



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

ORDER MO-2565

Appeal MA09-259

Toronto Police Services Board



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NATURE OF THE APPEAL:

The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Police Services Board (the police) for officer's notes relating to an incident in which the hydro wires in front of his home were brought down by a passing cartage company truck.

The police identified a two-page excerpt from a police officer's memo book as responsive to the request, and issued a decision denying access to it in part, pursuant to section 38(b) (personal privacy), in conjunction with section 14(1) and the presumption against disclosure in section 14(3)(b). The police also advised that other portions of the record were not responsive to the request.

The appellant appealed the access decision to this office, and a mediator was appointed to explore resolution of the issues. During mediation, one of the two individuals identified in the record provided his signed consent to the disclosure of the information relating to him. Accordingly, the police issued a revised decision disclosing that individual's information to the appellant. At this time, the police also withdrew their reliance on section 38(b) of the *Act* because the appellant's personal information does not appear in the record.¹ The revised decision letter confirmed that the police were relying on section 14(1), taken together with the presumption in section 14(3)(b), to deny access. The appellant indicated that he accepted the police's position that certain information had been severed as non-responsive. Accordingly, section 38(b) and the non-responsive portions of the record are not at issue in this appeal.

As the appeal could not be resolved through mediation, it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. During the inquiry, I sought and received representations from both the police and the appellant. The non-confidential portions of the police's representations were shared with the appellant.

Remaining at issue in this appeal is information withheld from one page of a police officer's notebook. For the reasons that follow, I find that the personal privacy exemption applies to only some of the information for which it was claimed by the police. Some of the withheld information does not qualify as "personal information" and it cannot, therefore, be withheld under the personal privacy exemption in section 14(1).

DISCUSSION:

DOES THE RECORD CONTAIN "PERSONAL INFORMATION"?

For the purpose of deciding whether or not the disclosure of the withheld portions of the record would result in an unjustified invasion of personal privacy, it is necessary to determine whether

¹ Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant and another individual, the police may disclose the record but have the discretion to deny the appellant access to the 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.

the record contains personal information and, if so, to whom it belongs. Only “personal information” can be exempt under the personal privacy exemption.

Section 2(1) of the *Act* defines personal information as “recorded information about an identifiable individual.” The definition of personal information is found in section 2(1) of the *Act*. To satisfy the requirements of the definition in section 2(1), the information must be “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;

Section 2(2.1)² also relates to the definition of “personal information” and states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

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 take the position that the driver of the cartage company truck was not acting in a business, professional or official capacity and that the information in the record is “of a personal nature.” According to the police, the information withheld falls under paragraphs (c) and (d) of the definition, namely:

the personal information of the driver, including his name, home address, home phone number and the company’s insurance policy numbers...

The appellant acknowledges that he knows the name of the company that owns the delivery truck, but he states that the company has denied any involvement in the downed wires incident. The appellant explains that he must therefore obtain the information to confirm the identity of the company and the license and insurance information of the delivery truck to “pursue recompense.” Further, the appellant submits that

... according to section [2(2.1)] of the *Act*, information such as “name, title, contact information or designation of an individual that identifies an individual in a business, professional or official capacity” does not constitute personal information. ... [T]he driver was operating a company vehicle in a professional capacity...

As stated previously, the information remaining at issue is contained on one page of a two-page excerpt from the officer’s notes created to record the incident involving the hydro wires in front of the appellant’s home. Based on my review of the record, I note that it contains the name, date of birth, home address and phone number of the driver of the cartage truck. I find that some of this information qualifies as that individual’s personal information pursuant to paragraphs (a) (age) and (d) (residential address and telephone number) of the definition of “personal information” in section 2(1) of the *Act*.

However, I reject the argument offered by the police that this individual was not driving the company vehicle in his business, professional or official capacity. In my view, the context in which the information appears establishes that this submission is incorrect. Rather, I find that the name of that individual falls within the scope of section 2(2.1) of the *Act* because it identifies

² In the Notice of Inquiry documentation sent to the appellant, this provision in the *Act* was mistakenly referred to as section 2(3), which is the section number for the equivalent provision in the provincial *Act*. The correct section reference for the municipal *Act* is section 2(2.1).

him in his professional, rather than in some personal, capacity. Accordingly, I find that this information does not qualify as “personal information.”

In addition, the information in the record relating to the company does not fit within the definition of “personal information” in section 2(1). Therefore, I find that the company’s name, its insurance policy numbers and an associated expiry date does not qualify as “personal information” because it is not *about* an identifiable individual, as is required under the definition of that term in section 2(1).

Since only “personal information” can qualify for exemption under the personal privacy exemption in section 14 of the *Act*, I will order the information described in the previous two paragraphs to be disclosed to the appellant.

