



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2461

Appeal MA08-160

Saugeen Shores Police Services Board



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NATURE OF THE APPEAL:

The Saugeen Shores Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a Condominium Corporation (the Corporation) for access to details of any police investigation and formal reply to a named individual regarding any “criminal allegations” that he made against the Corporation’s Board of Directors and “possibly the then president”. The Corporation also requested “copies of all reports, whether computer generated or otherwise, memorandums, interviews, notebook entries and the formal reply in relation to any complaints about the Corporation by [two named individuals] and other owners such as [a named individual].”

The Police identified records responsive to the request and denied access to them on the basis of the discretionary exemptions at sections 8(1)(b) (interfere with a law enforcement investigation), 8(2)(a) (law enforcement report), 8(2)(c) (law enforcement record) and 12 (solicitor-client privilege) of the *Act*, as well as the mandatory exemption at section 14(1) (personal privacy) with particular reference to the presumptions at 14(3)(a) (relates to medical history), 14(3)(b) (identifiable as part of an investigation into a possible violation of law), 14(3)(f) (describes an individual’s finances) and 14(3)(g) (personal recommendation or evaluations).

The Corporation appealed the decision.

During the course of mediation the Police issued two supplementary decision letters. In their first supplementary decision letter the Police decided to disclose a withheld record. They also advised that a record listed in its index of records related to another matter and was actually not responsive to the request. In their second supplementary decision letter the Police decided to disclose certain information that they had withheld under section 12 of the *Act*, and also provided a revised index of records. In the revised index the Police identified further additional information that they considered was also not responsive to the request. Upon receipt of the supplementary decision letters the Corporation advised the mediator that it was no longer interested in pursuing access to the non-responsive information. Accordingly, as a result of mediation and the supplementary decisions of the Police, the information the Police identified as non-responsive and the application of sections 8(1)(b), 8(2)(a), 8(2)(c) and 12 of the *Act* is no longer at issue in the appeal.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process.

I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the Police and a number of parties whose interests may be affected by disclosure (the affected parties). The Police provided representations in response to the Notice. Two affected parties consented to the disclosure of any information relating to them in the records. One of the other affected parties is now deceased. Four of the other affected parties responded and did not consent to the disclosure of any information relating to them in the records. The remaining two affected parties did not respond to the Notice.

I then sent a Notice of Inquiry, along with the non-confidential representations of the Police and a summary of the representations received from the affected parties, to the Corporation.

The Corporation provided representations in response to the Notice.

RECORDS:

Remaining at issue are all, or portions of, the records withheld by the Police consisting of letters (Records 1, 2 and 3), Occurrence Summary (Record 12), a General Occurrence Report (Record 5), Supplementary Occurrence Report (Record 6), witness statements (Records 8, 9, 10 and 11) and a police officer's notes (Record 13).

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" in accordance with section 2(1) of the *Act* and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, 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,
- (g) the views or opinions of another individual about the individual, and

- (h) the individual's name where 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.

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 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, PO-2225, R-980015, MO-1550-F, MO-2432].

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).

The Police submit that the records contain the personal information of five affected persons.

The Corporation submits that any opinions or views of an affected person that are found in the withheld portions of the records are about the Corporation, or its directors and, accordingly, would not qualify as any affected person's "personal information".

Analysis and Findings

All of the records relate to a criminal investigation regarding the actions of the Corporation.

"Personal information" is defined by section 2(1) of the *Act* to mean recorded information about an identifiable individual. The Corporation is not an "identifiable individual" [Orders P-16 and P-300]. I find that any views or opinions of an identifiable individual about the Corporation's

actions, remain the personal information of the individual who provided the view or opinion [See in this regard Order MO-1936, upheld on judicial review in *Geranium Corporation v. Ontario (Information and Privacy Commissioner)*, 2007 CanLII 3219 (Ont. Div. Ct.)]. Under paragraph (g) of the definition, however, views or opinions about other individuals, are the personal information of those other individuals.

I have reviewed the records or portions of the records that remain at issue and conclude that:

- All of them contain the personal information of identifiable individuals. This qualifies as their personal information because it contains their address or telephone number (paragraph (d)), the personal opinions or views of the individual relating to the actions of the Corporation (paragraph (e)), the views or opinions of another individual about the individual (paragraph (g)), and the individual's name where 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 (paragraph (h));
- records 6 and 13 contain the personal information of individuals who consented to the release of their information;
- some withheld information in the records relates to the Corporation or relates to an individual in their business, official, or professional capacity only and does not qualify as the personal information of an identifiable individual;
- the Police have withheld certain information that falls within the scope of sections 2.1 and 2.2 of the *Act* and does not qualify as "personal information".

I have highlighted the information that solely relates to the Corporation, or relates to an individual in their business, official, or professional capacity only, or falls within the scope of sections 2.1 and 2.2 of the *Act*, on a copy of those pages of the records provided to the Police with this order.

