



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

# **ORDER MO-2541**

**Appeal MA09-149**

**Ottawa Police Services Board**



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## **NATURE OF THE APPEAL:**

This appeal addresses the decision of the Ottawa Police Service (the police) to deny access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to portions of an occurrence report prepared following a collision involving the requester's vehicle.

Prior to issuing an access decision, the police notified the driver of the other vehicle involved in the collision (the affected party) to seek that individual's views regarding disclosure of the information in the responsive record relating to him. The affected party objected to disclosure, and the police consequently withheld information pursuant to section 38(b) of the *Act* (personal privacy), on the basis that disclosure of the entire occurrence report would result in an unjustified invasion of the affected party's personal privacy.

Upon appeal of the decision to this office, a mediator was appointed to explore resolution. During mediation, the appellant narrowed the scope of his request to include only the other driver's statement to the investigating officer, which is contained on page four of the record. This office contacted the affected party once again to seek consent for disclosure of this particular information, but consent was not obtained.

As it was not possible to resolve this appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I sought and received representations from the police and the appellant respecting the application of the exemption in section 38(b) to the withheld portions of page four of the occurrence report. In view of the affected party's express lack of consent to disclosure during previous discussions, I did not contact that individual during my inquiry.

For the reasons that follow, I will uphold the decision of the police in part.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

For the purpose of deciding whether or not the disclosure of the record would constitute an unjustified invasion of personal privacy, it is necessary to determine whether the record contains personal information and, if so, to whom it belongs. Section 2(1) of the *Act* defines personal information as "recorded information about an identifiable individual."

The police submit that page four of the occurrence report contains the mixed personal information of the appellant and another individual. The appellant did not specifically address this issue in his representations.

As stated previously, the information at issue is contained on one page of an occurrence report related to the motor vehicle collision involving the appellant and another individual. Based on my review of the record, I find that it contains the name, date of birth, vehicle plate number, and other details relating to the affected party, which qualifies as that individual's personal information under paragraphs (a) (age, sex) and (e) (personal opinions or views) of the definition

of that term which is contained in section 2(1) of the *Act*. I also find that this same page contains similar personal information about the appellant.

Furthermore, I find that the withheld portion of page four also contains personal information about the appellant as contemplated by paragraph (g) of the definition in section 2(1) since it includes the affected party's views or opinions about the appellant, as one of the drivers involved in the motor vehicle collision. I find, therefore, that the record contains the personal information of the appellant and the affected party.

In circumstances where a record contains both the personal information of the appellant and another individual, the request falls under Part II of the *Act* and the relevant personal privacy exemption is section 38(b) (Order M-352).

In my view, however, it is not necessary for me to consider whether the appellant's own personal information qualifies for exemption under section 38(b) since its disclosure to him cannot constitute an unjustified invasion of another individual's personal privacy, as required under that section. Accordingly, I will order the police to disclose the withheld portions of the record that contain the appellant's own personal information to him, as identified with highlighting on the copy of page four of the record to be sent to the police with this order.

I must now review whether the personal information remaining at issue on page four qualifies for exemption under the discretionary exemption at section 38(b) of the *Act*.

## **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) of the *Act*, where a record contains the personal information of both the appellant and another individual, the police have the discretion to deny the appellant access to that information if they determine that disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. Section 38(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. On appeal of a decision to deny access under section 38(b), I must be satisfied that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

Sections 14(1) to (4) provide guidance in determining whether the threshold for an unjustified invasion of personal privacy 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 any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

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).

Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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;

In support of the application of section 14(3)(b) to the personal information of the affected party, the police submit that it was collected in the course of interviewing the parties in order to determine if charges were warranted under the *Criminal Code of Canada* or the *Highway Traffic Act*. The police submit that, accordingly, the information was compiled and is identifiable as part of an investigation into a possible violation of law for the purpose of the exemption in section 14(3)(b).

The police take the position that the appellant’s personal information could not be severed and disclosed without revealing the personal information of the affected party. The police state that

We generally view the spirit and content of the *Act* as placing a greater responsibility in safeguarding the privacy interests of individuals where personal information is collected.

The police emphasize that the affected party did not consent to the disclosure of his personal information although he was contacted by both the police and this office. The police argue that if information collected by police is disclosed without the consent of individuals who supply it, then these same individuals might hesitate to assist police in the future, as there would be no guarantee that the information they provide would not be released.

