



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2442

Appeal MA09-68

Toronto Police Services Board



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NATURE OF THE APPEAL:

The requester submitted a request to the Toronto Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the police report relating to a specified incident in which she was the complainant.

The Police located two responsive records and issued a decision in which they granted partial access to these records. The Police withheld portions of both records pursuant to section 38(b) with specific reference to the presumption in section 14(3)(b) (personal privacy). The Police also withheld portions of Record 1 (an occurrence report) on the basis of sections 8(1)(i) (endanger the security of a building) in conjunction with section 38(a) (discretion to refuse requester's own information). In addition, the Police noted that some information had been removed from Record 2 (an event details report) as non-responsive to the request.

The requester (now appellant) appealed this decision.

During mediation, the mediator contacted other individuals identified in the records (the affected parties), to seek their consent to disclosure. Consent was refused in all cases. In addition, the mediator held conversations with a named police officer who indicated that the appellant should contact him for assistance in dealing with matters arising from the incident. This information was given to the appellant. After discussing the records with the named police officer, the mediator also provided the appellant with an explanation of the non-responsive portions of Record 2 and the portion of Record 1 withheld under section 8(1)(i). Nevertheless, the appellant indicated that she wished to pursue access to all of the withheld portions of the records. Accordingly, "Scope of the Request/Responsiveness of Records" was included as an issue in the appeal to address the non-responsive portions of the Record 2.

Further mediation could not be effected and the file was forwarded to the adjudication stage of the appeal process. I decided to seek representations from the Police, initially, and sent them a Notice of Inquiry setting out the facts and issues on appeal. The Police submitted representations in response to the Notice. I subsequently sought representations from the appellant, and sent her a copy of the non-confidential portions of the representations made by the Police along with a copy of the Notice of Inquiry.

The appellant submitted representations in response. In her submissions, the appellant states that her request is limited to knowing the names of the affected parties, although it appears that she is also interested in the withheld portions of the records that contain their statements. She clarified that she is no longer interested in pursuing access to the non-responsive portions of Record 2 or the portion of Record 1 withheld under section 8(1)(i). Accordingly these portions of the records are no longer at issue. The "Scope of Request" and sections 38(a) in conjunction with section 8(1)(i) are also no longer at issue. The remaining issue to address in this appeal is whether the withheld portions of the records are exempt under section 38(b) of the *Act*.

RECORDS:

The records at issue comprise the withheld portions of the identified Occurrence Report (Record 1) and the Event Details Report (Record 2).

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to determine whether the record contains personal information, and if so, to whom that personal information relates.

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual. An individual's name constitutes personal information, pursuant to section 2(1)(h), "if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual".

The Police state that the records were created in connection with a police investigation into the appellant's complaint that she was assaulted. They submit that the records at issue contain information that was collected or created during the course of the investigation, such as the names, addresses, telephone numbers and other identifying information of the appellant and two other identifiable individuals. As well, the records contain the information each of these individuals provided to the police.

The appellant does not agree that the records contain personal information.

Having reviewed the records in their entirety, I find that they contain the personal information of the appellant and other identifiable individuals. The personal information of the appellant and the other identifiable individuals in the records includes their names along with other personal information about them (paragraph (h) of the definition of that term in section 2(1)). The Police have disclosed the information in the records pertaining to the appellant. Some of the remaining portions contain discrete references to the affected parties. Moreover, I find that in other portions of the records, the appellant's personal information is so intertwined with that of the other individuals identified in the record that it is not severable.

PERSONAL PRIVACY

Introduction

In this case, I have determined that the records contain the personal information of the appellant and other individuals. Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access. Section 38(b) 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;

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, 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], 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 section 14 exemption. (See Order PO-1764)

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

In addition, if any of the exceptions to the section 14(1) exemption at paragraphs (a) through (e) applies, disclosure would not be an unjustified invasion of privacy under section 38(b).

