



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2235

Appeal MA06-282

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 copies of any reports regarding an investigation into allegations made in 2005 by the requester concerning a named family.

The Police searched for responsive records and issued a decision letter. The Police advised that a 2005 report did not exist, but that there were memorandum notes relating to this incident. The Police also offered to provide access to a report created in 1998, but the appellant declined. The Police denied access to the record, in its entirety, on the basis of the exemptions in section 14(1) and 38(b) (invasion of privacy), with reference to the presumption in section 14(3)(b). The Police's decision granted access to some information and enclosed a record. However, the requester maintains that no such disclosure took place.

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

During mediation, the Mediator noted that the Police had included the 1998 report as a responsive record and confirmed with the appellant that he sought access to this report. The Police subsequently informed the mediator that the appellant had submitted a new request for the 1998 report. The Mediator contacted the appellant who confirmed that the 1998 report could be removed from the scope of this appeal, as the Police were processing his new request separately. The appellant also agreed that non-responsive sections of the police officer's notes could be removed from the scope of the appeal.

Mediation did not resolve all of the issues in this appeal, and it was transferred to the adjudication stage of the process. Initially, a Notice of Inquiry was sent to the Police setting out the facts and issues in this appeal. The Police provided representations in response. A Notice of Inquiry was then sent to the appellant along with a severed copy of the Police's representations. Portions of the Police's representations were withheld due to my concerns about their confidentiality. The appellant also provided representations.

An individual whose interests may be affected by the outcome of this appeal (the affected person) was also contacted. The affected person provided his consent to the disclosure of the information in the record relating to him.

RECORDS:

The record at issue consists of 7 pages of police officer's notes.

DISCUSSION:

PRELIMINARY ISSUE

As stated above, the Police decision letter stated that access to some information had been granted and a record was enclosed. The appellant maintains that no such disclosure took place.

In their representations, the Police acknowledged that no disclosure had taken place and explained that the part of its decision letter referring to the partial disclosure of the record was due to inadvertence and should have been removed.

PERSONAL INFORMATION

General principles

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 part, in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

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

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.)].

Finding

From my review, I find that the records contain the personal information of the appellant and the affected person. The appellant’s name and other information about him falls within the ambit of paragraphs (g) and (h) of the definition of personal information in section 2(1) of the *Act*. The name, address, telephone numbers and views of the affected person fall within the ambit of paragraphs (d) and (h) of the definition of personal information in section 2(1) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

General principles

Since I have found that the record contains both the personal information of the appellant and the affected person, section 36(1) of the *Act* applies to this appeal. Section 36(1) 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 appellant 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 appellant.

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 appellant. This involves a weighing of the appellant's right of access to his 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.

Section 14(1)

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). In this case it appears that section 14(1)(a) and (f) may apply. These sections state as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(1)(a)

The affected person was contacted by telephone. He provided consent to the disclosure of the personal information relating to him. Unfortunately, despite many attempts by this office, we were unable to obtain the affected person's written consent.

For section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request. . In Order PO-1723, Adjudicator Laurel Cropley found that section 21(1)(a) of the provincial *Freedom of Information and Protection of Privacy Act*, the equivalent of section 14(1)(a) of the *Act*, requires that consent be provided under the *Act*, that is, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request. Adjudicator Cropley's finding has been followed in numerous orders and I adopt it here. Thus, while the affected person provided his oral consent, I find that this consent does not meet the criteria of section 14(1)(a). As such, I find that the section 14(1)(a) exception does not apply in this appeal.

Section 14(1)(f)

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f).

Section 14(3)

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].

The Police submit that the presumption at section 14(3)(b) of the *Act* in conjunction with section 38(b) apply to exempt the information from disclosure. 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 submit that the personal information in the record pertains exclusively to an individual who was interviewed by a police officer during the investigation of allegations made by the appellant.

The appellant states the following:

With respect to section 14(3)(b), it is submitted that while the information may have been compiled as part of an investigation, the investigation was at the behest of the Appellant and evidence supplied by him. Furthermore, as the Police refused to lay charges and advised the Appellant to proceed on his own, the Appellant should be allowed to see if the witness provided the same information to the Police as he did the Appellant. The Appellant is seeking to have this matter adjudicated and the Police records should be produced to allow that to take place.

Finding

I find that the information in the record was compiled and is identifiable as part of the police investigation into the allegations made by the appellant. This is acknowledged by the appellant.

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]. Thus, even though no charges were laid by the police in this case, the information in the record falls within the section 14(3)(b) presumption and its disclosure is presumed to be an unjustified invasion of privacy.

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]. Section 14(4) is inapplicable to the record at issue and the section 16 public interest override is not an issue in this appeal.

Accordingly I find that the presumption at section 14(3)(b) applies and the disclosure of the personal information in the record is presumed to be an unjustified invasion of privacy under section 38(b) subject to my finding on the Police’s exercise of discretion.

EXERCISE OF DISCRETION

The section 38(b) exemption is discretionary, and permits the Police to disclose information, despite the fact that it could withhold it. The Police must exercise its discretion. On appeal, I may determine whether the Police failed to do so.

The Police submitted the following in support of their exercise of discretion under section 38(b) of the *Act*.

In assessing the value of protecting the privacy interests of an individual other than the requester, one needs to consider the nature of the institution, which in great part entails gathering and recording information relating to unlawful activities, crime prevention activities, or activities involving members of the

public who require assistance and intervention by the police. A law enforcement institution's records are not simply 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 its ability to authorize the collection of personal information, we generally view spirit and content of the *Act* as placing a greater responsibility in safeguarding the privacy interests of individuals (including those directly and indirectly involved in the events) where personal information is being collected.

In order to strike a balance between right of access and protection of privacy, this institution considered and carefully weighed all factors. It was conscientiously determined that pursuant to sections 14 and 38 of the *Act*, disclosure of the personal information of persons other than the appellant was determined to be an unjustified invasion of personal privacy.

The appellant submits that the Police improperly exercised their discretion under section 38(b) and state:

There is no privacy issue here. The information being sought is basically a confirmation of the information that the Appellant provided to the Police, as reflected in the notes of [named detective].

The appellant further submits that the Police may have also acted in bad faith by denying the appellant's request.

I disagree with the appellant's view of the information at issue. While the appellant is aware of the subject matter of the information at issue, this does not change the fact that the information contained in the record is the personal information of the affected person. The appellant was not privy to the interview between the police officer and the affected person, and as such, the privacy of the affected person is very much an issue in this appeal.

Having reviewed the Police's representations on the factors it considered, I find that the Police properly exercised its discretion having taken into account the relevant considerations of the spirit and content of the *Act*, the collection of personal information and the privacy interests of individuals.

In summary, I find that section 38(b) of the *Act* applies to the information at issue and the record should not be disclosed.

ORDER:

I uphold the Police's decision to withhold the record at issue.

Original signed by: _____
Stephanie Haly
Adjudicator

_____ October 11, 2007