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

ORDER MO-2417

Appeal MA08-335

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

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 a specific occurrence report.

The Police located the responsive record and issued a decision in which they provided partial access to it, citing section 38(b) (personal privacy).

The requester, now the appellant, appealed this decision.

The appellant then provided the Police with a consent form signed by an individual named in the records. During mediation, based on this consent, the Police issued a revised decision letter and disclosed additional parts of the record.

No other mediation was possible, and this file was moved to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Police seeking their representations. I received representations from the Police, a copy of which was sent to the appellant, along with a Notice of Inquiry. Portions of the Police's representations which contained information concerning individuals other than the appellant were withheld due to concerns about confidentiality. I received representations from the appellant's father on behalf of the appellant in response.

RECORD:

The record at issue is an occurrence report. The Police have severed from the record the information received from the restaurant owner where the incident set out in the occurrence report occurred, the witness to the incident and the person who allegedly assaulted the appellant (the affected person). According to her representations, the appellant is only interested in receiving the name of the affected person.

DISCUSSION:

PRELIMINARY ISSUES RAISED BY THE APPELLANT

Request for an Oral Hearing

The appellant has asked for an oral hearing of her appeal. In her representations, relying on the *Statutory Powers Procedure Act* (the *SPPA*); she asserts that her agreement, in writing, is required before this office may proceed by way of written submissions. At the oral inquiry, she wishes to examine witnesses and parties under oath, and give and hear sworn testimony.

Analysis/Findings

With respect to the right to make representations at the inquiry, section 41(13) of the *Act* states that:

> The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 39(3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made.

Oral representations are specifically referred to in this office's Practice Direction 15, which states that:

> During an inquiry, the Adjudicator may request additional information from any party, either orally or in writing.

In this appeal, I agree with and adopt the reasoning of former Assistant Commissioner Irwin Glasberg in Order M-875, where he stated the following concerning a request for an oral hearing:

> It is the usual practice of the Commissioner's office to invite the parties involved in an inquiry to submit their representations in writing. The parties to this appeal have provided detailed and well articulated written submissions which fully address the issues raised in this appeal. On the basis that the appellant's representations are clear and understandable, I have decided that this is not a situation where it would be appropriate to depart from the Commission's usual approach for the receipt of representations.

Furthermore, section 41(2) of the *Act* specifically provides that the *SPPA* does not apply to an inquiry under the *Act*. Therefore, based upon my review of the representations and the record at issue, I have decided to proceed with this inquiry in writing.

Standing of the Toronto Police

The appellant challenges the right of the Toronto Police Services Board to be given standing in this inquiry. She submits that:

> In order to make decisions as specified in the [*Act*], a body offering Government Service in the Province of Ontario must be an Institution with a designated Head for the purpose of making decisions under the [*Act*].
>
> The Toronto Police Services is not defined explicitly as an Institution in [section 2(3) of the *Act*]…

> The Toronto Police Services has no standing as an Institution; therefore, a Head is not empowered, and that body may not make decisions under the [*Act*] whether by way of Head or delegated, Designated Head(s), nor may that body withhold records and/or information gathered in the course of Government Service.

Analysis/Findings

I do not agree with the appellant's claim that the Toronto Police Services Board does not have standing in this inquiry, as it is not an "institution". Section 2(1) of the *Act* defines an "institution" under the *Act*. It states in part that an "institution" means,

> (b) a school board, municipal service board, city board, transit commission, public library board, board of health, **police services board**, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the Municipal Act, 2001 or the City of Toronto Act, 2006 or a predecessor of those Acts [emphasis added]

The Toronto Police Services Board is, therefore, an institution under the *Act*, having been established under a predecessor of *the City of Toronto Act, 2006*.

I will now go on to determine whether the information at issue in the record is exempt under the *Act*.

PERSONAL INFORMATION

First, I must determine whether name of the affected person in the record is "personal information" as defined in section 2(1). The Police rely on paragraphs (d), (g) and (h) of the definition of "personal information" which is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (d) the address, telephone number, fingerprints or blood type of the 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].

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].

Effective April 1, 2007, the *Act* was amended by adding sections 2.1 and 2.2. These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2.1 modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2.2 further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

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 submit that the affected person's name was severed from the record as he was not conducting himself in a business, professional or official capacity when the appellant attended the restaurant.