PERSONAL PRIVACY

Where an appellant seeks the personal information of an individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. In my view, there are two exceptions to the section 14(1) mandatory exemption which have potential application in the circumstances of this appeal, namely sections 14(1)(a) and 14(1)(f). These sections read:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
or

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

I will address section 14(1)(a) first.

Section 14(1)(a)

In the course of the adjudication of this appeal, two of the identifiable individuals whose names appear in the records provided this office with written consents, on forms prepared by this office, to disclosure of their personal information. I find that the two consents comply with the provisions of section 14(1)(a) of the *Act*. Accordingly, I will order that any of their personal information that falls within the scope of the request be disclosed to the Corporation. This information appears on page 2 of Record 6 and page 8 of Record 13. I have highlighted this information in a copy of those pages of the records provided to the Police with this order.

The Notice of Appeal provided by the Corporation in this appeal was accompanied by a complete copy of an affidavit of one individual named in the request and a portion of an affidavit of another individual named in the request, along with a copy of two exhibits that were attached to the first affidavit. The Corporation explains in its representations that the affidavits were provided by these two individuals in response to a Superior Court of Justice application commenced by the Corporation for an order that one of them be prohibited from instituting legal proceeding against the Corporation. The Corporation says that the affidavits and the exhibits refer to the police investigations and certain exhibits “may be the same documents that have been exempted by [the Police]”.

The Corporation takes the position that by including this material and information in the affidavits filed in the Superior Court of Justice proceeding, the two individuals, expressly or by implication, consented to the disclosure of their personal information. The Corporation refers to Order P-439 in support of its position. The Corporation further submits that if the facts do not support a finding of express or implied consent, because the information in the Court proceeding file is publicly available, disclosing it does not constitute an unjustified invasion of personal privacy.

Previous orders have established the requirements necessary for section 14(1)(a) to apply. In Order PO-2033-I, an order addressing a similar provision in the *Provincial Freedom of Information and Protection of Privacy Act (FIPPA)* former Assistant Commissioner Tom Mitchinson stated:

In order for consent to operate as an exception to the mandatory section 21(1) exemption, it must be in writing, and provided to the institution that has custody

and control of the records containing the individual's personal information. The individual can provide this consent either directly to the institution or indirectly through this office on appeal.

Similarly, in Order PO-1723, Adjudicator Laurel Cropley stated as follows with respect to the similar provision in section 21(1)(a) of *FIPPA*:

In my view, section 21(1)(a) requires that consent be provided under the *Act*, that is, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request. The affected persons' disclosure of their personal information to the appellant was done in the context of their dispute and does not, in my view, extend to disclosure under the *Act*.

These orders suggest that the consent required under section 14(1)(a) is specific to the operation of the *Act*.

With respect to whether a consent under section 14(1)(a) of the *Act* can be retracted, Adjudicator Donald Hale addressed this issue in Order MO-1751. In that appeal, the appellant provided the institution (the Ottawa Police Service) with a copy of a consent, signed by the affected person whose information was contained in the records, granting the appellant the right to access all of the affected person's personal information maintained by the Police. In the course of processing the request, the Police contacted the affected person, who indicated that he no longer consented to the disclosure of his personal information. Adjudicator Hale summarized the positions of the parties as follows:

The Police take the position that the "authorization" dated August 19, 2001 that was provided by the appellant with the current request was nearly two years old at the time it was submitted. They further argue that the affected person made his views respecting disclosure known more recently when he declined to consent to the disclosure of his personal information to the appellant in February 2002.

The appellant submits that the August 19, 2001 authorization remains valid.

Adjudicator Hale went on to make the following finding with respect to section 14(1)(a):

Two diametrically opposed statements have been submitted as evidence by the Police and the appellant from the affected person respecting his position on the disclosure of his own personal information to the appellant. The appellant argues that the August 19, 2001 authorization from the affected person remains valid and ought to be treated as this individual's consent to the disclosure of his personal information to the appellant. The Police submit that the response which they obtained following a notification to the affected person under section 21(1) upon receipt of request 02-039 ought to be considered to represent the affected person's position on the disclosure of his own personal information to the appellant.

In light of the contradictory evidence provided by the parties respecting the affected person's views on disclosure and the very sensitive nature of much of the information contained in the records, I cannot accept the August 19, 2001 "authorization" as representative of the affected person's present position on disclosure of his personal information to the appellant. The affected person has more recently (February 11, 2002) declined to allow the release of his personal information to the appellant.

Adjudicator Hale consequently found that the exception in section 14(1)(a) did not apply in the circumstances of his appeal.

I have considered the orders set out above along with the approach taken to the section 14(1)(a) exception outlined in them. In the circumstances of this appeal, I am not satisfied that the Corporation has established that any other individual has consented to disclosure of any of their personal information in the records, either expressly or by implication.

