



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2309

Appeal MA07-171

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

NATURE OF THE APPEAL:

The Ottawa Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to an incident in which the requester was allegedly the victim of an assault.

The Police located responsive records and notified four persons whose personal information may be contained in the records (the affected persons). Three of the four affected persons responded to the Police and did not consent to the release of their personal information in the records. The Police then issued a decision providing partial access to the records, citing the application of the discretionary exemption in section 38(b) (personal privacy) of the *Act*.

The requester, now the appellant, appealed this decision.

During mediation, the appellant indicated that she was interested only in one witness statement from one affected person; accordingly the other records were removed from the scope of the appeal. As mediation was not successful in resolving the issues in this appeal, 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 and two affected persons, initially. I received representations from the Police and one affected person. This affected person objected to the disclosure of their personal information in the record. The other affected person could not be located. I then sent a Notice of Inquiry, along with a copy of the Police's representations, to the appellant seeking her representations. The affected person's representations were withheld due to my concerns about their confidentiality. I did not receive representations from the appellant in response.

RECORD:

The record at issue is a witness statement contained in a General Occurrence Report.

DISCUSSION:

PERSONAL INFORMATION

I will first determine whether the record contains "personal information" as defined in section 2(1) 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].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities

from their dwelling does not qualify as “personal information” for the purposes of the definition in section 2(1).

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 in the records is the personal information of other individuals and the appellant as defined in the *Act*. The information listed below is considered to be solely the personal information of other individuals.

- 2(a) Information relating to the race, age and sex of the other individuals;
- 2(b) Information relating to the education or employment history;
- 2(d) The address and telephone numbers of the individuals;
- 2(h) The individual’s name if it appears with other personal information (information listed is 2(a), (b) and (d)).

The statements made by the other individuals are considered to be the mixed personal information of the appellant, the individuals who supplied the statements and other individuals referred to in the statements.

Analysis/Findings

Only one witness statement is at issue, namely, the statement made by the affected person who provided me with confidential representations objecting to the disclosure of this statement. Upon my review of this statement, I note that it contains the personal information of the appellant, the affected persons and other identifiable individuals. This personal information includes their sex, employment history, the views or opinions of another individual about these individuals, and their names which appear with other personal information relating to them, in accordance with paragraphs (a), (b), (d) and (h) of the definition of “personal information” in section 2(1) .

Although the personal information in the record is about these individuals in their professional capacity, I find that this information relates to an investigation into or assessment of the performance or alleged improper conduct of these individuals. As such, the characterization of this information changes and becomes personal information as it relates to these individuals in their personal, rather than their professional, capacities [PO-2271].

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:

This information was collected for the sole purpose of interviewing all parties and ascertaining if charges are warranted...

Police investigation reports into the conduct of citizens are both confidential and privileged to the investigative body to maintain fairness and presumption of innocence. The information was compiled and is identifiable as part of an investigation into a possible violation of law.

The personal information of the other individuals was compiled by members of the Ottawa Police Service during an investigation into an alleged assault and was used to determine whether an offence under the Criminal Code of Canada may have been committed. The information contained in these records was used to investigate this incident and prosecute any offender(s) should charges be laid...

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 other records disclosed to the appellant reveals that the records at issue were compiled as part of a Police investigation into whether a charge of assault pursuant to the *Criminal Code of Canada* should be laid against one of the affected persons.

I find that 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 record is presumed to constitute an unjustified invasion of the personal privacy of the identifiable individuals other than the appellant in the record and that the record qualifies for exemption under section 38(b).

EXERCISE OF DISCRETION

I will now determine whether the Police exercised their discretion under section 38(b) and if so, whether I should uphold the 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 submit that:

The following factors were considered when we exercised our discretion to deny the appellant access to the information.

1. The privacy rights of the other individuals referred to in the records.
2. The exemptions in section 14 that serve to protect the other individuals.
3. The right of access of the appellant to this information.
4. The information was collected for a law enforcement purpose in order for the police to conduct investigations under the Criminal Code of Canada.
5. The information is considered to be not only the personal information of the appellant, but other individuals and should be protected.
6. Police investigations into the conduct of citizens are confidential and privileged to the investigative body in order to maintain fairness and a presumption of innocence.

The circumstances of the incident were looked at to see if the right of access to the appellant outweighed the privacy rights of the other individuals. Disclosure of a record is in effect disclosure to the world and not just the appellant. We therefore feel that the privacy rights of the other individuals outweighs the appellant's right to access.

After careful consideration of the contents of the records at issue, to protect the process and to safeguard the rights and privacy of all parties involved we exercised our discretion to deny access to the requester.

Analysis/Findings

I find that in denying access to the witness statement in the record, the Police exercised their 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 record. Accordingly I find that the witness statement that comprises the record at issue is exempt under section 38(b) of the *Act*.

Moreover, the appellant's personal information is so intertwined with that of the other identifiable individuals, that the appellant's personal information is not severable.

ORDER:

I uphold the Police's decision and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ May 28, 2008