



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2168

Appeal MA06-292

London 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/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The London Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for the following information:

I would like to know if one [named individual] formally at [address] and now residing at [address] has made a complaint against me in regards to me constantly being in proximity to his daughter and himself in an inappropriate manner.

The requester stated that he was seeking police reports relating to such complaints. He provided the Police with the two dates and times on which he believes the complaints were made.

The Police issued a decision letter that stated that the existence of the records cannot be confirmed or denied in accordance with section 14(5) of the Act. This provision allows an institution to refuse to confirm or deny the existence of a record if disclosure of that fact would constitute an unjustified invasion of personal privacy.

The requester (now the appellant) appealed the Police's decision to this office. During the mediation stage of the appeal, the mediator raised the possible application of the discretionary exemption in section 38(b) of the Act, because if the records exist, they may contain the personal information of the appellant.

This appeal was not settled in mediation and was transferred to adjudication. Initially, I issued a Notice of Inquiry to the Police, who submitted representations in response. The Police asked that portions of their representations be withheld from the appellant, due to confidentiality concerns. I then issued a Notice of Inquiry to the appellant, along with the non-confidential representations of the Police. In response, the appellant submitted representations to this office.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

Section 14(5) reads:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

Section 14(5) gives an institution discretion to refuse to confirm or deny the existence of a record in certain circumstances.

A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the Act. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339].

Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; **and**
2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.

[Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802]

Part one: disclosure of the record (if it exists)

Under part one of the section 14(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy.

Definition of personal information

An unjustified invasion of personal privacy can only result from the disclosure of personal information. That term is defined in section 2(1) of the *Act*, which states, in part:

“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,

- (e) the personal opinions or views of the individual except if 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;

The Police state that if the individual identified by the appellant had filed complaints with them, police reports would have been generated. They submit that these reports, if they exist, would contain the names, addresses, phone numbers, and dates of birth of the complainant and his daughter, which constitutes their personal information, within the meaning of the definition of that term, as set out above.

The appellant's representations do not directly address whether the records, if they exist, would contain personal information.

I am satisfied that the records, if they exist, would contain information which qualifies as the personal information of the complainant and his daughter. In addition, I find that they would likely contain the personal information of the appellant, such as his name, address, the views of other individuals about him, and possibly other personal information, if they exist. In short, I find that the records, if they exist, would contain the personal information of both the appellant and other individuals.

Which personal privacy exemption applies?

Where a requester seeks personal information of another individual, the mandatory exemption in section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. Section 14(1) is found in Part I of the *Act*.

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 discretionary exemption in section 38(b) of the *Act* allows an institution to refuse to disclose that information to the requester. Section 38(b) is found in Part II of the *Act*.

Given that the records, if they exist, would contain the personal information of both the appellant and other individuals, the relevant exemption claim in this appeal is section 38(b), not section 14(1).

However, section 37(2) of the *Act* provides that only certain sections from Part I of the *Act* (where section 14(5) is found) apply to requests under Part II (which deal with requests for a requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests which contain a requester's own personal information, as would be the case in this appeal, if a record exists.

Adjudicator John Higgins addressed this issue in Order M-615:

... in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.

Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

I agree with this reasoning and adopt it for the purposes of this appeal.

Unjustified invasion of personal privacy

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met. Section 14(1) sets out certain exceptions to the general rule against the disclosure of personal information that relates to an individual other than the requester. The only exception which may have some application in the circumstances of this appeal is set out in section 14(1)(f), which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, if the disclosure does not 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 38(b). If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

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]

The Police submit that the presumption in section 14(3)(b) of the *Act* applies because the personal information in the records, if they exist, would have been compiled and be identifiable as part of different investigations into possible violations of the *Criminal Code*.

Section 14(3)(b) of the *Act* 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;

The Police further submit that the factors in sections 14(2)(e), (f) and (h) of the *Act* weigh against disclosure of the personal information in the records, if they exist. These sections state:

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,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

In his representations, the appellant assumes that the individual named in his request has filed complaints against him. He submits that these complaints are false, and he needs access to the records to clear his name. In particular, he states that, "Once the complaints are proven untrue, I would be able to sue and that's what this is really all about!"