In his representations, the appellant explains that he is seeking access to the affected party’s statement to pursue the insurance claim resulting from the accident. The appellant submits that the affected party’s version of events conflicts with his own and that several different versions of the events were given by the affected party so he would like to see which version appears in the occurrence report. The appellant notes that he has already been provided with many details about the affected party through the police report, including that individual’s name, home address and phone number. The appellant asks, “What else could possibly be in the report that I cannot see?”

In order for the presumption against disclosure in section 14(3)(b) of the *Act* to apply as claimed by the police, the personal information must have been compiled and must be identifiable as part of an investigation into a possible violation of law.

Having reviewed the record, I agree that the information it contains was compiled and is identifiable as part of an investigation by the Ottawa Police Service into a motor vehicle collision. I am also satisfied that the investigation was directed at determining whether or not a violation of the *Motor Vehicle Act* had taken place in the circumstances. Therefore, I find that the personal information at issue was compiled and is identifiable as part of an investigation into a possible violation of law by the police.

As such, I find that the presumption in section 14(3)(b) applies to the personal information of the affected party contained in the record at issue and that its disclosure is presumed to constitute an unjustified invasion of personal privacy. To be clear, my finding regarding the application of section 14(3)(b) does not extend to the appellant's own personal information that I have ordered disclosed to him in the preceding section of this order which addresses the question of whether the record contains personal information and if it does, to whom does it relate. Moreover, contrary to the police's assertion, I am satisfied that the appellant's personal information is capable of severance pursuant to section 4(2) of the *Act*.

As stated previously, a presumption under section 14(3) cannot be rebutted by one or a combination of factors under section 14(2) (*John Doe*, cited above). In view of my finding that the presumption in section 14(3)(b) applies, it is therefore not necessary for me to consider the criteria listed in section 14(2), including the factor at paragraph (d) (fair trial/impartial adjudication) whose relevance is suggested by the appellant's representations. Furthermore, as established by *John Doe*, cited above, a section 14(3) presumption can only be overcome if the personal information at issue is caught by section 14(4) or if a "compelling public interest", as contemplated by section 16, is established. In the circumstances, I agree with the police that neither of sections 14(4) or 16 were raised nor could they apply in this appeal.

Accordingly, the information remaining at issue (i.e. information in the record that is *not* the appellant's personal information) is exempt from disclosure under section 38(b) of the *Act*.

### **EXERCISE OF DISCRETION**

As previously noted, the section 38(b) exemption is discretionary and would permit the police to disclose information, despite the fact that it could be withheld. On appeal, adjudicators from this office may review the decision in order to determine whether the police exercised their discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

I may find, for example, that the police erred in exercising discretion where there is evidence that it did so in bad faith or for an improper purpose, where irrelevant considerations were taken into account or where relevant considerations were not. If warranted, I may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). However, I may not substitute my own discretion for that of the institution (see section 43(2)).

To be clear, in this section I am only reviewing the police's exercise of discretion in relation to the information for which I have upheld the application of section 38(b), together with section 14(3)(b), to withhold it.

The police submit that when exercising their discretion to deny access to portions of the record, they considered factors such as:

- The privacy rights of the other driver and the fact that he declined to consent to disclosure of the information relating to him;
- The special purpose of the section 14 exemption and the fact that this information was collected for the purpose of a law enforcement investigation; and
- The appellant's right to access this information.

The police submit that in weighing the appellant's right to access the information against the affected party's privacy rights, the balance weighed in favour of protecting the latter's right to privacy.

The appellant does not specifically address the issue of the police's exercise of discretion but his representations do suggest, in my view, that he has a sympathetic or compelling need to receive the information.

Upon review of the circumstances of this appeal, I am satisfied that the exercise of discretion by the police to withhold the personal information of the affected party under section 38(b) was proper and that they did not err in exercising their discretion in this manner. Accordingly, I will not interfere with the exercise of discretion by the police on appeal.

## **ORDER:**

1. I order the police to disclose to the appellant those portions of page four of the record that contain his personal information which I have indicated on the highlighted copy of the record provided to the police with this order. I order the police to disclose the appellant's personal information to him by **August 27, 2010** but not earlier than **August 23, 2010**.
2. I uphold the decision of the police not to disclose the remaining portions of the record containing the personal information of the affected party.

Original Signed By: \_\_\_\_\_

Daphne Loukidelis  
Adjudicator

July 23, 2010 \_\_\_\_\_