



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2339

Appeal MA07-85

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 all witness statements obtained in relation to a workplace accident involving a named individual. The request was submitted by a lawyer on behalf of her client, the named individual, who was involved in the accident. The client provided his consent to have his lawyer seek access to his personal information. The specific information sought was as follows:

1. Copies of any statements received from the accident site;
2. Copies of the notes and memo books from the officers present at that time.

The Police located records responsive to the request and issued a decision denying access to them pursuant to section 38(a) (discretion to refuse a requester's own information), read in conjunction with section 8(1)(a) and (b) (law enforcement) and section 38(b) (personal privacy), read in conjunction with section 14(3)(b) (investigation into violation of law), of the *Act*.

The requester, now the appellant, appealed the Police's decision to this office.

During mediation, the parties agreed to place the appeal on hold pending the completion of an investigation into the accident at issue, conducted by the Ministry of Labour.

Following the completion of the investigation, the Police notified several individuals who might be affected by the disclosure of the information at issue (the affected parties) to determine whether they would consent to the release of their personal information. No consent was obtained. The Police issue a revised decision letter granting the appellant partial access to the requested records. Access to the remaining portions of the records was denied pursuant to section 38(a), read in conjunction with section 8(1)(l) (facilitate the commission of unlawful act), and section 38(b), read in conjunction with section 14(3)(b) of the *Act*. In addition, the Police advised that some of the information was severed from the records as it is not responsive to the request.

Subsequently, the Police obtained the consent of one of the affected parties to release their personal information to the appellant. As a result, additional information was disclosed to the appellant.

The mediator attempted to contact the remaining five affected parties to determine whether they would consent to release the information relating to them. No consent was obtained.

After reviewing the records disclosed to her, the appellant advised that she is not pursuing access to the police codes. As a result, section 38(a), read in conjunction with section 8(1) of the *Act*, is no longer at issue. The appellant also advised that she is not seeking access to any of the information that was identified by the Police as not responsive to the request. Finally, the appellant confirmed that she is not pursuing access to the remaining information on pages 15, 16, 21, 22 and 33, as well as the first two severances made to page 1 of the records.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process.

I began my inquiry into this appeal by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the Police. The Police responded with representations.

I also sent a Notice of Inquiry to four affected parties, inviting them to provide me with their views on the disclosure of the information that relates to them. One of the affected parties submitted representations in response. He did not consent to the disclosure of the information relating to him. The remaining three affected parties who were notified did not respond to the Notice of Inquiry.

Although there is a fifth affected party, this office has sent several letters for this and a related appeal to the address that appears on the records. All letters have been returned by the current occupant of that address advising that the affected party does not reside at that address and never has. Despite efforts made, a current address for the fifth affected party could not be located. As a result I did not send a Notice of Inquiry to him.

I then sent the Notice of Inquiry to the appellant enclosing a copy of the non-confidential representations provided by both the Police and the one affected party who responded. The appellant provided representations in response.

RECORDS:

The information that remains at issue is found in the following portions of records:

- I/CAD Event Details Report - page 1
- Occurrence Report - pages 8 to 13
- Police Officer Memorandum Book Notes - pages 18, 19, 23 to 27

DISCUSSION:

PERSONAL INFORMATION

Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester [see Order M-352]. Where records contain the requester's own information, access to the records is addressed under Part II of the *Act* and the exemptions at section 38 may apply. Where the records contain the personal information belonging to individuals other than the appellant, access to the records is addressed under Part I of the *Act* and the exemption found at sections 6 to 15 may apply.

In order to determine which sections 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,
- (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, 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.)].

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], but 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].

Having reviewed the records at issue, I find that all of the records (the I/CAD Event Details Report, the Occurrence Report and the Memorandum Book Notes) contain the personal information of the appellant's client, including his address and telephone number (paragraph (d)), his age (paragraph (a)), and medical information (paragraph (b)) as well as his name and other personal information relating to him (paragraph (h)). These records also contain the personal information of other identifiable individuals including their addresses and telephone numbers (paragraph (d)), their age and family or marital status (paragraph (a)), as well as their personal views and opinions (paragraph (e)) and their names along with other personal information relating to them (paragraph (h)), including statements made to the Police.

