



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2360

Appeal MA07-213

Waterloo Regional Police Services Board



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BACKGROUND:

The Waterloo Regional 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 am writing to request information on a file or files that may contain my name. I understand that some of this information is what is known as “third party information” for which you may have to obtain consent. I wish to obtain any reports for which my name has been mentioned for my legal proceedings.

In her request, the requester also provided details about a specific incident and the possible location of responsive information.

The Police issued a decision letter in which it agreed to provide partial access to the information contained in two records. The Police denied access to the withheld information pursuant to section 38(a), read with the law enforcement exemptions in sections 8(1)(d) (confidential source) and 8(1)(l) (commission of an unlawful act or control of crime) and section 38(b), read with section 14(1) (personal privacy). In support of their section 38(b)/14 exemption claim, the Police cited the application of the presumption in section 14(3)(b) (investigation into violation of law) and the factor in section 14(2)(h) (supplied in confidence).

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

During the mediation stage of the appeal process the Police advised the appellant that the incident in question involved an alleged domestic dispute. The Police also confirmed that they were unsuccessful in obtaining the consent of the affected parties named in the records to the release of information that pertains to them.

As the parties were unable to resolve the appeal during mediation, the file was moved to the adjudication stage for an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the Police. The Police submitted representations and agreed to share the non-confidential portions with the appellant.

I then sought representations from the appellant and enclosed a severed copy of the Police’s representations with the same Notice of Inquiry that I had issued to the Police. Portions of the Police’s representations were withheld due to confidentiality concerns. The appellant submitted representations in response.

RECORDS:

There are two records at issue. One record is a three-page occurrence report (Record 1), and the other is three-page occurrence report (Record 2).

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which section 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,
- ...
- (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 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].

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.)].

On my review of the parties’ representations and the records at issue, I am satisfied that the records contain the personal information of the appellant and three other identifiable individuals.

The information relating to the appellant includes her name, sex, date of birth, address, telephone numbers and her personal views and opinions. The information relating to the other identifiable individuals includes their names, sex, dates of birth, addresses, telephone numbers, other personal information relating to them and, in one case, that individual’s personal views and opinions.

Having found that the records contain the personal information of the appellant and other identifiable individuals, I have decided to first examine the application of the section 38(b)/14 exemption.

PERSONAL PRIVACY

Section 38(b)/14 exemption

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. The Police take the position that the undisclosed portions of the records are exempt under the discretionary exemption in section 38(b). Under section 38(b), where a record contains the 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 presumptions contained in paragraphs (a) to (h) of section 14(3) apply, the disclosure of the information is presumed to constitute an unjustified invasion of privacy, unless the information falls within the ambit of the exceptions in section 14(4), if or the “public interest override” in section 16 applies [*John Doe v.*

Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767]. In this case the Police have raised the application of section 14(3)(b). This section 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;

Section 14(3)(b) may still apply even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

Representations

With regards to the application of the section 14(3)(b) presumption, the Police state that the records at issue were compiled during the course of an investigation into an alleged domestic dispute in which a possible violation of law, namely a charge of criminal harassment under the *Criminal Code*, was considered. The Police state that after completing their investigation, including a follow-up, no charges were laid.

In response, the appellant acknowledges that a Police investigation was completed and that she was the target of this investigation. However, she submits that as the suspect in this investigation the information in the records should not be viewed as “confidential”. She feels that she should have a right to understand the full extent of the allegations made against her and that the only way she can gain this understanding is if she is provided complete access to the records.

Analysis and findings

I found above that the records at issue contain the personal information of the appellant and three other identifiable individuals. Based on my review of their contents and the parties’ representations, I conclude that these records were compiled as part of an investigation into a possible violation of law, specifically allegations of criminal harassment under the *Criminal Code*. Accordingly, I find that the section 14(3)(b) presumption applies to the records. The fact that criminal proceedings were not commenced against the appellant does not negate the application of the section 14(3)(b) presumption. As stated above, the presumption only requires that there be an investigation into a possible violation of law [Order P-242], which is the case in these circumstances.

Having found that the section 14(3)(b) presumption applies to the personal information in the records, I am not at liberty to consider other factors in support of disclosure aside from the possible application of the exceptions in section 14(4) or the section 16 “public interest override”.

I have considered the application of the exceptions contained in section 14(4) of the *Act* and find that the personal information at issue does not fall within the ambit of this provision. In addition, the application of the “public interest override” at section 16 of the *Act* was not raised, and I find that it has no application in the circumstances of this appeal.

Accordingly, as a result of the section 14(3)(b) presumption, I find that the disclosure of the withheld personal information in these records would result in an unjustified invasion of the personal privacy of individuals other than the appellant. Therefore, this information is exempt under section 38(b).

Having found that the section 38(b)/14 discretionary exemption applies in this case to the information at issue, I do not need to consider the application of section 38(a), read with sections 8(1)(d) and 8(1)(l).

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 they made appropriate and just use of their discretion under the *Act*. The Police state with regard to Record 1 they provided the appellant with access to her own personal information and those portions of that record that were not subject to any exemptions under the *Act*. In deciding to withhold the remaining information in Record 1 and the contents of Record 2 in its entirety, the Police state that they acted in good faith, having regard to the interests of the appellant, the affected parties and the public. The Police suggest that they would be negligent in fulfilling their responsibilities to the public if they were unable to protect the personal information of witnesses gathered during the course of an investigation.

As alluded to above, the appellant feels that she is entitled to the withheld information, in order to understand the full nature of the allegations made against her and she suggests that the Police should have exercised their discretion by providing this information to her.

On my review of the parties' representations, I am satisfied that the Police properly exercised their discretion, taking into account relevant considerations and not taking into account irrelevant considerations. While I acknowledge the appellant's views, I am satisfied that in the circumstances of this case, involving a highly sensitive matter between the appellant and the complainant, the Police properly exercised their discretion by denying access to information that I have found exempt under section 38(b). Accordingly, I uphold the Police's exercise of discretion.

SEVERANCE

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be released without disclosing material which is exempt.

The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information.

The parties did not provide representations on the severance issue.

I am satisfied with the Police's approach to the severing exercise in this case, with one minor exception. I note that with regard to Record 1 the Police provided the appellant with access to the portion of that record that contains her name, sex, date of birth, address and telephone numbers. Record 2 contains an identical reference; however, in that case the Police chose not to disclose this information to the appellant. This represents a clear inconsistency in the Police's approach to severing in this case. That said, the reference in Record 2 contains information that is already known to the appellant and, therefore, of no additional value to her. I therefore see no practical purpose in ordering the Police to disclose this information in Record 2 to the appellant in this case. However, I would ask that in the future the Police pay closer attention to severing to ensure consistency between records that share the same information.

ORDER:

I uphold the Police's decision.

Original Signed by: _____
Bernard Morrow
Adjudicator

_____ October 30, 2008