I note that in Order P-439, former Assistant Commissioner Mitchinson held that that it was clear from the content of an individual's affidavit included in the appellant's representations in that appeal, that the individual had no objection to the release of his name to the appellant. In those circumstances former Assistant Commissioner Mitchinson was prepared to interpret an implied consent on the part of this individual to the release of his name. The affidavits provided with the Notice of Appeal in this proceeding do not lead me to the same conclusion. The affidavits were not prepared in contemplation of, or in relation to, an access request. In addition, in my view it is not clear from the content of the affidavits that the deponents have no objection to the release of their personal information.

Furthermore, although all were provided with the opportunity, of the nine individuals notified in the course of the adjudication of this appeal, only two expressly consented in writing to disclosure of their personal information in this proceeding. Some of the affected parties expressly stated that they did not consent to the disclosure of their personal information, thereby retracting any implied consent that may have been found to exist [see in this regard Order MO-1751, discussed above].

Finally, in my view, the fact that the appellant may have been able to obtain information relating to this matter from a civil proceeding does not negate the application of the *Act* to the records at issue. The *Act* establishes a separate and distinct regime for obtaining access to records [see in this regard order PO-2066].

In all the circumstances, I find that section 14(1)(a) applies only to the personal information of the two individuals who consented in writing to the disclosure of their personal information.

Section 14(1)(f)

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of another individual's personal privacy.

Under section 14, 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.

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]

The Submissions of the Parties

The Police claim that all of the withheld information is personal information that was compiled and is identifiable as part of an investigation into a possible violation of law. The Police submit that the presumption at section 14(3)(b) applies in the circumstances of this appeal.

The affected parties submitted that the personal information was provided in confidence, releasing it could cause harm to the individuals that have concerns about the management of the Corporation, and its disclosure would prejudice ongoing litigation against the Corporation. This raises the possible consideration of the factors at sections 14(2)(d) (relevant to a fair determination of rights), 14(2)(e) (unfair exposure to pecuniary or other harm) and 14(2)(h) (information supplied in confidence). The Corporation submits that the withheld personal information is relevant to a fair determination of its rights, citing the factor in section 14(2)(d) of the *Act*.

I will first consider the application of the presumption at section 14(3)(b) of the *Act*.

Section 14(3)(b)

Section 14(3)(b) reads as follows:

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 all of the withheld information is personal information that was compiled and is identifiable as part of an investigation into a possible violation of law. As a result, they argue that disclosure would result in a presumed unjustified invasion of personal privacy.

I find that section 14(3)(b) applies in the circumstances of this appeal. I have reviewed the records remaining at issue and I conclude that the personal information contained in them was compiled and is identifiable as part of an investigation into a possible violation of law. Whether or not charges are laid does not affect the application of 14(3)(b) [Order PO-1849]. Because this presumption applies, in accordance with the ruling in *John Doe* cited above, I am precluded from considering the possible application of any of the factors or circumstances favouring disclosure under section 14(2). This would include any consideration of the factors at sections 14(2)(d), 14(2)(e) and/or 14(2)(h) of the *Act*.

The presumed unjustified invasion of personal privacy at section 14(3)(b) therefore applies to this information. Section 14(4) does not apply.

SEVERANCES

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information, including the information of individuals who consented to disclosure, that what is disclosed is substantially unintelligible. The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only “disconnected snippets”, or “worthless”, “meaningless” or “misleading” information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997),

102 O.A.C. 71 (Div. Ct.)). In my view, it is not possible to disclose any of the remaining withheld personal information without disclosing the information that I have found to be exempt.

PUBLIC INTEREST IN DISCLOSURE

The Corporation takes the position that the “public interest override” provision in section 16 of the *Act* applies to the information that I have found to be exempt. The Corporation submits that it is in the public interest to disclose the information as this would assist the Superior Court of Justice in making a full and fair determination of the facts and legal rights of the parties to that proceeding. The Corporation further submits that this is a compelling public interest that outweighs any privacy interest of the individuals in their withheld personal information.

Section 16 states:

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

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.

In considering whether there is a “public interest” in 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 or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and 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]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.)].

As acknowledged by the Corporation, the information is being sought primarily to advance a position in private litigation. While this may be of importance to the Corporation and the other parties to the civil proceeding, this is, in my view, in the nature of a private rather than a public interest. Accordingly, in my view, there does not exist any public interest, compelling or

otherwise, in the disclosure of the withheld information at issue. I therefore find that the privacy interest protected by section 14(3)(b) concerning the information that I have not ordered disclosed above cannot be overcome in this case by the “public interest override” in section 16 [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. As a result, I find that section 16 has no application in the present appeal.

ORDER:

1. I Order the Police to disclose to the Corporation the severed information that is highlighted in a copy of the records provided to the Police with this order by sending it to the Corporation by **November 5, 2009**, but not before **October 30, 2009**.
2. In order to verify compliance with provision 1 of this order I reserve the right to require the Police to provide me with a copy of the records as disclosed to the Corporation.

Original signed by: _____
Steven Faughnan
Adjudicator

September 30, 2009 _____