Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2379

Appeal MA07-327

Halton Regional 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/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Halton Regional Police Services Board (the Police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> I am requesting a list of all "911" calls directly, or dispatch of the police services via a call to the CAS, which then concluded with police dispatch/involvement to the above noted address: [named address], originated by the caller(s) with the following names: either or both [names of two individuals]. This information is requested for the time period commencing February 2006 to current. Dates include but are not limited to the following and known to have originated by one or both individuals:
>
> March 29, 2006 – police attended with [named individual] from the CAS
> May 18, 2006 – police constable [name]
> July ? 2006
> July 5, 2007 etc.
>
> A list of incident numbers or reports have not been obtained or requested, we are simply requesting a list of dates, and times of police involvement with or without CAS attendance stemming from calls initiated by the [named individuals] through either direct contact or via CAS. Our records have indicated, through both access to some reports, and the CAS files that there have been over 9 such incidents over the stated time period. Confirmation of our records would be appreciated.

The Police issued a decision letter to the requester, stating that it had decided to refuse to confirm or deny the existence of records pursuant to sections 8(3) and 14(5) of the *Act*.

The requester (now the appellant) appealed the Police's decision to this office, which appointed a mediator to assist the parties in resolving the issues in this appeal. This appeal was not resolved in mediation and was moved to the adjudication stage of the appeal process for an inquiry.

I started my inquiry by sending a Notice of Inquiry to the Police, which submitted representations in response. In their representations, the Police stated that they are no longer relying on section 8(3) of the *Act*. In addition, they asked that portions of their representations be withheld from the appellant because they fall within this office's confidentiality criteria on the sharing of representations.

I then sent a Notice of Inquiry to the appellant, along with the non-confidential portions of the Police's representations. The appellant submitted representations in response.

RECORDS:

The Police have refused to confirm or deny the existence of records.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

Section 14(5) reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339].

Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; **and**

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.
>
> [Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802]

Part one: disclosure of the record (if it exists)

Under part one of the section 14(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy.

Definition of personal information

An unjustified invasion of personal privacy can only result from the disclosure of "personal information." That term is defined in section 2(1) of the *Act* 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 Police submit that the records, if they exist, would contain the personal information of the appellant and other individuals:

> Personal information is defined in section 2(1) of the Act in part as **"recorded information about an identifiable individual …"** Simply stated, the appellant is asking if two named individuals contacted police about her during a certain time frame. In an individual contacts police, their name, address, date of birth,

> telephone number and reasons for the call is usually documented in a police occurrence report. This constitutes the personal information of that individual, usually deemed the complainant in a police occurrence report … [Emphasis in original.]

The appellant's representations do not directly address whether the records, if they exist, would contain personal information.

I am satisfied that the records, if they exist, would contain information which qualifies as the personal information of both the appellant and other individuals. I find that the information in such records would fall within paragraphs (a), (d), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

Which personal privacy exemption applies?

In her request, the appellant is seeking a "list" of 911 calls or calls made to the Children's Aid Society (CAS) by two named individuals that resulted in police officers being dispatched to her address. It is evident from the Police's representations, that if responsive records exist, they would not be in the form of a list, but in a collection of occurrence reports that are compiled each time a call is received. In addition, if such records exist, they would contain the personal information of both the appellant and other individuals.

Where a record only contains the personal information of an individual other than the requester, the mandatory exemption in section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) applies. Section 14(1) is found in Part I of the *Act*.

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 discretionary exemption in section 38(b) of the *Act* allows an institution to refuse to disclose that information to the requester. Section 38(b) is found in Part II of the *Act*.

Given that the records, if they exist, would contain the personal information of both the appellant and other individuals, the relevant exemption claim in this appeal is section 38(b), not section 14(1).

However, section 37(2) of the *Act* provides that only certain sections from Part I of the *Act* (where section 14(5) is found) apply to requests under Part II (which deal with requests for a requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to records which contain a requester's own personal information, as would be the case in this appeal, if a record exists.

Senior Adjudicator John Higgins addressed this issue in Order M-615:

> … in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.
>
> Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

I agree with this reasoning and adopt it for the purposes of this appeal.

Unjustified invasion of 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.

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) sets out certain exceptions to the general rule against the disclosure of personal information that relates to an individual other than the requester. 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 from disclosure under section 38(b). I find that none of the paragraphs in section 14(1) would apply to the personal information in the records, if they exist.

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). If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

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. A section 14(3) presumption 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].

The Police have raised the application of the section 14(3)(b) presumption in the event records exist. Section 14(3)(b) 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:

> If the information exists, then an occurrence number would have been generated in order for police to conduct a law enforcement investigation into the complaint. Since this would then relate to records compiled as part of an investigation into a complaint, the mere confirmation of a call or calls made by the two named individuals would then become the personal information of the two named individuals and disclosure would be presumed to be an invasion of their personal privacy, except to the extent that it is necessary to prosecute that violation.