In this case, the Police have decided to deny access to the records on the basis that they are exempt under section 38(b), in conjunction with the presumption at section 14(3)(b).

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.

Representations of the Parties

The Police note that “an important principle in the Freedom of Information legislation is that personal information held by institutions should be protected from unauthorized disclosure.” They indicate further that the information at issue was collected by the investigating officer in the course of an investigation into a possible violation of law. The Police state that some of the information contained in the records was released to the appellant and submit:

The nature of the relationship between the appellant and the other identified individuals is not on positive terms. The appellant is angered that criminal charges were not laid by police against the individual she claims assaulted her...

The Police note further that the two affected parties were contacted during the mediation stage of the appeal and, in both cases, consent was refused.

The Police submit that section 14(3)(b) applies in the circumstances, as the Police conducted an investigation based on the appellant’s claim that she was a victim of assault, and the personal information in the records was compiled as part of an investigation into a possible violation of law.

The appellant provides extensive representations regarding the alleged incident that resulted in the Police being called in to investigate. She indicates that she requires the names of the affected parties in order to commence a private prosecution against one of them. The appellant attached copies of the forms to be used to initiate a private prosecution, which indicate that she is required to provide the name and address of the accused.

The appellant agrees that the records relate to a police investigation. She disagrees with the Police that her relationship with the affected parties is not “on positive terms,” as she has “never had anyone complaining about any kind of relationship.” The appellant states further:

Obviously this information given to the police is misleading. I never was angry with the police either because they did not lay charges against the perpetrator. I think that all these statements written in her representation and given by the police who wrote the police report should be heard in the court to find out the truth of these statements.

Findings

Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

I find that the personal information in all of the records was compiled and is identifiable as part of an investigation into a possible violation of law pursuant to the *Criminal Code*. The fact that criminal proceedings were not commenced has no bearing on the issue, since section 14(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849).

The primary argument made by the appellant is that she requires the names in order to commence a private prosecution. This relates to the factor in section 14(2)(d) of the *Act*. However, as I indicated above, once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) (*John Doe*).

I find further that neither section 14(4) nor section 16 is applicable in the circumstances.

As a result of my finding that the presumption in section 14(3)(b) applies to the personal information at issue, I conclude that its disclosure is presumed to constitute an unjustified invasion of the personal privacy of the identifiable individuals in the records. Therefore, subject to my discussion below of Absurd Result and Exercise of Discretion, I conclude that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellant and that this information qualifies for exemption under section 38(b).

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

As I indicated above, the withheld portions of the records contain the identifying information of the affected parties and statements they gave to the investigating officer. I have been provided with no evidence that withholding these portions of the records would result in an absurdity. My review of the withheld portions of the records does not raise any questions in this regard, and I conclude that the absurd result principle does not apply in the circumstances.

EXERCISE OF DISCRETION

The section 38 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 54(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

Representations of the Parties

The Police state that they did not exercise discretion in bad faith or for an improper purpose, nor did they take into account irrelevant considerations. The Police submit that they took into account all relevant considerations, including the trust of the affected parties that the Police will act responsibly in the manner in which they deal with personal information. The Police note that the appellant was provided with information regarding the methods by which the information could be obtained in the event that she wishes to pursue charges. The Police also suggest that the appellant seeks to hold the Police accountable for the manner in which the investigation was conducted and concluded and refer to my findings in Order MO-1224 in support of their exercise of discretion not to disclose the information at issue.

The Police conclude:

The mandate, and indeed, the spirit of the *Act* is the balance of privacy protection with the public's right to information held by institutions. This institution scrupulously weighs these factors in each and every access request. As the majority of our records contain sensitive material, we must balance the access interests of the requester with the privacy rights of other individuals.