In my view, this argument gives rise to the possible application of the factors in sections 14(2)(d) and (g) of the *Act*:

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;

- (g) the personal information is unlikely to be accurate or reliable;

I have considered the representations of the parties. If the individuals cited by the appellant had filed complaints against him, the Police would have created certain records, such as reports. These records, if they exist, would contain the personal information of both the appellant and other individuals.

In my view, the presumption in section 14(3)(b) of the *Act* would apply to the personal information in these records, if they exist, because this information would have been compiled by the Police and be identifiable as part of an investigation into possible violations of the *Criminal Code*.

It is clear from the parties' representations that no charges have been laid against the appellant with respect to the complaints that he believes have been filed against him. However, 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].

Consequently, I find that the section 14(3)(b) presumption applies to the personal information of both the appellant and other individuals which may be contained in any responsive records, if they exist.

The Divisional Court's decision in the *John Doe* case, cited above, precludes me from considering whether the section 14(3)(b) presumption can be rebutted by either one or a combination of the factors set out in section 14(2). However, a presumed unjustified invasion of personal privacy under section 14(3) can be overcome if section 14(4) or the "public interest override" at section 16 applies.

I have considered the application of the exceptions contained in section 14(4) of the *Act* and find that the personal information in the records, if they exist, would not fall within the ambit of this section. Moreover, the public interest override at section 16 would not apply, because the appellant has not referred to it.

Consequently, I find that the Police have established that disclosure of the records, if they exist, would constitute an unjustified invasion of personal privacy. In other words, they have met the first requirement that must be established to invoke the section 14(5) test.

Part two: disclosure of the fact that the record exists (or does not exist)

To satisfy the second requirement, the Police must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant; and the nature of the information conveyed is such that disclosure would in and of itself constitute an unjustified invasion of personal privacy.

The Police's submissions on this issue are mainly in the confidential portions of their representations. The basic thrust of these submissions is that disclosure of the mere existence (or non-existence) of the records would result in an invasion of the privacy of the individuals identified in the appellant's request.

The appellant's representations do not specifically address whether the second requirement that must be established with respect to section 14(5) of the *Act* has been satisfied.

I have carefully considered both the confidential and non-confidential representations of the Police. For the reasons that follow, I am satisfied that disclosure of the very fact that a record exists (or does not exist) would in and of itself convey information to the appellant, and the nature of the information conveyed is such that disclosure of this fact would constitute an unjustified invasion of personal privacy.

Disclosure of the fact that a record exists (or does not exist) in the circumstances of this appeal would convey to the appellant whether the individual he cites in his request has filed complaints against him with the Police. In my view, this constitutes the personal information of that individual and his daughter.

However, it must also be established that the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy. In other words, the Police must provide evidence that disclosing whether the individual named in the appellant's complaint has filed complaints against the appellant would constitute an unjustified invasion of the personal privacy of that individual and his daughter.

I am not persuaded that the presumption in section 14(3)(b) of the *Act* would necessarily apply in such circumstances, because if the records do not exist, this means that no complaints would have been filed and no investigations would have taken place. In such circumstances, it could not be argued that this personal information was compiled and is identifiable as part of an investigation into a possible violation of law, as required by the section 14(3)(b) presumption.

It is necessary, therefore, to weigh the factors set out in section 14(2) in determining whether the nature of the information conveyed (i.e., whether the individual named in the appellant's request has filed complaints against the appellant with the Police) is such that disclosure would constitute an unjustified invasion of personal privacy.

In my view, concerns about harm to individuals [sections 14(2)(e)], the highly sensitive nature of such information [section 14(2)(f)] and protecting information that was supplied to the Police in confidence [section 14(2)(h)] outweigh concerns that the information is relevant to a fair determination of the appellant's rights [section 14(2)(d)] and is unlikely to be accurate or reliable [section 14(2)(g)].

I find, therefore, that disclosure of the fact that a record exists (or does not exist) in the circumstances of this appeal would convey information to the appellant. I further find that the

nature of the information conveyed (i.e., whether the individual named in the appellant's request has filed complaints against the appellant with the Police) is such that disclosure of that fact alone would constitute an unjustified invasion of the personal privacy of both that individual and his daughter. Consequently, the second requirement with respect to section 14(5) of the *Act* has been met.

CONCLUSION

The Police have submitted sufficient evidence to establish that they have met both of the section 14(5) requirements. I find, therefore, that they properly exercised their discretion in invoking section 14(5) of the *Act* in response to the appellant's request.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

February 28, 2007 _____