As noted above, previous orders have established that where a record contains both the personal information of the appellant and another individual, the request falls under Part II of the *Act* and the decision regarding access must be made in accordance with the exemptions at section 38 [Order M-353]. As I have found that all of the records contain the personal information of the appellant's client together with that of other identifiable individuals, I must now determine whether the exemption at section 38(b) applies to exempt the information that remains at issue from disclosure.

PERSONAL PRIVACY

Section 38(b) of the *Act* is the relevant personal privacy exemption under Part II of the *Act*. It provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

The personal privacy exemptions under the *Act* are *mandatory* at section 14(1) under Part I and *discretionary* at section 38(b) under Part II. Put another way, where a record contains the personal information of both the appellant and another individual, section 38 (b) in Part II of the *Act* permits an institution to disclose information that it could not disclose if the exemption at section 14(1) in Part I was applied [Order MO-1757].

Section 38(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. The institution retains the discretion to deny the appellant access to information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy [Order M-1146].

In order for disclosure to “constitute an unjustified invasion of another individual’s personal privacy” under either the discretionary exemption at section 38(b) or the mandatory exemption at section 14(1), the information in question must contain the personal information of an individual or individuals other than the person requesting it.

The factors and presumptions in sections 14(2) to (4) provide guidance in determining whether the “unjustified invasion of personal privacy” threshold is met. Section 14(2) provides some criteria for the institution to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In this case the Police rely on section 14(3)(b).

The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (*John Doe*)] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption. [See Order PO-1764]

Section 14(3)(b): identifiable as part of an investigation into a possible violation of law

The Police submit that the presumption at section 14(3)(b) applies to all of the information at issue in this appeal. Section 14(3)(b) provides:

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.

Representations

The Police submit that the records at issue related to an investigation into a violation of law. They explain that the records relate to a workplace accident that was investigated by both the Police and by the Ontario Ministry of Labour “in order to ascertain the nature of it and if any criminal culpability attached to it.” The Police submit that it has a statutory duty to ensure that the incident was indeed accidental and that the Ministry of Labour must ensure that there has not been any violation of relevant statutes.

In support of their position that section 14(3)(b) applies, the Police cite Order MO-1256, issued by former Assistant Commissioner Tom Mitchinson. In that order, Assistant Commissioner Mitchinson states:

In Order MO-1192, Adjudicator Laurel Cropley stated, in the contest of a request for police records concerning an alleged assault:

The appellant submits that since the Police have made a judgment call not to lay charges against the suspect, they have not established the application of the presumption in section 14(3)(b).

I am satisfied that the Police investigated an alleged assault on the appellant at the named high school and that the investigation was conducted with a view to determining whether criminal charges were warranted. Accordingly, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law and its disclosure would constitute a presumed unjustified invasion of personal privacy. The presumption may still apply, even if, as in the present case, no charges were laid (Orders P-223, P-237, and P-1225). As I indicated above, once a determination has been made that the presumption in section 14(3)(b) applies, it cannot be rebutted by factors in section 14(2). Therefore, even if I were to find that section 14(2)(d) applies in the circumstances, it would not be sufficient to rebut the presumption in section 14(3)(b). I have considered section 14(4) and find that it does not apply in the circumstances of this appeal.

In my view, the principles articulated by Adjudicator Cropley in Order MO-1192, and in other previous orders such as those referred to by the Police, are also applicable in the circumstances of this case. The information contained in the records was clearly compiled and is identifiable as part of an investigation into a possible violation of law; specifically the *Criminal Code*. Therefore, the section 14(3)(b) presumption of an unjustified invasion of personal privacy applies to the requested information. Because none of the exceptions under section 14(4) applies, the information is exempt under section 14(1).

The affected party also submits that disclosure of the information would constitute an unjustified invasion of personal privacy because the records were compiled and are identifiable as part of an investigation into a possible violation of law within the meaning of the presumption at section 14(3)(b). He submits:

The records are officer's notes in relation to a workplace accident. They were collected during an investigation to determine whether laws were contravened. It is an additional fact that [the affected party] did not actually witness the accident.

Nonetheless, the investigation could conceivably result in charges under the *Occupational Health and Safety Act*, the *Workplace Safety and Insurance Act*, the *Employment Standards Act, 2000* and/or the criminal negligence provisions of the *Criminal Code*.