In response, the appellant claims that the Police did not take into account the injuries she received as a result of the alleged assault. Moreover, the appellant notes that she inquired into the process of laying a private charge and has not received any assistance in obtaining the personal information of the other individuals. She does not believe that she will be able to seek redress and concludes:

What I see in my case is that this 'balance' is rather 'unbalance' in favour of the perpetrator. This is another reason to bring this case to the court...I think the correct 'balance' is to get the information I requested to the police to bring my case to the court.

Findings

In Order MO-1224, which concerned a request for records relating to an allegation of sexual assault, the appellant had concerns regarding the manner in which the Police investigated her complaint and the apparent unfairness in the investigation and prosecution of a sexual assault where the accused is provided with access to statements she made to the police, while the victim is denied complete access to any information. I made the following comments on this issue:

In my view, the appellant is confusing access under the Act to disclosure in the criminal context. I find that the rights the accused is entitled to under due process

of law are not relevant to an access request for personal information under the Act. However, I find that disclosure of the personal information in the records is relevant to the appellant's ability to understand and monitor the manner in which the Police investigated her complaint.

With one exception, which I will discuss below, [relating to the absurd result principle] in weighing the appellant's rights to disclosure of the information and the factors weighing in favour of non-disclosure, I find that, in the circumstances of this appeal, the sensitivity and confidentiality of the law enforcement investigation outweigh the appellant's desire to know what the police did and how they did it.

In my view, these comments are relevant to the circumstances of the current appeal. Despite the appellant's dissatisfaction with the manner in which the investigation might have been conducted and the decision of the Police not to lay charges, I am not persuaded that the Police exercised their discretion improperly in withholding the information at issue from her on this basis.

With respect to the appellant's stated purpose for requesting the information at issue in order to commence a private prosecution, I do not find the decision of the Police to refuse access to reflect an improper exercise of discretion despite being advised of the reason. In Order MO-1436, former Adjudicator Dawn Maruno discussed the issue of alternate methods of access in both civil and criminal proceedings:

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 [30.10 of the Rules of Civil Procedure] for the production of the record in question from the Health Unit, 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...

...

As a general rule, private citizens have the same right to bring criminal court proceedings as does a Crown Attorney on behalf of the Attorney General. However, it appears that criminal proceedings cannot be brought against an unnamed person. In *R. v. Unnamed Person* (1985), 10 O.A.C. 229 (C.A.), where an information had been sworn against "unknown person that can be pointed out", the issue was whether the information was fatally defective in failing to name or describe the accused. The court held that:

an information cannot be laid against an unknown person and must be sworn against a named person or against a person who can be sufficiently described as to be identifiable.

It appears that, unlike in the civil court context, the appellant cannot commence a criminal proceeding and later use the criminal court process to obtain the name and address of the affected person...

In spite of the appellant's inability to obtain the affected party's name and address by using the criminal court process, the appellant can still accomplish his objective of bringing a criminal proceeding against the affected party by first commencing a civil suit. Earlier, I found that the appellant can use the civil process to get the affected party's name and address from the Police. After the appellant has the name and address, he can then commence criminal proceedings against the affected party. I am satisfied that it would not be onerous for the appellant to structure the proceedings in this way, especially since he has indicated his intention to bring both a civil suit and a criminal proceeding against the affected party...

I am not persuaded that the appellant would not be able to avail herself of alternate methods of obtaining the information at issue, and find that the Police properly took the appellant's stated purpose and the alternate methods into consideration in exercising their discretion not to disclose the information.

I have found above that the records contain the personal information of both the alleged victim and other individuals in a criminal matter. In denying access to the records, I find that the Police exercised their discretion under section 38(b) in a proper manner, taking into account all relevant factors and not taking into account any irrelevant factors.

Consequently, I conclude that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of the individuals identified in them, other than the appellant, and they are properly exempt under section 38(b) of the *Act*.

ORDER:

I uphold the decision of the Police to withhold portions of the records from disclosure.

Original Signed by: _____
Laurel Cropley
Adjudicator

_____ July 28, 2009