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

FINAL ORDER MO-2069-F

Appeal MA-050185-1

Toronto Police Services Board

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/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

This is my final order dealing with the outstanding issue remaining from Interim Order MO-2031-I, namely, whether the Toronto Police Services Board (the Police) have exercised their discretion properly in refusing the appellant access to the information she requested. In Order MO-2031-I, I ordered the Police to re-exercise their discretion to exempt the requested information under section 38(b) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*)

NATURE OF THE APPEAL:

The windshield of the appellant's car was shattered by a rock thrown from a bridge. The Police investigated and identified a suspect. The investigating officer advised the appellant that a young boy was found to be throwing rocks at cars on that road. The Police prepared a report in which they named the suspect and set out his address and telephone number.

According to the appellant, when she asked the Police how she could obtain compensation for the damage to her windshield, which was not covered by her insurance policy, the Police advised her to make a request for the name and address of the boy under the *Act*.

She made a request to the Police under the *Act*, stating:

> I am now asking for the name and address of the parents of the boy to send the bill for repair to them, in hopes that they will accept it and pay at least part if not all this bill.

The Police refused access to this letter on the basis of section 38(b) of the *Act* (invasion of privacy), as the report contained the personal information of the appellant as well as the personal information of the boy alleged to have broken her windshield.

DISCUSSION:

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.

If any of paragraphs (a) to (h) of section 14(3) of the *Act* apply, disclosure of the information is 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 if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In this appeal, the Police claimed that the presumption at paragraph (b) of section 14(3) applied.

Section 14(3)(b) provides:

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

After receiving representations from the Police, the appellant, and the mother of the boy named in the Police report, I found that the information requested was compiled and is identifiable as part of an investigation into a possible violation of law, and therefore its disclosure would be presumed to be an unjustified invasion of the privacy of the boy and his mother. I also found that this presumption was not overcome by section 14(4) or section 16. Therefore, the information falls within the exemption from disclosure at section 38(b).

However, 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.

After reviewing the representations of the Police, I found that these representations revealed no indication that the Police made any attempt to take into account the circumstances of the appellant or that the Police gave any real consideration to whether the requester has a need to receive the information. As a result, I concluded that the Police fettered their discretion by treating this matter as if they had no discretion, and therefore they did not take into account relevant factors – in particular the fact that the information might be relevant to a fair determination of the appellant's rights, a factor favouring disclosure.

Accordingly, I issued Interim Order MO-2031-I, and as noted above, I ordered the Police to re-exercise their discretion. In particular, Order MO-2031 required the Police to take into account the representations of the appellant and the mother of the boy suspected of throwing the rock, and to provide either a different access decision or representations in support of their original decision.

I received representations from the Police, the appellant, and the mother. The representations of the Police make it clear that they have now considered the appellant's interest in receiving this information for the purpose of exercising any rights to a civil remedy that she may have against the individual named in the Police report.

As the Police have now considered the relevant factor that they previously appeared not to consider, I have no basis on which to find any error in the manner in which they have exercised

their discretion. Accordingly, I will uphold the decision of the Police to refuse access to the requested information.

Before concluding this discussion, however, it is relevant to note that the question of whether an institution is required to disclose personal information required by a requester to pursue a civil remedy for injury has come before this Office in several appeals. Where the disclosure would not constitute an unjustified invasion of privacy, this office has ordered the disclosure of sufficient information to permit a requester to pursue legal action. (See, for example, Orders M-55, M-746, M-1146).

I agree with the observation of former Adjudicator Laurel Cropley in Order M-1146 that:

> [W]herever possible, the *Act* should be interpreted and applied such that it is not used as a shield to prevent individuals from seeking justice against those who may be involved in a "wrongful" action of any nature.

Nevertheless, as a result of the decision of the Divisional Court in the *John Doe* case, cited above, it is not possible for this Office to prevent the use of the *Act* as a "shield" under certain circumstances. If personal information falls within section 14(3)(b), the presumption that its disclosure would be an unjustified invasion of privacy cannot be overcome by the factors favouring disclosure under section 14(2). Under these circumstances, the information will not be disclosed to enable the individual to pursue his or her civil remedies unless the institution chooses to exercise its discretion to do so.

I appreciate the appellant's desire to obtain the identity of the individual allegedly involved in destroying her windshield. While this may be less than satisfactory from her point of view, previous orders have suggested a possible approach to this: In Order MO-1197, Senior Adjudicator David Goodis stated:

> 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 to deny access to the requested information.

Original Signed by: July 18, 2006
John Swaigen