



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2077

Appeal MA-050204-1

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 the names and contact information of two witnesses to a motor vehicle accident which occurred on December 4, 2001, and “the information that is blacked out in the police officer’s notes”. The requester was one of the drivers involved in the motor vehicle accident.

The Police sent a letter to both witnesses seeking their consent to the release of their personal information to the requester. One witness (affected person 1) replied that he did not consent to the release of his personal information. The letter seeking consent sent to the second witness (affected person 2) was returned to the Police with a notation on the envelope as “moved/unknown”. The Police then issued a decision letter to the requester denying access to this information under section 14(1) of the *Act* as disclosure would constitute an unjustified invasion of the personal privacy of the witnesses.

The requester, now the appellant, appealed this decision.

During mediation, the Police clarified that the information “blacked out” in the police officers’ notes is the contact information of the witnesses. As no further mediation was possible, the file was moved to the adjudication stage.

This office initiated the adjudication by sending a Notice of Inquiry to the Police, inviting their representations. The Police provided representations. This office also sent a Notice of Inquiry seeking representations to affected person 1, which was returned as undeliverable. This office then sent the Notice of Inquiry to the appellant, along with the representations of the Police, in their entirety, inviting the appellant to provide representations. The appellant then provided representations. This appeal was subsequently assigned to me.

RECORDS:

The records at issue are the undisclosed portions of four pages of the investigating officers’ notes.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain “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 where 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, 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.)].

The Police in their representations stated that:

there are four 'blacked out' areas in the photocopies supplied by the requester. Three of these areas comprise the name, address, postal code, telephone number

and the date of birth of the witnesses and the fourth section contains the signature of one of the witnesses.

Section 2(l)(d) specifically defines personal information as "recorded information about an identifiable individual" including, "the address, telephone ... of the individual."

I have reviewed the records and find that they contain information about identifiable individuals, namely the affected persons, and therefore constitute their "personal information". Specifically, the undisclosed portions of the records consist of the affected persons' names along with other personal information about them (paragraph (h) of the definition), their addresses and telephone numbers (paragraph (d)), and the date of birth of affected person 1 (paragraph (a)).

The disclosed portions of the records also contain the personal information of the appellant, namely, the views or opinions of other individuals about the appellant (paragraph (g)). This information has already been disclosed to the appellant, with information of the other individuals severed.

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.

Section 38(b) is one of those exceptions to that right. That section reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

- (b) if the disclosure would constitute an unjustified invasion of other individual's personal privacy.

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 has the discretion to refuse to disclose that information to the requester.

The disclosed and undisclosed portions of the records contain the information of the appellant and other individuals. I will therefore consider whether the disclosure of this personal information would be an unjustified invasion of the personal privacy of these other individuals and is exempt from disclosure under section 38(b).

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.

All of the records, portions of which are at issue, contain the personal information of the appellant and one or more other individuals. I find that these records ought to be considered under Part II of the *Act*, not Part I. Accordingly, since the Police have taken the position that disclosure of the withheld parts of these records would be an unjustified invasion of personal privacy, I will consider whether the exemption provided by section 38(b) applies to them.

Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant and other individuals and the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

In considering the possible application of section 38(b), sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. 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 (Div. Ct.)].

If none of the presumptions contained in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the *Act*, as well as all other considerations that are relevant in the circumstances of the case.

The Police submit that section 14(3)(b) applies. This section states:

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;

The Police state:

In section 14(3)(b), the presumed invasion of privacy addresses the fact that when personal information is supplied to or collected by a law enforcement agency, the use of that information will be restricted to that which is required to investigate/adjudicate the matter. The personal information gathered pertains exclusively to identifiable individuals and was collected in the course of investigating an accident.

The Police rely on Orders M-198 and M-375.

In Order M198 Inquiry Officer Anita Fineberg writes:

The fact that no criminal proceedings were commenced by the Police does not negate the applicability of section 14(3)(b) (Order P-237). As section 14(3)(b) only requires that there be an investigation into a possible violation of law, I am satisfied that the requirements for a presumed unjustified invasion of personal privacy under section 14(3)(b) have been established.

