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

ORDER MO-2380

Appeal MA08-97

Kenora Police Services Board

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NATURE OF THE APPEAL:

The Kenora 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:

> Any information pertaining [to] any conviction regarding [a named Mayor].

The Police issued a decision advising as follows:

> Further to your request made under the *Municipal Freedom of Information and Protection of Privacy Act*, I have decided that I must refuse to confirm or deny the existence of a record because the disclosure may constitute an unjustified invasion of personal privacy. I refer [to] section 14(5) of the *Act* and to FIPPA Case PO-1779 in support of my decision.

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

During the mediation stage of the appeal process, the mediator discussed section 14(5) of the *Act* (refusal to confirm or deny the existence of a record) with the parties, and provided the appellant with relevant past orders issued by this office.

The appellant, subsequently, confirmed that he wishes to pursue this appeal to adjudication.

As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process for an inquiry, where the issue to be determined is whether the Police have properly applied section 14(5) of the *Act* in the circumstances of this case.

I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the Police. The Police responded with very brief representations in which they confirmed their reliance on section 14(5) and indicated that responsive records, if they exist, would be subject to the presumed unjustified invasion of privacy in section 14(3)(b).

I then provided the appellant with the same Notice of Inquiry and invited him to submit representations regarding the application of section 14(5) to the circumstances of this case. In the Notice of Inquiry I confirmed the Police's reliance on section 14(5) and their reliance on the presumption in section 14(3)(b). The appellant chose to not submit representations.

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,

> (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,

Neither party has offered submissions that address this issue. However, I am satisfied that a record responsive to the appellant's request, if it exists, would contain information which qualifies as the personal information of an individual other than the appellant. I find that the information contained in such a record would clearly fall within paragraph (b) of the definition of "personal information" in section 2(1) of the *Act*, as it would constitute information relating to another individual's "criminal history".

Unjustified invasion of personal privacy

It is evident from both the appellant's request and my finding above that if a responsive record does exist it would contain only the personal information of another individual.

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) sets out certain exceptions to the general rule against the disclosure of personal information that relates to an individual other than the requester.

The only exception which may have some application in the circumstances of this appeal is set out in section 14(1)(f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, if the disclosure does not constitute an unjustified invasion of personal privacy.

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 privacy" under section 14(1) and, accordingly, under section 14(5).

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(1). 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. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]

In this case, the Police have raised the application of the section 14(3)(b) presumption, which reads:

> 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;

In their very brief representations, the Police assert that in the event a record does exist the information contained in it would have been compiled as part of an investigation into a possible violation of law.

I disagree with the Police's assertion. In my view, any record that is responsive to the appellant's request would provide information regarding an individual's criminal history, if any, perhaps in the form of a criminal record or a list of convictions. I see no basis for concluding that such a record would have been compiled or identifiable as part of an investigation into a possible violation of law. Accordingly, I find that the section 14(3)(b) presumption has no application in the context of this case. I also find that none of the other presumptions in section 14(3) would apply to the circumstances of this case.

Turning to the section 14(2) factors, while the parties have not provided any submissions on the application of any of the factors, it is my view that paragraphs (a) and (f) may be relevant in the circumstances of this case.

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,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
> >
> > (f) the personal information is highly sensitive;

Dealing first with section 14(2)(a), I note that the request in this case relates to an elected official. It is, therefore, conceivable that the appellant is seeking the requested information for reasons related to a desire to achieve public accountability. That said, the appellant was given an opportunity to submit representations and chose to not do so. There is no evidence before me to suggest that disclosure of the information being sought, if it exists, would be desirable for the purpose of subjecting the activities of the institution to public scrutiny. I find that section 14(2)(a) does not apply.

Turning to section 14(2)(f), to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual [Order PO-2518]. In my view, information pertaining to an individual's conviction history, if it exists, is clearly highly sensitive personal information, the disclosure of which would be expected to cause significant personal distress to that person. In my view, this is self-evident in light of the very nature of the information that would be contained in the kind of record the appellant is seeking, if it exists. Accordingly, in the circumstances of this case, absent any factors weighing in favour of disclosure, I find that disclosure of any records responsive to the appellant's request (if they exist) would constitute an unjustified invasion of personal privacy.

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 has not been raised, and I find that it does not apply.

Consequently, I find that the Police have established that disclosure of 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)

Under part two of the section 14(5) test, 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.

Once again, the parties have not provided representations that assist me in my analysis. For the reasons expressed above, I find that neither the section 14(3)(b) presumption nor the factor in section 14(2)(a) applies in the circumstances of this case. However, I find that the factor in section 14(2)(f) does apply. In my view, the mere fact that an individual has or has not been convicted of an offence is highly sensitive personal information. Accordingly, disclosure of the fact that a record exists (or does not exist) would, in and of itself, convey sensitive personal information to the appellant, which would be an unjustified invasion of personal privacy. Consequently, I find that the Police have met the second requirement under section 14(5) of the *Act*.

CONCLUSION

I am satisfied that both requirements in section 14(5) requirements have been met. I find, therefore, that the Police have properly exercised their discretion in invoking section 14(5) of the *Act* in response to the appellant's request.

ORDER:

I uphold the decision of the Police.

Original Signed by: December 30, 2008
Bernard Morrow
Adjudicator