Pursuant to the *Act*, disclosure in these circumstances is “presumed” to be an unjustified invasion of personal privacy. The *Act*, therefore, requires that the Police refuse disclosure of the records. It is unnecessary to consider the factors listed under section 14(2) due to this presumption. (See *John Doe v. Ontario (Information and Privacy Commissioner)*(1993), 13 O.R. 767 Div. Court). The presumption results in an exemption from the requirements to disclose. However, it is also the case that as [the affected party] did not actually witness the accident there is no need for the appellant to receive the records.

The appellant agrees that the requested information “constitutes personal information, which was compiled as part of an investigation into what we contend was a violation of law.” However, the appellant submits that “the exemption in section 16 should apply as the public interest in disclosure outweighs the purpose of the exemption (refusal to disclose).”

Analysis and findings

Based on careful review of the personal information at issue, I find that the nature and content of the records demonstrate that they were compiled and are identifiable as part of a police investigation into a workplace accident. As a result, I find that the records were compiled by the Police and is identifiable as part of their investigation, the purpose of which is, in part, to determine whether there has been a possible violation of law under the *Criminal Code*, the *Occupational Health and Safety Act* or the *Workplace Safety and Insurance Act*. Accordingly, I find that that the presumption at section 14(3)(b) applies.

As I have found that section 14(3)(b) applies and, as noted above, it cannot be rebutted by factors in section 14(2), it is not necessary for me to determine whether any of the factors in section 14(2) apply. Additionally, in my view, section 14(4) does not apply to any of the records information. However, as the appellant has raised the possible application of the public interest override at section 16 of the *Act*, I will go on to determine whether or not that section applies to rebut the presumption at section 14(3)(b) and override the application of the exemption at section 38(b).

PUBLIC INTEREST OVERRIDE

As noted above, the appellant submits that the public interest override provision in section 16 applies in the circumstances of this appeal.

Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act*, which are equivalent to sections 8 and 12 of the *Act*, are to be "read in" as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

In my view s. 23 of the *Act* infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. ... I would read the words "14 and 19" into s. 23 of the *Act*.

As the records contain both the personal information of the appellant and other individuals, I have found that the information at issue is exempt under the personal privacy exemption at section 38(b) in Part II. Section 16 does not refer specifically to this exemption. This matter has been previously considered by Inquiry Officer Anita Fineberg in Order P-541 where she made the following comment concerning sections 23, 29(b) and 21 of the *Provincial Freedom of Information and Protection of Privacy Act*, which are the equivalent of sections 16, 38(b) and 14 of the *Act*:

In my view, where an institution has properly exercised its discretion under section 49(b) of the *Act*, relying on the application of sections 21(2) and/or (3), and appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21.

I agree with Inquiry Officer Fineberg's statement and will consider the possible application of section 16 to the information which I have found to qualify for exemption under section 38(b).

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1396, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In considering whether there is a "public interest" in the disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated

that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

A compelling public interest has been found not to exist where, for example:

- Another public process or forum has been established to address public interest considerations [Orders P-123, P-124, P-391, M-539].
- A significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
- A court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317].

Representations

The appellant submits that section 16 supports her request for disclosure of the contact details of the witnesses (the affected parties) whose information appears in the records at issue. The appellant submits:

[E]ven though the information was collected as part of a Toronto Police Service investigation into a potential violation of law, the police never brought any charges against the individuals and corporation involved in the August 24, 2006 workplace accident. We submit that section 16 should apply, as the issue of the appellant’s entitlement to benefits is an issue in dispute at the Workplace Safety and Insurance Board [WSIB]. It is in the interests of justice and the public, that this information be disclosed to assist in the determination of the appellant’s entitlement to WSIB benefits.

...

We submit that the contact information and content of the statements of said witnesses is contained in the records of the Toronto Police Service, and we are requesting disclosure of said information to enable us to fully investigate and

advance the WSIB claims on behalf of the appellant as a result of the August 24, 2006 workplace accident.

The appellant sustained serious and permanent physical and mental injuries including a brain injury as a result of the August 24, 2006 workplace accident. It is submitted that the disclosure of the witnesses' names and contact details would assist in administration and exercise of justice by providing necessary relevant evidence pertaining to the matters at issue in the WSIB hearing. The disclosure will assist in the fair determination of the appellant's rights and in the adequate provision of care for him.

