



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER MO-2265-I**

**Appeal MA07-131**

**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 information relating to an investigation of a report of fraud relating to the purchase of a truck.

The Police located the responsive record and granted partial access to the requested information. Access to the remainder of the record was denied pursuant to section 38(b) (personal privacy) of the *Act*.

The requester, now the appellant, appealed the decision of the Police.

During the course of mediation, the mediator attempted to contact three individuals whose personal information may be contained in the record (affected persons) in an effort to get their consent to the release of their personal information to the appellant. The mediator was able to contact two affected persons by telephone, both of whom did not consent to the release of their personal information in the record.

The appellant advised the mediator that she believes additional records should exist containing the notes of the investigating police officers. As a result, the issue of whether the Police conducted a reasonable search was added as an issue in this appeal.

The parties were unable to resolve the issues under appeal through the process of mediation. The file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Police and the one affected person whose address I was able to locate, initially. I received representations from the Police only, a complete copy of which was sent to the appellant, along with a Notice of Inquiry. I received representations from the appellant in response.

## **RECORD:**

The record at issue is a six page electronic Occurrence Report.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

In order to determine which sections of the *Act* apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. The Police rely on paragraphs (d), (e) and (h), of the definition of “personal information” 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,

- (e) the personal opinions or views of the individual except where they relate to another individual,
- (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 contained within the said six page Occurrence Report is personal information. For example, the first and last names, addresses and telephone numbers as per the record at issue.

The appellant did not address this issue in her representations.

### **Analysis/Findings**

I agree with the Police that the record contains personal information of identifiable individuals in their personal capacity. In particular, the record contains the personal information of the appellant, the affected persons and other identifiable individuals, the appellant's family members. The personal information in the record includes these individuals' addresses, telephone numbers, personal opinions or views and their names which appear with other personal information, in accordance with paragraphs (d), (e) and (h) of the definition, cited above. The record also contains information relating to financial transactions in which these individuals have been involved, in accordance with paragraph (b) of the definition of "personal information".

However, I find that a portion of the record on page 3 does not contain personal information, but information related to the truck which was the subject of the report of fraud made by the appellant. Therefore, I will order the Police to disclose this information, which I have found not to be personal information, to the appellant.

## **PERSONAL PRIVACY**

I will now determine whether the discretionary exemption at section 38(b) applies to the personal information at issue.

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). If section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this appeal, the information does not fit within paragraphs (a) to (e) of section 14(1) and section 14(4) does not apply.

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 rely on the presumption in section 14(3)(b) of the *Act*, which 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 matters surrounding the requested records relate to a "Fraud" report made by the appellant to the Toronto Police Service. Although members of the public have the right to report incidents to the police, it is not a foregone conclusion that all reports are criminal. The belief of innocent until proven guilty is the fundamental basis of our judicial system. The Police are mandated to investigate matters and proceed accordingly. In this matter, the appellant was repeatedly advised by the Police that the incident in question is not criminal, but rather civil. The report provided to the appellant is a well-rounded and detailed account of all the information gathered by the Police. The appellant has been advised of the outcome of the findings whereby no criminal acts were committed. Further, there was no police action to be taken as this is a civil matter only. The appellant has been provided with as much information as possible, with the exception of the personal information of other individuals as dictated by the *Act*....

Further, in the Notice of Inquiry, it states that the mediator contacted the affected parties. The mediator was unsuccessful in obtaining consent. The mediator's report states the following:

During the course of the mediation, the mediator attempted to contact the affected persons listed in the record in an effort to get their consent to the release of their personal information to the appellant. The mediator was able to contact two affected persons by telephone, both of whom did not consent to the release of their personal information in the record.

Therefore, releasing this personal information without consent would not only be a direct violation of the *Act*, but would discredit the trust bestowed upon not only this institution, but the IPC [Information and Privacy Commissioner/Ontario] as well.

The appellant did not address this issue in her representations, other than confirming that the record arose as a result of a criminal investigation conducted by the Police into allegations made by her.

### **Analysis/Findings**

Upon review of the personal information in the record, I find that it was compiled and is identifiable as part of an investigation by the Police into a possible violation of law as contemplated by section 14(3)(b). The already disclosed information from the record reveals that the police were investigating whether a charge of fraud pursuant to section 380 of the *Criminal Code of Canada* should be laid against any of the affected persons.

The presumption in section 14(3)(b) applies to the personal information at issue even though criminal proceedings were not commenced. The presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law [Order P-242].

This presumed unjustified invasion of personal privacy under section 14(3), cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. 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*, cited above]. Section 16 has not been raised by the appellant and, as stated above, section 14(4) is inapplicable in this appeal.

Accordingly, I conclude that disclosure of the personal information in the records is presumed to constitute an unjustified invasion of the personal privacy of the identifiable individuals other than the appellant in the record.

### **Absurd result**

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]
- the requester was present when the information was provided to the institution [Orders M-444, P-1414]
- the information is clearly within the requester’s knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester’s knowledge [Orders M-757, MO-1323, MO-1378].

Neither party provided representations on the issue of absurd result.

