



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

# **ORDER MO-2502**

**Appeal MA09-124**

**Niagara Regional Police Services Board**



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## **NATURE OF THE APPEAL:**

The Niagara Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specific Police file involving the requester. The request was for the following information:

- Full police file including all evidence used in this information
- All statements taken from myself [requester's name] and [named individual] along with any witness statements/evidence
- Any medical evidence used to lay this information from [named individual]
- Names and identification of all [Police] officers involved in the apprehension/transport /detention/Identification Process
- Identity of any person used to identify me [requester's name]
- All relevant case/file numbers related to this file
- Access to any/all video/photographic/medical images used in this information. Access to any/ all audio recordings.

The Police located the responsive records and provided access to them in part. Access to the remaining records or portions of records was denied in accordance with sections 38(a) in conjunction with sections 8(1)(l) (commission of an unlawful act or control of crime), and 38(b) (personal privacy) of the *Act*.

The requester, now the appellant, appealed that decision.

During mediation, the appellant advised that he is only seeking access to information related to the incident that occurred on a specified date. He is not seeking access to records from previous incidents. The appellant also advised that he does not object to the Police's decision to withhold operational codes (ten codes) or Incident Class Numbers on the police forms. He also stated he is not seeking access to any internal police identifying numbers. He agreed to withdraw his appeal with respect to the portion of the records for which the Police claimed sections 38(a) in conjunction with section 8(1)(l) of the *Act*.

The appellant also advised that he is not seeking access to the birth date or the home phone number of any individual. He confirmed he continues to object to the Police's decision not to disclose the remaining records.

As mediation did not resolve this appeal, the file was referred 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 complete copy of which was sent to the appellant along with a Notice of Inquiry. The appellant did not provide representations in response to the Notice of Inquiry.

## RECORDS:

The records at issue are listed in the following index provided by the Police:

### INDEX OF RECORDS

| Record At Issue                                    | Severances   | Exemptions Claimed                   |
|--|--|--------------------------------------|
| 1. Assault Bodily Harm Report [#]                  | Personal information of victim   | 38(b) as 14(3)(a) & 14(3)(b) applies |
| 2. Duty Book notes of Sergeant                     | Personal information of victim   | 38(b) as 14(3)(b) applies            |
| 3. Duty Book notes of first Constable              | Personal information of victim   | 38(b) as 14(3)(b) applies            |
| 4. Statement of second Constable                   | Personal information of victim and 4 other individuals   | 38(b) as 14(3)(b) applies            |
| 5. Duty Book notes of second Constable             | Personal information of victim (including her statement) and personal information of other individuals | 38(b) as 14(3)(b) applies            |
| 6. Statement of witness #1                         | Denied in full   | 38(b) as 14(3)(a) & 14(3)(b) apply   |
| 7. Statement of witness #2                         | Denied in full   | 38(b) as 14(3)(a) & 14(3)(b) apply   |
| 8. Statement of witness #3                         | Denied in full   | 38(b) as 14(3)(a) & 14(3)(b) apply   |
| 9. CD of photographs of victim's injuries          | Denied in full   | 14(3)(a) applies                     |
| 10. Medical information Release Authorization Form | Denied in full   | 14(3)(b) applies                     |
| 11. Diagnostic Imaging Report of victim's injuries | Denied in full   | 14(3)(a) applies                     |
| 12. Notes of doctor                                | Denied in full   | 14(3)(a) applies                     |

## 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” 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 and 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 and PO-2225].

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 records contain personal information of identifiable individuals in their personal capacity including the appellant, the victim, the family of the victim; friends of the victim, and witnesses to the assault. The information includes the names, addresses, and statements of individuals, and information about their relationship to the victim. Although one of the individuals is named in her professional capacity, the Police submit that her involvement in this incident is of a personal nature.

As stated above, the appellant did not provide representations.

### **Analysis/Findings**

The records were created following the victim’s telephone call to the Police about the appellant’s assault of her at her home. During the course of their investigation, the Police made notes in their notebooks, compiled a report of the assault incident, prepared witness statements and took pictures of the victim. The victim also sought medical attention following the assault and the medical records comprise part of the records at issue.

