



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2447

Appeal MA08-321

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

NATURE OF THE APPEAL:

The Ministry of Labour (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*) for access to information relating to a construction accident which occurred on a particular date, at a specified location. Specifically, the requester sought access to the following information:

1. A complete copy of all investigation reports pertaining to the construction accident that occurred at [specified address] on [specified date] at approximately [specified time].
2. A copy of all photographs that were taken in connection with this incident.
3. A copy of any witness statements that are available.
4. A copy of your entire file pertaining to this matter.
5. A copy of any statements that [requester] gave to the Ministry of Labour.

Please be advised that it is absolutely necessary for us to obtain forthwith particulars of any motor vehicles that were present at the scene including the following vehicles; without limiting the generality thereof:

1. Excavator
2. Bobcat
3. Backhoe
4. Dump trucks

After reviewing the request and the responsive records, the Ministry transferred part of the request to the Toronto Police Services Board (the Police) as it was of the view that the Police had a greater interest in the disclosure of some of the records.

With respect to the responsive records in which the Police did not have a greater interest, the Ministry issued a decision letter denying access to them pursuant to sections 14(1)(a) and (b) (law enforcement) of the provincial *Act*, as the investigation of the accident was still ongoing. The requester appealed the Ministry's decision and Appeal PA07-124 was opened. Appeal PA07-124 was subsequently closed by letter, during the adjudication stage of the appeal process.

After receiving the request which had been transferred by the Ministry, the Police issued a fee estimate and an interim decision letter granting partial access to the responsive records and photographs requested.

The requester paid the fee and the Police issued a final decision granting partial access to the records and advised that access was denied to some of the information pursuant to sections 38(a) (discretion to refuse a requester's own information) in conjunction with section 8(1)(l) (facilitate the commission of an unlawful act) and 38(b) (personal privacy) in conjunction with section 14(3)(b) (investigation into violation of law) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

Additionally, the Police advised that some of the information was severed from the records as it was deemed not responsive to the request. Also, they advised that as the appellant had not provided documentation in support of either section 54(a) (personal representative of deceased)

or 14(4)(c) (compassionate circumstances) of the *Act*, they assumed that the appellant is unable to fulfill the requirements of these sections.

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

During mediation, the appellant indicated that he wishes to pursue access to the withheld information pertaining to the deceased individual and the two witnesses. He indicated, however, that he is not pursuing access to the non-responsive information, nor to the police codes which have been severed from the records under section 38(a), in conjunction with section 8(1)(l) of the *Act*. Accordingly, section 38(a), read in conjunction with section 8(1)(l), is no longer at issue in this appeal.

Following discussions with the Police, the mediator notified the two witnesses to seek their views on the disclosure of their personal information. One individual did not respond to the mediator and the other individual objected to the disclosure of his personal information.

As further mediation was not successful, the appeal was forwarded to the adjudication stage of the appeal process.

I began my inquiry into the appeal by sending a Notice of Inquiry to the Police and the two witnesses. The Police responded with representations. The two witnesses did not respond to the Notice of Inquiry. I then sent a copy of the Notice of Inquiry to the appellant, together with a copy of the non-confidential portions of the Police's representations. The appellant provided brief representations in response.

RECORDS:

The records at issue consists of 74 pages of Police records including occurrence reports, memorandum book notes of several police officers, and I/CAD event details reports. The records have been partially disclosed. Accordingly, the severed portions remain at issue.

DISCUSSION:

Under the *Act*, different exemptions may apply depending on whether or not a record contains 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 exemptions 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 records contain "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, 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].

Also, 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 explain that the records pertain to an industrial accident in which an individual was injured and another individual died. They submit that the deceased's name, address, date of birth, next of kin and other personal information about him appears in the records. They also submit that the personal information, specifically, the name, date of birth, address and telephone numbers, of a relative of the deceased appears in the records. Additionally, the Police submit that the records contain the names, addresses, dates of birth, telephone numbers and the personal opinions or views of two individuals who witnessed the accident as well as a number of individuals who did not witness the accident but who were working on the site when the accident occurred.

Having reviewed the 74 pages of records closely, I find that all of them contain the personal information of identifiable individuals other than the appellant that meet the definition of "personal information" in section 2(1) of the *Act*. This information includes addresses, telephone numbers (paragraph (d)), age and marital or family status (paragraph (a)), as well as their personal opinions and views (paragraph (e)), and their names, along with other personal information relating to them (paragraph (h)).

I find that the police officers' notes on pages 25 to 27 and on pages 53 to 62 are the only records which contain the personal information of the appellant, including his address and telephone number (paragraph (d)), his age (paragraph (a)), his personal views and opinions (paragraph (e)) and his name, along with other personal information relating to him (paragraph (h)). The record which is comprised of pages 53 to 62, contains the statement he made to the Police. The portions of the records which contain the appellant's personal information have been disclosed to him. All of this information also contains the personal information of other identifiable individuals.

As noted above, if a record does not contain the personal information of the appellant, but contains either the personal information of individuals other than the appellant or no personal information at all, a decision regarding access must be made in accordance with the exemptions in Part I of the *Act*. However, in circumstances 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 in that part.