I will now review whether the information that I have found to qualify as personal information according to the definition of the term in section 2(1) qualifies for exemption under section 14(1), taken together with the presumption in section 14(3)(b).

WOULD DISCLOSURE RESULT IN AN UNJUSTIFIED INVASION OF ANOTHER INDIVIDUAL’S PERSONAL PRIVACY?

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. 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.³ Neither of these sections is raised in this appeal and in the circumstances, I find that they do not apply.

In this appeal, the police are relying on the presumption in section 14(3)(b), which 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;

The police submit that the personal information of the driver, including his name, home address, home phone number and the company’s insurance policy numbers are exempt under section 14(3)(b). According to the police, the release of this information, without the “specific consent from the driver and the company would constitute an unjustified invasion of their personal privacy.” The police note that the mediator (from this office) tried unsuccessfully to contact the driver during mediation, and that, “In the absence of a response, this institution can not justifiably release their personal information. Releasing his personal contact information would be in direct violation of protecting personal privacy.”

³ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

Moreover, the police argue that since the appellant knows the identity of the owner of the truck that caused the damage, “he is not without the means to pursue recompense.”

As to the specific application of section 14(3)(b), the police submit that the record was initially created and compiled for the purpose of an investigation into an accident involving a motor vehicle, and the attending officer was required to determine whether there had been a possible violation of the *Highway Traffic Act*. The police also submit that although charges under the *Highway Traffic Act* were not laid, this does not negate the application of the presumption against disclosure in section 14(3)(b), as it only requires that there be an investigation into a possible violation of law.

The police argue that the driver provided this information willingly and the incident was then referred to Toronto Hydro, as the entity responsible for maintenance and repair of the wires, which is where “any steps for recovery of repair funds would be directed.” The police add that

It might be argued from the appellant’s perspective that disclosure of the third party information in this case might be “relevant to a fair determination of ... rights.” The Commissioner’s Orders 12 and P-224 state that, “Although release of a person’s name and address may be relevant to a fair determination of another’s rights, disclosure must be balanced against the protection of the privacy rights of individuals.”

After consideration of the foregoing factors, and balanced against the confidentiality of the information given to the police, I have exercised my discretion to protect the privacy of the third party.

The appellant submits that given his position that the information identifying the cartage company and the driver does not constitute personal information, he is not seeking disclosure of *personal* information and section 14 of the *Act* does not apply. The appellant’s explanation for why he is seeking the information also suggests the possible application of the factor in section 14(2)(d).

Analysis and Findings

To begin, it should be emphasized that my review of the possible application of the presumption in section 14(3)(b) relates *only* to the information that I have found above to qualify as “personal information” according to the definition of that term in section 2(1). None of the other information for which the police claimed the personal privacy exemption can qualify for exemption under section 14 of the *Act* as it does not qualify as “personal information.”

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 personal information it contains relating to the driver was compiled and is identifiable as part of an investigation by the police into the downing

of the hydro wires in front of the appellant's home. I am also satisfied that the investigation was directed at determining whether or not the driver had violated the *Highway Traffic Act* 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 truck driver's personal information 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 truck driver's name or the information relating to the company described previously because it does not qualify as "personal information."

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 possible application of the factors listed in section 14(2), such as section 14(2)(d).

In this context, and as an aside, I note that the police provided representations that address the possible application of the factor in section 14(2)(d) ("fair determination of rights"). These representations suggest that the police considered the "foregoing factors," but ultimately exercised their discretion to protect the privacy of the third party driver. It should be stated that this is not an appeal in which the exercise of discretion is at issue because section 14 is a mandatory exemption. When a claimed mandatory exemption applies, as in this matter, the police do not have the discretion to disclose the information. The police would only have been in a position to exercise their discretion in this manner if the appellant's own personal information appeared in the record, in which case this appeal would have proceeded on the basis of a review of section 38(b) of the *Act*, in conjunction with the presumption against disclosure in section 14(3)(b), which becomes discretionary in that context.

I find that the information remaining at issue (i.e. information in the record that qualifies as the truck driver's personal information) is exempt from disclosure under section 14(3)(b) of the *Act*.

ORDER:

1. I order the police to disclose to the appellant those portions of page one of the record which I have highlighted in green on the copy of the record provided to the police with this order. I order the police to disclose this information to the appellant by **December 10, 2010** but not earlier than **December 3, 2010**.
2. I uphold the decision of the police not to disclose the remaining portions of the record, which are not highlighted on the copy of the record provided to the police with this order.

Original signed by: _____
Daphne Loukidelis
Adjudicator

November 5, 2010