Upon my review of the records, I agree with the Police that Records 1 to 8 contain the personal information of the appellant, the victim and other identifiable individuals in their personal capacity. I also agree with the Police that Records 9 to 12 contain the personal information of the victim only.

The personal information in the records includes these individuals’ dates of birth, telephone numbers, home addresses, medical history, identifying numbers and their names which appear with other personal information relating to these individuals in accordance with the definition of the term “personal information” in section 2(1).

Although one individual who provided a statement knew the victim in a professional capacity, I find that her information qualifies as personal information as the information reveals something of a personal nature about this individual [Orders P-1409, R-980015 and PO-2225].

### **PERSONAL PRIVACY**

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.

Under section 14, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an “unjustified invasion of personal privacy”.

As a result of my finding that Records 1 to 8 contain the victim’s and other identifiable individuals’ personal information along with that of the appellant, section 38(b) may apply in the circumstances of this appeal to Records 1 to 8 .

Only section 14 may apply to Records 9 to 12 as these records contain only the victim’s personal information and does not contain the appellant’s information.

In both these situations, sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold 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 sections 38(b) or 14. 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 14. The information does not fit within paragraphs (a) to (e) of section 14(1) nor does section 14(4) 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 sections 38(b) and 14. 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 rely on the presumptions in sections 14(3)(a) and (b). These sections read:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

- (b) 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 presumption in 14(3)(b) applies to this information. The information contained in the records at issue was collected for the purpose of an investigation into a possible violation of the law. The police were investigating a possible assault and did lay a charge of Assault Bodily Harm as a result of their investigation, an offence under section 267 of the *Criminal Code of Canada*.

Many of the records at issue contain the medical condition, treatment, and/or evaluation of the victim of this assault and the presumption in 14(3)(a) applies to this information.

### **Analysis/Findings**

Upon my review of the personal information at issue, I agree with the Police that it was compiled and is identifiable as part of an investigation by them into a possible violation of law as contemplated by section 14(3)(b). The Police were investigating whether a charge of Assault Bodily Harm pursuant to the *Criminal Code of Canada* should be laid against the appellant. Therefore, section 14(3)(b) applies to the records where claimed by the Police. In addition, as claimed by the Police, the records contain the medical evaluation information of the appellant under section 14(3)(a).

This presumed unjustified invasion of personal privacy under section 14(3), cannot be rebutted by one or more factors or circumstances under section 14(2). 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*, cited above]. Section 16 has not been raised by the appellant and, as stated above, section 14(4) is inapplicable in this appeal.

As Records 9 to 12 do not contain the appellant’s personal information, section 38(b) cannot apply and these records are, therefore, exempt under section 14(1).

Records 1 to 8 contain the appellant’s personal information. Therefore, section 38(b) applies and I will review below whether the Police exercised their discretion in a proper manner concerning disclosure of these records.

### **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 they considered the fact that the appellant does have a right of access to his own personal information and attempted to give him as much access as possible to his own personal information while trying to protect the privacy of the victim and of other involved parties. The Police considered the sensitive nature of the records as well as the relationship between the appellant and the victim of this assault in their exercise of discretion. The Police submit that they were not aware of any sympathetic or compelling need on the part of the appellant to receive the information.

**Analysis/Findings**

Having regard only to the Police's representations, as I did not receive representations from the appellant, I am satisfied that they have properly taken into account only relevant factors, in exercising their discretion to withhold the information at issue in Records 1 to 8 that I have found subject to section 38(b). I am also satisfied that the Police did not exercise their discretion in bad faith, for an improper purpose or took into account irrelevant factors.

The purpose of section 38(b) is to protect the privacy of identifiable individuals. The information at issue is sensitive. The appellant does not have a sympathetic or compelling need to receive the information

Having regard to the above, I find that the Police properly exercised their discretion in deciding to withhold the information I found exempt under section 38(b).

**ORDER:**

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

Original signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ March 9, 2010