



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2254

Appeal MA07-154

Peel Regional Police Services Board



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NATURE OF THE APPEAL:

The Peel Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any information the Police have related to the requester.

In response, the Police located four responsive records and provided access in full to three of them. The Police provided access to all but one paragraph of the fourth record, citing the discretionary exemption in section 38(b) (personal privacy) of the *Act*.

The requester, now the appellant, appealed that decision.

As mediation was not successful, the file was moved to the adjudication stage of the inquiry process. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Police initially, seeking their representations. I received representations from the Police. I sent a copy of the representations to the appellant, along with a Notice of Inquiry, seeking his representations. Portions of the Police's representations were withheld due to confidentiality concerns. The appellant did not submit representations in response to the Notice of Inquiry.

RECORD:

The record at issue is one paragraph from a three page Police Occurrence Synopsis.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections 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,
- (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].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, 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 submit that the information at issue in the record contains personal information of both the appellant and another identifiable individual. I agree with the Police that the information at issue in the record contains both the personal information of the appellant and another identifiable individual. This personal information is information about these individuals in their personal capacities. Moreover, the appellant's personal information is so intertwined with that of the other identifiable individual, that the appellant's personal information is not severable.

PERSONAL 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 paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The information at issue does not fit within these paragraphs.

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).

The Police submit that the presumption in section 14(3)(b) applies, as the information was compiled by the Police when they were called upon to investigate a verbal domestic assault complaint. Section 14(3)(b) reads

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 state that:

The information contained in the record was compiled as a result of [a named police constable’s] investigation into [an identifiable individual’s] allegations. Criminal Charges were not laid in this instance; however, the appellant was apprehended under the *Mental Health Act (MHA)*. The presumption in subsection

14(3)(b) only requires that there be an investigation into a possible violation of law, therefore is applicable in this case.

Analysis/Findings

I find that the presumption in section 14(3)(b) applies to the undisclosed information in the record. As stated by the Police, the information was compiled and is identifiable as part of an investigation into a possible violation of law under the *Criminal Code* [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].

This case is distinguishable from the situation where the Police compiled the information in accordance with their legislated authority under the *MHA*. In Order MO-1384, former Assistant Commissioner Tom Mitchinson stated:

Section 17 of the *Mental Health Act* does not create an offence for the actions of individuals which may justify the involvement of the Police. The Police have provided no evidence to suggest the appellant's behaviour harmed or threatened to harm any other person. Rather, it would appear that the Police decided to approach the appellant on the basis of possible harm she might inflict on herself. In my view, absent evidence to the contrary, the actions taken by the Police, under the apparent authority of the *Mental Health Act*, do not fall within the scope of section 14(3)(b) because, while they involve police officers, they do not involve or relate to "a possible violation of law". This situation can be distinguished from investigations undertaken by police services in situations involving a suspicious death, where possible foul play may have occurred. In those circumstances, it is often reasonable for a police service to conclude that there may have been "a possible violation of law", specifically the Criminal Code of Canada.

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 identifiable individual other than the appellant in the record under section 38(b). 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), because of *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

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. Section 14(4) has no application to the information at issue and section 16 was not raised by the appellant. Therefore, subject to my discussion of the Police's exercise of discretion, I conclude that disclosure of the undisclosed personal information in the record would constitute an unjustified invasion of the personal privacy of the identifiable individual other than the appellant in the record and that this information qualifies for exemption under section 38(b).

EXERCISE OF DISCRETION

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 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, in the non-confidential portions of their representations, submit that:

The content of the record in question clearly falls within the applicability of subsection 14(3)(b) and, therefore, the exercise of discretion relative to section 38(b) is not relevant.

Analysis/Findings

The Police provided both confidential and non-confidential representations concerning the exercise of their discretion. I have considered both the confidential and the non-confidential portions of the Police's representations and find that in denying access to the undisclosed information in the record, the Police exercised their discretion under section 38(b) in a proper manner. The Police took into account relevant considerations and did not take into account irrelevant considerations.

In particular, the personal information at issue was compiled during a law enforcement investigation. The information is sensitive and significant to the identifiable individual other than the appellant in the record. As the appellant did not provide representations, I have no evidence before me to conclude that he has a sympathetic or compelling need to receive the information at issue. The Police already disclosed all of the information in the record to the appellant, except for the one paragraph at issue. This paragraph contains information supplied by an identifiable individual other than the appellant to the Police. In the circumstances of this appeal, I uphold the Police's exercise of discretion in protecting the privacy rights of this individual.

ORDER:

I uphold the Police's decision.

Original signed by: _____
Diane Smith
Adjudicator

December 19, 2007 _____