The appellant submits that the affected person's name is not personal information. She states that:

> [Section 2(1) of the *Act*] defines recorded information about an individual as subject to exemption only if the name appears with other personal privileged information or if disclosure of the name reveals other personal, privileged information about that aforesaid individual, it is apparent and readily seen that no legal exemption applies in this matter…, for the name of the assailant of the appellant stands alone in the record and is not personal information, as defined...
>
> The interpretation of name in the *Act* clearly shows that the assailant's name is not personal information for the purposes of interpretation of the *Act*. It does not satisfy either of appearing with or revealing other personal information about the assailant, a mandatory prerequisite condition in order that the name be deemed personal, hence exemptible under the provisions of the *Act*.

Analysis/Findings

Based upon my review of the record, I find that it contains the personal information of the affected person, the witness, the restaurant owner and the appellant.

Concerning the appellant, the personal information in the record includes her age, her home address and telephone number, along with her name which appears with other personal information relating to her.

Concerning the affected person, the record contains this individual's name which appears with other personal information relating to him.

Although the affected person was working at the restaurant at the time of the incident set out in the record, the record does not identify that individual in a "business, professional or official capacity". Information that relates to an individual in his professional, official or business capacity, may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015 and PO-2225].

In Order P-1180, former Inquiry Officer Anita Fineberg stated:

> Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information [emphasis added].

Statements provided to investigators by potential witnesses have also been found to be "personal information". In Order PO-2271, Senior Adjudicator David Goodis stated:

> When an individual in a professional capacity provides a statement about his or her actions and observations to an investigator, in a context where there is a reasonable prospect that the individual may be found at fault, the information "crosses the line" from the purely professional to the personal realm. The fact that the incident took place in the course of these individuals doing their job in no way undermines this conclusion.

The information at issue in this appeal concerns the affected person's name. Although this information in the record is about this individual in his business capacity, this information relates to an investigation into or assessment of the performance or alleged improper conduct of this individual. As such, the characterization of this information changes and becomes personal information as defined in paragraph 2(1) of the *Act*.

PERSONAL PRIVACY

I will now determine whether the discretionary exemption at section 38(b) applies to the information at issue, namely, the name of the affected person.

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.

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 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 under section 38(b). If paragraph (a), (b) or (c) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The parties do not claim that the information at issue fits within these paragraphs of sections 14(1) or 14(4), and I am satisfied that these sections do not apply.

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). 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].

The Police submit that the information contained in the record was compiled and is identifiable as part of an investigation into a possible violation of law; specifically the *Criminal Code*. They rely on the presumption at section 14(3)(b), 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;

The Police submit that:

> The nature of a law enforcement institution is in great part to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police. Law enforcement institution records are not simple business transaction records in which disclosure of another individual's personal information may not, on balance, be offensive...
>
> The information collected by officer(s) investigating unlawful activities must be protected against the use or misuse of said information where entitlement is not proven under the [*Act*]. Police investigations imply an element of trust that the law enforcement agency will act responsibly in the manner in which it deals with recorded personal information. The involved (parties) willingly cooperated with the Police at the time of the investigation. Release of these individuals' personal information would not only undermine their confidence in the police, but also create unwillingness in them to cooperate with the police in the future.

In response to the Police's representations concerning section 14(3)(b), the appellant relies on the exception in that section and submits that:

> In fact, an Investigation has never been initiated by the Toronto Police Services in the matter of the assault causing bodily harm perpetrated by the assailant against the appellant. The appellant has been waiting since [date] to be interviewed, and thence to be duly informed that her assailant has been arrested and charged under the *Criminal Code* for his unprovoked attack and torture upon her person. Moreover, this exemption applies only to personal information, which does not apply to the name of the assailant.
>
> There is an ongoing action before the Office of the Justices of the Peace, York County. This action is presently intestate, and will remain in such state and condition until the appellant is able to provide the name of her affected person to a sitting Justice of the Peace, in order that he may be properly charged and summonsed to Court in the matter of the assault causing bodily harm perpetrated by her (name withheld) assailant…

Analysis/Findings

The record is a police occurrence report containing information obtained during a police investigation into a possible violation of law. This record contains the personal information of both the appellant and other individuals. I am satisfied that the information in the record was collected by the Police in the course of investigating a complaint, and that the information is identifiable as part of an investigation into a possible violation of law.