Accordingly, access to the records that contain the personal information of the appellant (pages 25 to 27 and 53 to 62) must be determined under Part II of the *Act*, in accordance with the exemption at section 38(b). Access to the records that contain no personal information belonging to the appellant (all of the remaining records) must be determined under Part I of the *Act*, in accordance with the exemption at section 14(1).

PERSONAL PRIVACY

As noted above, under the *Act*, different exemptions may apply depending on whether or not a record contains 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 exemptions found at sections 6 to 15 may apply.

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].

The mandatory personal privacy exemption at section 14(1) in Part I of the *Act* provides, in part:

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.

Section 38(b) of the *Act* is the discretionary 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.

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 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].

I will now review whether the information in the police officers’ notes on pages 25 to 27 and pages 53 to 62 (which contain the personal information of the appellant as well as that of other individuals) qualifies for exemption under the discretionary exemption at section 38(b) and whether the information in the remaining records at issue (which contain the personal information of other individuals but not that of the appellant) qualifies for exemption under the mandatory exemption at section 14(1). The Police submit that the mandatory exemption at section 14(1) should be read in conjunction with the presumption at section 14(3)(b) of the *Act*.

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.

The Police submit that they have conducted their initial investigation into the occurrence but that now, the Ministry of Labour is in the process of conducting its own investigation. The Police submit:

Should the Ministry of Labour's investigation discover that the occurrence was the result of criminal intent rather than an offence under the *Occupational Health and Safety Act*, R.S.O. 1990, it would then be incumbent upon the Toronto Police Service to pursue the criminal charges concerned.

The appellant submits:

Since the Ministry of Labour prosecution has been completed with regards to this matter, it is our position that we should be entitled to all of the requested documentation from the Toronto Police Services.

The Ministry of Labour prosecution presumably was also based on the Toronto Police Services investigation. Since [appellant] sustained injuries and impairments arising out of this [specified date] incident, he and his *Family Law Act* claimant, [named individual] and his corporation, [named corporation], are entitled to the information requested since [appellant] was a victim of this accident and provided a statement to the police.

Analysis and findings

Unlike the law enforcement exemption at section 8(1)(a) which requires that a law enforcement matter in question be specific and ongoing [Order MO-1578], the presumption at section 14(3)(b) requires only that there be an investigation into a possible violation of law [Order P-242].

Based on a 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 construction accident that resulted in a sudden death. As a result, I find that the records were compiled by the Police and are 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*. Therefore, I find that the presumption at section 14(3)(b) applies.

As noted above, once a presumption is found to apply to the personal information contained in a record, no factor or combination of factors listed in section 14(2) can operate to rebut the presumptions. Also, in my view, neither section 14(4) nor section 16 is applicable to the information at issue. Accordingly, I find that subject to the possible application of the absurd result principle and my review of the Police's exercise of discretion, the discretionary exemption at section 38(b) applies to the severed portions of the police officer notes at pages 25 to 27 and 53 to 62.

As for the severed portions of the remaining records which do not contain the personal information of the appellant but rather, only that of other individuals, I find that, subject to the possible application of the absurd result principle, the mandatory exemption at section 14(1) applies to exempt them from disclosure.

ABSURD RESULT

Whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under either section 38(b) or section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]
- the requester was present when the information was provided to the institution [Orders M-444, P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

My review of the portions of records at issue indicate that the appellant's name appears in the police officers' notes at pages 25 to 27, and a statement that he provided to the Police appears in the police officers' notes at pages 53 to 62. To be clear, the appellant's name appears at the top of page 27 and his statement begins at the bottom of page 53 and ends at the bottom of page 56 with the appellant's signature, date and time. This information has already been disclosed to the appellant and is therefore not at issue in this appeal.

With respect to the remaining information, I am not satisfied that the portions that have been withheld were supplied by the appellant, that he was present when the information was provided to the Police or that the information is within his knowledge. Accordingly, I find that the absurd result principle has no application in the circumstances of the current appeal.

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 withheld portions of the police officers' notes at pages 25 to 27 and pages 53 to 62 from disclosure, I must review the Police's exercise of discretion in deciding to deny access to those portions of the 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 considerations
- 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 considerations [Order MO-1573].

The Police take the position that their exercise of discretion was reasonable in the circumstances. They state that since the collection of personal information of the individuals other than the appellant was made as a result of a police investigation into a workplace construction accident, the balance between the appellant's right of access and the protection of other individuals' privacy must weigh in favour of protecting the privacy of the individuals. The Police submit that in assessing the value of protecting the privacy interests of individuals other than the appellant, they considered the nature of the institution and the information at issue. They also submit that due to the sensitive nature of recorded information held by a law enforcement institution they are of the view that they carry a greater responsibility in safeguarding the privacy interests of individuals whose information has been collected in the course of a law enforcement matter.

I have reviewed the Police's exercise of discretion in deciding to withhold the portions of the records for which I have found section 38(b) applies and accept that they have taken into consideration the competing interests in this matter as well as the nature and sensitivity of the information. Additionally, I find that there is nothing in their exercise of discretion that would indicate that it was exercised in an improper manner. I conclude, therefore, that the Police's exercise of discretion was appropriate.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Catherine Corban
Adjudicator

August 18, 2009 _____