The Police submit that section 16 is not relevant in this appeal. They submit:

Section 16 demands a much higher threshold than the nature of the matter at hand. As stated in the Annotations concerning section 16: "This section cannot be used by people trying to assert only private interests."

In Order MO-1256, [former] Assistant Commissioner Tom Mitchinson writes:

I am not persuaded that there is a compelling public interest in disclosure of the records, nor that any public interest that may be present is sufficient to outweigh the purpose of the mandatory personal information exemption claim.

The "compelling public interest" override of section 14 does not exist and the institution therefore views the release of this information to be an unjustified invasion of the personal privacy of other individuals.

The affected party submits:

Based on the information currently available to [the affected party] there is absolutely no "compelling public interest" in the disclosure of the records by the appellant. She may have a personal interest in reviewing the records, but this, by itself does not raise the matter to even a minor "public interest". It must be pointed out again that [the affected party] did not actually witness the accident. Even if it can be concluded that the appellant's demand for disclosure represents a public interest, which is denied, that interest cannot outweigh the importance of the statutory scheme established by the legislature to protect personal privacy. [The affected party] relies on these same statutory protections to safeguard his personal privacy.

Analysis and findings

The appellant states that she seeks access to the information at issue to assist in arguing a claim for entitlement to benefits for her client before the WSIB. Although I am sympathetic to the

appellant's client's circumstances, in my view, his interests in the disclosure of the information at issue are essentially of a personal and private nature, rather than a public one. Moreover, I do not find that his private interest raises issues of more general application that could be said to amount to a public interest. The WSIB receives its mandate from the *Workplace Safety and Insurance Act*. In my view, the existing statutory scheme is designed to address any public interest element arising from the appellant's claim for benefits. Accordingly, I find that not only are the appellant's interests not public in nature but given the existing statutory scheme they are also not sufficiently compelling to satisfy the requirements of section 16.

Moreover, even if a compelling public interest in the disclosure of the information were to exist, for the section 16 override provision to apply, that compelling public interest must be shown to clearly outweigh the purpose of the exemption claim. In this case, the purpose of the exemption at section 38(b) is the protection of the privacy of the affected parties which reflects one of the two key purposes of the *Act*: to protect the privacy of individuals with respect to personal information about themselves held by institutions. In my opinion, the personal interests of the appellant in this case do not outweigh the privacy interests of the affected parties.

Accordingly, I am not satisfied that there exists a compelling public interest in the disclosure of the remaining personal information in the record. Therefore, I find that the "public interest override" at section 16 does not apply in these circumstances and, subject to my finding on whether the Police properly exercised their discretion, the exemption at section 38(b) applies to exempt the information at issue from disclosure.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion, and, if so, to determine whether it erred in doing so.

Because section 38(b) is a discretionary exemption and I have found that the Police have properly applied it to exempt the portions of the records that remain at issue, I must review the Police's exercise of discretion in deciding to deny access to portions of those records.

I may find that the Police erred in exercising their discretion where, for example:

- they do so in bad faith or for an improper purpose
- they take into account irrelevant consideration
- they fail to take into account relevant considerations

In either case, this office may send the matter back to the Police for an exercise of discretion based on proper consideration [Order MO-1573].

The Police submit that it is not possible to release further information to the appellant without violating the privacy of the affected parties. They further submit that it is reasonable in the circumstances to refuse disclosure of the personal information if such disclosure would constitute an unjustified invasion of the personal privacy of other individuals.

I have reviewed the information at issue for which I have found section 38(b) applies. In the circumstances of this appeal and given the nature and sensitivity of the information, I am satisfied that the Police have properly taken relevant factors, and not irrelevant ones, into consideration in exercising their discretion to withhold the information at issue. In particular, it appears that the Police considered the sensitive nature of the information at issue and balanced the appellant's right to access the information against the affected parties' right to their personal privacy. I agree with the Police that disclosure of the information would constitute an unjustified invasion of the personal privacy of the affected parties.

Accordingly, I conclude that the Police properly exercised their discretion in deciding to withhold the information at issue from the appellant and find that it is properly exempt under section 38(b).

ORDER:

I uphold the Police's decision to deny access to the information at issue.

Original Signed by: _____
Catherine Corban
Adjudicator

_____ August 25, 20008