The appellant claims that section 14(3)(b) does not apply as disclosure of the information at issue in the record is necessary to prosecute a violation of law. In my view, this part of section 14(3)(b) of the *Act* was not intended to apply in circumstances where a private individual or organization wishes to pursue their own investigation or prosecution [See Orders M-718, M-249, MO-1356, PO-2167 and PO-2327].

Concerning this issue, I agree with and adopt the analysis of Adjudicator Laurel Cropley in Order MO-1192, where she stated in the context of a request for police records concerning an alleged assault:

> The Police indicate that the personal information pertaining to the suspect which is contained in the records was compiled as part of a law enforcement investigation into an alleged assault at a high school. The Police state further that the occurrence report consists of the facts in the case and the manner in which the officer concluded his investigation. Therefore, the Police submit that, since the personal information pertaining to individuals other than the appellant relates to records compiled as part of an investigation into an assault, the disclosure of the personal information is presumed to be an unjustified invasion of their personal privacy.
>
> The appellant submits that since the Police 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).

Concerning the ability of the appellant to obtain the name of the affected person in order to commence a private prosecution, this issue has been adjudicated upon in Order MO-1436 by Adjudicator Dawn Maruno, wherein she stated that:

> Previous orders of this office have discussed alternative methods of obtaining access to personal information of an unidentified individual for the purpose of commencing or maintaining a civil action against the individual (Orders M-1146, PO-1728, P-689 and P-447). Adjudicator Laurel Cropley in Order M-1146 explained how a plaintiff can commence a civil action against an individual where the plaintiff does not know the defendant's address. She states:

> ...the registrar will issue a statement of claim without a defendant's address or with an "address unknown" notation.... Once the claim is issued, the appellant, as plaintiff, could bring a motion under rule [[#] of the Rules of Civil Procedure] for the production of the record in question from the [institution], in order to obtain the address.

In Order PO-1728, Senior Adjudicator David Goodis, agreed that "these principles could apply where the *name* as well as the address of the potential defendant is unknown, by use of a pseudonym such as 'John Doe' [see *Randeno v. Standevan* (1987), 61 O.R. (2d) 726 (H.C.), and *Hogan v. Great Central Publishing Ltd.* (1994), 16 O.R. (3d) 808 (Gen. Div.)]".

Based on the above, I am satisfied that the appellant would be able to commence his proposed civil action against the affected person as an unnamed defendant, by use of a pseudonym, and then use the civil court process to obtain the affected person's name and address from the Police.

I agree with the approach taken to the interpretation of section 14(3)(b) in previous orders, and I find that disclosure of the information at issue in the record is presumed to constitute an unjustified invasion of the privacy of the affected person. As set out above, a section 14(3) presumption cannot be rebutted by the factors in section 14(2). Therefore, subject to my review of the Police's exercise of discretion, I find that disclosing the information at issue, the affected person's name, would constitute an unjustified invasion of his personal privacy under section 38(b).

EXERCISE OF DISCRETION

I will now determine whether the Police exercised their discretion under section 38(b), and if so, whether I should uphold this 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:

> In our decision to deny access, this institution took into account the content of the information being withheld, the extent to which this information is significant and/or sensitive to the affected persons and the historic practices of our institution

> when dealing with information of this nature. In doing so, we find that it is incumbent on the institution to ensure the privacy of the affected parties is protected. The specific nature of this case, found upon conclusion that there was no one party identified as culpable. This further supports the maintenance of privacy protection.

The appellant appears to respond to the Police's exercise of discretion by submitting that she is entitled to obtain access to the withheld information as it relates to her and the alleged assault against her. She provided detailed representations on how she believes the Police conducted themselves in a "cowardly, indifferent, deceitful, dismissive, hostile and anti-social" manner in denying her with access to this information. She also provided representations as to how the affected person is not deserving of privacy protection as his "brutal act of cowardice far outweigh[s] the privacy privilege of the [the affected person] to remain anonymous and hide from his disgraceful, cruel, criminal conduct".

Analysis/Findings

I find that the Police exercised their discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. In these circumstances, disclosure would constitute an unjustified invasion of the affected person's privacy. The information was compiled in the course of a law enforcement investigation and is sensitive information. The privacy rights of the affected person in the circumstances of this appeal outweigh the appellant's right to access to her own information under section 38(b).

ORDER:

I uphold the Police's decision and dismiss the appeal.

Original Signed by: May 13, 2009
Diane Smith
Adjudicator