### **Analysis/Findings**

Upon review of the record, I find that the appellant is otherwise aware of some of the undisclosed personal information in the record relating to the Police investigation. In particular, the appellant provided this undisclosed information on page 2 of the record concerning her family members to the Police when they interviewed her.

As a result, I will order that the appellant be given access to the undisclosed information on page 2 of the record concerning her family members. I will now consider whether the Police properly exercised its discretion in this appeal with respect to the remaining personal information in the record.

### **EXERCISE OF DISCRETION**

I will now determine whether the Police exercised its discretion in a proper manner under section 38(b) with respect to the information that I have not found to be subject to disclosure by reason of the absurd result principle.

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 submit that:

The main issue is this; do the access rights of the appellant supersede those of the affected parties?

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 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 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 did not address this issue in her representations.



## **Analysis/Findings**

I find that the Police disclosed as much of the remaining information in the record as could reasonably be disclosed without disclosing material which is exempt. I find that in denying access to the undisclosed portions of the record, the Police exercised its discretion under section 38(b) in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. I find that the Police applied the claimed exemption in the *Act* appropriately to the withheld portions of the record at issue. Any additional disclosure of information would constitute an unjustified invasion of the personal privacy of the affected persons and the other identifiable individuals in the records. Accordingly I find that the remaining undisclosed portions of the record are exempt under section 38(b) of the *Act*.

## **SEARCH FOR RESPONSIVE RECORDS**

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The Police were asked to provide a written summary of all steps taken in response to the request.

The Police submit that:

Police officers gather information using service issued memorandum books. Details are gathered, noted and as soon as reasonably possible, police officers generate a complete account of events, known as an Occurrence Report. This report is added to the Toronto Police Service's database as statistical information and an investigative tool. The six page Occurrence Report contains the initial complaint to police and all supplementary reports and conclusions by all involved officers. During the mediation process, the appellant was adamant that Police Constable [#] of 13 Division should have additional information not found in the Occurrence Report. This officer was contacted and provided the following notations:

My memo-book notes were checked by hand, between the period of 2005.10.31 - 2006.01.30, and although I do recall meeting (the appellant) I have no notes during this period of time.... I worked

the front desk of [Division] 13 that is most likely where we met and how she got my name and contact.

A copy of the memorandum book notes are in this institution's file, and offers no additional details other than the full account and sequence of events noted in the six page Occurrence Report released to the appellant. There were no additional records prepared, as no criminal offence has been committed. No records of arrest or fraud reports exist, as previously reiterated, this is a civil matter and no further police actions were required.

The appellant did not address this issue in her representations.

### **Analysis/Findings**

As noted above, the appellant informed the mediator that she believes additional records should exist containing the notes of the investigating police officers. The *Act* does not require the Police to prove with absolute certainty that further records do not exist. However, the Police must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

The appellant sought records concerning a specific fraud investigation. In her request she named 10 police officers who she had contact with concerning her fraud complaint. She provided the badge number of eight of these officers in her request. I note from the Police's representations that the record, which is an Occurrence Report, was generated from police officers' memorandum books. The Police have not disclosed these memorandum books. Nor have the Police disclosed to the appellant the DVD made of her interview with the Police at the police station on November 15, 2005, as referred to in the disclosed portions of the record.

Based on the non-disclosure of the memorandum books and the DVD, and based on the submissions of the Police, I find that the Police have not conducted a reasonable search for records responsive to the appellant's request. Therefore, I will order the Police to conduct a new search for the responsive records, including any responsive police officer memorandum books. I will also order the Police to make an access decision concerning the DVD.

### **ORDER:**

1. I order the Police to provide the appellant with the undisclosed information on pages 2 and 3 of the record concerning the appellant's family members and concerning the truck, **by February 29, 2008 but not before February 25, 2008**. For greater certainty, I have highlighted the portions of pages 2 and 3 of the record which is to be disclosed to the appellant on the copy of these pages of the record sent to the Police along with this Order.
2. I uphold the Police's decision to deny access to the remaining undisclosed portions of the record.

3. In order to verify compliance with this Order, I reserve the right to require the Police to provide me with a copy of the record disclosed to the appellant pursuant to provision 1, upon my request.
4. I order the Police to conduct a new search for responsive records related to the appellant's fraud report, including any responsive police officer memorandum books. I order the Police to provide me with an affidavit sworn by the individual(s) who conducted the search, confirming the nature and extent of the search conducted for the responsive records within 30 days of this interim order. At a minimum the affidavit should include information relating to the following:
  - (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
  - (b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
  - (c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,
  - (d) the results of the search.
5. The affidavit referred to above should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.
6. If, as a result of the further search, the Police identify any additional records responsive to the request, I order the Police to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this Order as the date of the request.
7. I further order the Police to provide a decision letter to the appellant regarding access to the DVD of her interview with the Police in accordance with the provisions of the *Act*, considering the date of this Order as the date of the request.
8. In order to verify compliance with this Order, I order the Police to provide me with a copy of the decision letter(s) provided to the appellant.

9. I remain seized of this appeal in order to deal with any outstanding issues arising from this appeal.

Original signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

\_\_\_\_\_  
January 25, 2008