The Police further submit that the factors in sections 14(2)(e) and (f) of the *Act* weigh against disclosure of the personal information in the records, if they exist. These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;

In her representations, the appellant does not specifically address whether section 14(5) applies in the circumstances of this appeal. In addition, she does not respond to the Police's submission that the section 14(3)(b) presumption would apply to the personal information in the records, if they exist, nor does she specifically cite any of the factors in section 14(2) that weigh in favour of disclosure of the personal information in the records, if they exist.

For the most part, the appellant's representations set out the reasons she is seeking a list of the 911 calls made to the Police or calls to the CAS by the two individuals named in her request.

For example, she states the following:

> Our records show that [the two named individuals] have contacted the Police and CAS over 38 times in the past 3 years. We are simply requesting either verification of a total number of times (respecting the need to privacy) and in doing so requesting the right to live without on-going harassment and abuse.
>
> The constant use of "the system" is also abuse, and directly affects our safety and right to privacy. Harassment is a criminal offence, and abuse is punishable. We are not requesting any investigation, merely respect for our well-being and secure living environment and that these intrusive calls cease.

In my view, these submissions gives rise to the possible application of the factors in sections 14(2)(d) and (g) of the *Act*, which weigh in favour of disclosure of the personal information in the records at issue, if they exist. These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (g) the personal information is unlikely to be accurate or reliable;

I have considered the representations of the parties. If the individuals cited by the appellant had made 911 calls or calls to the CAS that resulted in the dispatch of police officers to the appellant's home, the Police would have created occurrence reports. These records, if they exist, would contain the personal information of both the appellant and other individuals.

In my view, the presumption in section 14(3)(b) of the *Act* would apply to the personal information in these records, if they exist, because this information would have been compiled by the Police and been identifiable as part of an investigation into possible violations of the *Criminal Code*. Consequently, I find that the section 14(3)(b) presumption applies to the personal information of both the appellant and other individuals which may be contained in any responsive records, if they exist.

The Divisional Court's decision in the *John Doe* case, cited above, precludes me from considering whether the section 14(3)(b) presumption can be rebutted by either one or a combination of the factors set out in section 14(2). 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.

I have considered the application of the exceptions contained in section 14(4) of the *Act* and find that the personal information in the records, if they exist, would not fall within the ambit of this section. Moreover, the public interest override at section 16 would not apply, because the appellant has a private, not a public interest, in seeking access to the personal information in the records, if they exist.

As noted above, 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). Consequently, the personal information in any responsive records, if they exist, would qualify for exemption under section 38(b) of the *Act*. I find, therefore, that the Police have established that disclosure of the personal information in the records, if they exist, would constitute an unjustified invasion of personal privacy. In other words, they have met the first requirement that must be established to invoke the section 14(5) test.

Part two: disclosure of the fact that the record exists (or does not exist)

To satisfy the second requirement, the Police must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

In my view, disclosure of the fact that a record exists (or does not exist) in the circumstances of this appeal would in itself convey to the appellant whether the two individuals named in her request have actually made specific 911 calls to the Police or calls to the CAS to complain about her.

The Police submit that merely disclosing the existence or non-existence of calls from a complainant would constitute an unjustified invasion of that individual's personal privacy:

> This institution would never confirm that someone has contacted police about another named individual. If police released or confirmed this type of information, it most certainly would be an unjustified invasion of the individual's personal privacy. If release were routine, no one would ever call police again. This institution believes there is an expectation of some level of confidentiality or anonymity from citizens who call police.

In applying part one of the section 14(5) test, I considered whether disclosure of the records, if they exist, would constitute an unjustified invasion of personal privacy under section 38(b) of the *Act*. In making this determination, I found that the presumption in section 14(3)(b) of the *Act* would apply to the personal information in these records, if they exist, because this information would have been compiled by the Police and be identifiable as part of an investigation into possible violations of the *Criminal Code*.

In my view, the section 14(3)(b) presumption cannot be applied to determine whether the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy, as required by part 2 of the section 14(5) test. If the records do not exist, this means that no 911 calls or calls to the CAS would have been made by the two individuals named in the appellant's request, and no investigations would have taken place. In such circumstances, it could not be argued that personal information was compiled and is identifiable as part of an investigation into a possible violation of law, as stipulated in the section 14(3)(b) presumption.

However, it is possible to weigh the factors set out in section 14(2) of the *Act* in determining whether the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy. In my view, the Police's concerns about harm to individuals [sections 14(2)(e)] and the highly sensitive nature of such information [section 14(2)(f)] outweigh concerns that the information is relevant to a fair determination of the appellant's rights [section 14(2)(d)] and is unlikely to be accurate or reliable [section 14(2)(g)].

I find, therefore, that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy. Consequently, the second requirement with respect to section 14(5) of the *Act* has been met.

Conclusion

I recognize that the appellant has concerns that the two individuals named in her request have made unfounded complaints to the Police or the CAS about her, and I acknowledge that she finds this situation frustrating. However, the Police have submitted sufficient evidence to establish that they have properly invoked section 14(5) of the *Act*.

ORDER:

I uphold the Police's decision to refuse to confirm or deny the existence of records.

Original signed by: December 18, 2008
Colin Bhattacharjee
Adjudicator