



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2057

Appeal MA-050254-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a police officer's "field notes, records, memo book, etc." in regard to an alleged dog attack. The request was submitted by legal counsel acting on behalf of the individual injured as a result of the alleged attack.

The Police issued a decision in which it granted partial access to records responsive to the request. Access to the withheld information was denied pursuant to section 38(b) (discretion to refuse requester's own information), read in conjunction with section 14(1) (personal privacy). In support of its reliance on section 14(1), the Police cited the application of section 14(3)(b) (investigation into a possible violation of law). The Police also denied access to information in the records that they consider to be non-responsive to the request.

The requester (now the appellant) appealed the Police's decision.

During the mediation stage of the appeal process, the mediator contacted an affected party to determine whether he would be prepared to consent to the disclosure of information in the records that relates to him. The affected party indicated that he was not prepared to provide his consent. The mediator conveyed the affected party's position to the appellant's representative.

Also during the mediation stage, the mediator spoke to the appellant's representative about the information described by the Police as non-responsive. The appellant's representative confirmed that the information marked non-responsive is not at issue.

Further mediation was unsuccessful and the file was moved to the adjudication stage of the appeal process for an inquiry.

I commenced my inquiry by first seeking representations from the Police. The Police submitted representations and agreed to share them, in their entirety, with the appellant.

I provided the appellant with a complete copy of the Police's submissions and sought representations. The appellant chose to not submit representations.

RECORDS:

There is one record at issue comprised of four pages of a police officer's notes, excerpted from that officer's memorandum book. As confirmed above, the portions of the record marked non-responsive are not at issue.

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether section 38(b) 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,

...

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

...

(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 one of the paragraphs in section 2(1) 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 state that the record in question contains the “names and dates of birth of other individuals as well as the address, telephone number and license plate number of an individual other than the appellant.”

On my review of the Police representations and the record at issue, I am satisfied that the record contains the appellant’s personal information, pursuant to paragraphs (c), (d) and (h) of the definition of “personal information in section 2(1) of the *Act*, including his name, address, telephone number, date of birth and recollection of events relating to the alleged dog attack. I also find that the record contains the personal information of three other individuals, pursuant to

paragraphs (c), (d) and (h) of the definition of “personal information” in section 2(1). Specifically, the record contains the personal information of the dog owner in question, including his name, sex, date of birth, address, license plate number and description of the dog; the personal information of the dog owner’s daughter, including her name, date of birth and telephone number; and the personal information of a third individual, including his name and date of birth.

In conclusion, I find that the undisclosed information in the record contains the personal information of three individuals in addition to that of the appellant.

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 the 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), or if 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].

Representations

The Police state that the record at issue relates to a dog bite incident that they investigated. The Police submit that investigating officers attended at the scene of the incident and were given a description of the possible dog owner and a license plate number, which enabled the Police to determine the identity of the dog owner. The Police state that a physical description of the dog owner was obtained from the victim and the officers fully investigated the matter in order to determine whether there was a violation of law, specifically a “possible offence under the *Provincial Offences Act* for dog owner liability.”

Analysis and findings

On my review of the representations of the Police and the record at issue, it is clear that the personal information contained in the record was compiled as part of an investigation into a possible violation of law under the *Provincial Offences Act*. Therefore, I find that the section 14(3)(b) presumption applies.

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, as a result of the application of section 14(3)(b), I find that the disclosure of the personal information at issue would be an unjustified invasion of the personal privacy of individuals other than the appellant. Therefore, this information is exempt under section 38(b).

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 key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires the head of an institution to disclose as much of the record as can reasonably be severed without disclosing the exempt information.

In this case, on my review of the record at issue, the Police have released the appellant’s personal information to him and the only information withheld was the personal information of the affected persons.

In the circumstances, I find that the Police have disclosed to the appellant all of the information in the record with the exception of the information that qualifies for exemption under section 38(b). Therefore, I am satisfied that the Police have complied with their statutory obligation under section 4(2).

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 state that in the circumstances of this case they considered “whether the access right of the requester prevails over the right to privacy of the other involved [parties] mentioned in the records.” The Police submit that in order to “strike a balance between right of access and protection of privacy”, they “considered and carefully weighed all factors.” The Police state that they “conscientiously determined” that disclosure of the information at issue in this case would be an unjustified invasion of personal privacy.

While the Police’s representations in this case were of a general nature, I am satisfied that they considered relevant matters and did not err in the exercise of their discretion by deciding not to release the undisclosed information to the appellant.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ June 19, 2006