the records as containing the following personal information:

Page 1 [the occurrence report] contains the personal information of the affected person as well as the appellant. The appellant was provided with his own information. The personal information of the affected person consists of her date of birth, address and phone number. This is her home phone number and

address, which is personal information in her personal capacity. This coincides with the definition of personal information [paragraphs] ... (a), and (d). It certainly relates to an identifiable individual, as the appellant obviously knows her.

Page 2 [the general occurrence report] contains the personal information of the affected person as well as the appellant. The personal information on this page was provided to the police by the affected person and fits under the definition of personal information [paragraphs] ... (e), (g) and (h). Even though some of these discussions occur at work the individuals involved are not acting in their professional capacity at the time. The discussions occurred in their personal capacity.

Page 3 [the supplementary occurrence report] contains the personal information of the appellant and the affected person. As previously indicated this page was released to the appellant in its entirety as it relates to a conversation [that one of the investigating officers] had with the appellant.

The next nine pages [the statement from the affected person] consist of a documented list of dates and times the appellant contacted the affected person. These pages contain the personal information of the appellant, the affected person and third parties. These nine pages were created by the affected person and submitted to the police by her, in confidence. This coincides with the definition of personal information section 2(1)(f).

I agree with this characterization by the Police of the information in the records. I find, therefore, that the records contain the personal information of the appellant, the affected person and other identifiable individuals within the meaning of the definition of that term in section 2(1).

## **INVASION OF PRIVACY**

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 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 information fits within any of the exceptions set out in section 14(1)(a) through (e), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

The Police argue that the presumption at paragraph (b) of section 14(3) applies. If this paragraph does apply, disclosure of the information would be presumed to be an unjustified invasion of personal privacy under section 38(b). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome in this case if the “public interest override” at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Under section 14(3)(b), 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.

Section 14(3)(b) applies even if criminal proceedings were not commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

As noted above, the Police claim that:

Section 14(3)(b) applies to the records at issue. The personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The violation of law was criminal harassment, section 264 of the Criminal Code of Canada. The appellant was spoken to and warned by (a named police constable).

I have reviewed the records, along with the representations of the Police. The appellant has requested complete access to the police file relating to a harassment complaint made against him by the affected person. I find that these records were compiled as part of an investigation into a possible violation of law by the appellant as a result of a complaint to the Police by the affected person. The Police have already disclosed all of the appellant’s information in the records to the appellant, and the remaining information is the personal information of other individuals, whose disclosure is a presumed unjustified invasion of privacy under section 14(3)(b). Sections 14(4) and 16 do not apply in this case, and accordingly, I find that disclosure of the withheld portions of the records would constitute an unjustified invasion of personal privacy. Therefore, I find that the records are exempt under section 38(b).

## **EXERCISE OF DISCRETION**

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.

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.

Relevant considerations in the exercise of section 38(b) 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 provided lengthy representations on the exercise of its discretion under section 38(b). I am unable to refer in detail to those representations as they were confidential in nature. The Police do state in their representations that in the exercise of their discretion under section 38(b), they relied upon the Best Practices for Police Services policy guideline developed by the Commissioner's office and the Toronto Police Service as a guide.

The exercise of discretion under section 38(b) 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.

As stated in the Police representations, the appellant made a request for a police report relating to a harassment complaint made against him. However, the records also contain the personal information of other individuals. I have reviewed the confidential representations made by the Police on this issue.

In particular, I note that the Police have disclosed the appellant's personal information, and only withheld the personal information of other individuals. In this appeal, that result is consistent with the purpose of the exemption.

I find that in denying access to the record the Police exercised their discretion under section 38(b) properly, taking relevant factors into account, and not considering irrelevant ones.

**ORDER:**

I uphold the Police's decision to deny access to the withheld portions of the records at issue.

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

Diane Smith  
Adjudicator

July 28, 2006 \_\_\_\_\_