In Order M-375 Inquiry Officer Laurel Cropley writes:

I have reviewed the remaining information contained in the records at issue. While I am sympathetic to the appellant's needs, I am of the view that the remaining information must not be disclosed for the following reasons:

.... In my view, the personal information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law and, accordingly, the presumed unjustified invasion of privacy in section 14(3)(b) applies.

The appellant does not address the possible application of the section 14(3)(b) presumption to the personal information in the records. However, the appellant does state that the personal information is relevant to a fair and proper determination of rights affecting the person making the request (the appellant's clients), who are being sued by a passenger in one of the motor vehicles involved in the accident. This raises the consideration listed in section 14(2)(d).

Section 14(2)(d) provides that:

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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request.

Findings

I find that section 14(3)(b) applies in this case. The information was compiled and is identifiable as part of an investigation into a possible violation of law, specifically the *Highway Traffic Act* [Order P-242]. The fact that criminal or quasi-criminal proceedings were not commenced does not have a bearing on the issue, since section 14(3)(b) only requires that there be an investigation into a possible violation of law (Orders PO-1849 and PO-2167).

As a result of my finding that the presumption in section 14(3)(b) applies to the personal information at issue, I conclude that its disclosure is presumed to constitute an unjustified invasion of the personal privacy of the affected persons.

Having found that section 14(3)(b) applies I am precluded from considering any of the factors weighing in favour of disclosure under section 14(2), including that in section 14(2)(d), because of *John Doe v. Ontario (Information and Privacy Commissioner)*, cited above. Sections 14(4) and 16 do not apply in this case. Accordingly, I find that the undisclosed information is exempt under section 38(b).

EXERCISE OF DISCRETION

Section 38(b) allows an institution 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. This 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.

The exemption provided by section 38(b) (in Part II of the *Act*) is discretionary; if disclosure of a record containing the personal information of the requester and another individual or individuals would be an unjustified invasion of the personal privacy of that other individual or individuals, the institution may refuse disclosure. However, in this situation (in contrast to the mandatory nature of the personal privacy exemption in section 14(1)), the institution has the power to grant access in appropriate circumstances.

The Police originally claimed section 14(1) to exempt all the undisclosed information at issue in this appeal. I have previously found that the records, of which parts are at issue, contain the personal information of the appellant and other individuals.

For that reason, as explained earlier in this Order, I have considered the possible application of section 38(b) to the withheld portions of the records and found that it does apply. Since section 38(b) is a discretionary exemption, the Police have the discretion to apply it and withhold the information from disclosure. Alternatively, the Police may decide to disclose the information. Accordingly, I wrote to the Police and asked them to provide further representations on only section 38(b) as to the exercise of their discretion. The Police provided representations in response. In their representations on the exercise of their discretion, the Police stated:

Section 29 of the *Act* authorizes the indirect collection of personal information for the purpose of law enforcement. Section 28 introduces safeguards to the collection of personal information. In the case at issue, since the collection of the personal information of the individuals was made only in order for the police to investigate a motor vehicle accident, the balance between right of access and the protection of privacy must be given in favour of protecting the privacy of the other individuals.

In assessing the value of protecting the privacy interests of individuals, one needs to consider the nature of the institution. The nature of a law enforcement institution is in great part to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police. Law enforcement institution 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 the unique status 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 [and particularly those individuals who are only indirectly or incidentally involved in the event(s)] where personal information is being collected.

The undisclosed portions of the records contain only personal information concerning individuals other than the appellant. Significantly, the appellant's own information was disclosed with the information of other individuals severed. I find that in denying access to the undisclosed personal information in the records exempted under section 38(b), the Police relied on relevant factors, not irrelevant ones, and therefore exercised their discretion under section 38(b) in a proper manner.

ORDER:

I uphold the Police's decision.

Original signed by: _____
Diane Smith
Adjudicator

_____ August 18, 2006