

ORDER MO-2638

Appeal MA10-62

Niagara Regional Police Services Board

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 all Police files pertaining to the requester. The request specifically stated:

Wants all copies of reports pertaining to him since May /09

The Police located the responsive records and provided access to the records in part. Access to the remaining portions of the records was denied in accordance with section 38(a) in conjunction with section 8(1) (law enforcement) and section 38(b) (personal privacy) of the *Act*.

The requester, now the appellant, appealed that decision.

No issues were resolved in mediation. Accordingly, the file was referred to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, seeking the representations of the Police and the affected persons whose personal information may be contained in the records, initially. I received representations from the Police and certain affected persons. These affected persons objected to the disclosure of their personal information in the records to the appellant. The Police's representations were sent to the appellant, along with a Notice of Inquiry, seeking his representations. A portion of the Police's representations and all of the affected persons representations were withheld due to confidentiality concerns. In their representations, the Police withdrew their reliance on the law enforcement exemption in section 8(1)(a). Therefore, sections 38(a) in conjunction with 8(1)(a) are no longer at issue. The appellant did not provide representations. Subsequently, I received representations from the Police on the applicability of sections 38(a) in conjunction with 8(1)(c) to one record. I then sought representations from the appellant on the late raising of this discretionary exemption and the applicability of this exemption. The appellant did not provide representations.

RECORDS:

The records at issue consist of the severed portions of police general occurrence reports.

DISCUSSION:

PERSONAL INFORMATION

I will first determine whether the records contain "personal information" as defined in section 2(1) 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 if 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 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;

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).

Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) 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.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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, PO-2225 and MO-2344).

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 including the appellant, the appellant's family members, numerous complainants, subjects, and suspects. The information includes the names, addresses, telephone numbers, descriptors, occupations, ethnicity, identifying numbers, statements, etc of these individuals.

Some of the information is about individuals in their personal capacity and some of the information is about individuals in their professional capacity. In some cases [the Police] have severed information about individuals even though in their professional capacity due to the nature of the reports. [I]t is reasonable to expect that the individuals may be identified should their personal information be disclosed given the locations and/or circumstances of the incidents

Analysis/Findings

Based upon my review of the records, I find that they contain the personal information of the appellant and other identifiable individuals. This personal information at issue includes the dates of birth, home addresses and phone numbers, employment and medical history, driver licence numbers, details of race and the names of the individuals other than the appellant which appear with other personal information relating to the individual in accordance with paragraphs (a) to (d) and (h) of the definition of that term in section 2(1).

The information severed from the records also contains the personal opinions or views of other individuals as they relate to the appellant and the views or opinions of the appellant about these individuals in accordance with paragraphs (e) and (g) of the definition of personal information in section 2(1).

There is also some discrete information in the records that only applies to the appellant. The personal privacy exemption in section 38(b) applies to personal information the disclosure of which would constitute an unjustified invasion of another individual's personal privacy. As no

other exemptions have been claimed for this information, I will order the personal information that is related only to the appellant disclosed.

Based upon my review of the remainder of the records, I find that they contain the personal information of the appellant and other identifiable individuals in their personal capacity. Even though there is information in some of the records that relates to an individual in a professional, official or business capacity, it still qualifies as personal information since it reveals something of a personal nature about the individual (Orders P-1409, R-980015, PO-2225 and MO-2344). In making this finding, I adopt the reasoning in Order MO-2510. In that order, Adjudicator Frank DeVries considered whether information compiled as part of a police investigation into a motor vehicle accident about individuals whose employment responsibilities related to road construction and/or road signage, was personal information. He stated that:

...In my view, the information contained in these police records reveals something of a personal nature about affected party D, as this individual's conduct was scrutinized. Because the information relating to affected party D examines and relates to the conduct of this individual, and is contained in these records relating to a police investigation, it takes on a different, more personal quality. Consequently, I find that the information relating to affected party D reveals something of a personal nature about him. Even though such information appears in a professional context, its disclosure would reveal something inherently personal in nature about this individual.

Accordingly, I will determine whether the personal privacy exemption in section 38(b) applies to the remaining personal information in the records.

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 under section 14(1)(f), 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.

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 14 or

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 sections 14 or 38(b). In my view, sections 14(1) and (4) do not apply in this appeal.

The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

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 38(b) 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). As stated above, section 14(4) does not apply. Furthermore, the appellant has not raised the application of section 16 to the records.

The Police have relied on the presumption at section 14(3)(b). This section reads:

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;

A presumed unjustified invasion of personal privacy under section 14(3) cannot be rebutted by one or more factors or circumstances under section 14(2) (*John Doe*, cited above).

The Police submit that:

The information contained in the records at issue was collected for the purpose of investigations into possible violations of the law. The Police were investigating various complaints. All of these complaints could result in either provincial offence or *Criminal Code* charges.

Analysis/Findings

Based upon my review of the records and the Police’s representations, I find that the remaining personal information in the records was compiled and is identifiable as part of investigations into possible violations of law under the *Criminal Code of Canada* or provincial law enforcement related statutes. The presumption can apply to a variety of investigations, including those relating to by-law enforcement (Order MO-2147).

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law (Orders P-242 and MO-2235). The presumption can also apply to records created as part

of a law enforcement investigation where charges are subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).

Accordingly, the presumption in section 14(3)(b) applies to the remaining personal information in the records and, subject to my review of the Police's exercise of discretion, the information at issue in the records is exempt under section 38(b).

LATE CLAIMING OF THE DISCRETIONARY EXEMPTIONS IN SECTIONS 38(a) IN CONJUNCTION WITH 8(1)(c)

As stated above, during the adjudication stage of this appeal, the Police raised the application of sections 38(a) in conjunction with 8(1)(c) with respect to the information contained on two pages of one occurrence report. In Order PO-2113, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions after the expiration of the time period prescribed in the Confirmation of Appeal:

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

The Police submit that they failed to claim the discretionary exemption at sections 38(a) in conjunction with 8(1)(c) by error. Given the duration of the appeal, the Police submit that the appellant is not prejudiced in any way by the delay in claiming these discretionary exemptions. They also submit that the integrity of the appeals process is not compromised by the claiming of these exemptions, as the appeal process must have a method for dealing with errors.

Analysis/Findings

Based upon my review of the Police's representations, and in the absence of representations from the appellant, I find that the appellant has not been prejudiced in any way by the Police's late claiming of the discretionary exemptions in sections 38(a) in conjunction with 8(1)(c) to a portion of the information contained in one occurrence report. Furthermore, I find that by allowing the Police to apply additional discretionary exemptions to one record, in the circumstances of this appeal, the integrity of the appeals process has not been compromised. Therefore, I am allowing the Police to claim the discretionary exemptions at sections 38(a) in conjunction with 8(1)(c) for the information at issue in one occurrence report.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

Introduction

As stated above, section 36(1) 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.

Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. Section 8(1)(c) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 8(1)(e), where section 8 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

The Police provided detailed confidential representations on the application of section 38(a) in conjunction with section 8(1)(c).

Analysis/Findings

The Police have applied sections 38(a) in conjunction with 8(1)(c) to two pages in one occurrence report. In order to meet the “investigative technique or procedure” test, the Police must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487, MO-2347-I and PO-2751]. Moreover, the techniques or procedures must be “investigative.” The exemption will not apply to “enforcement” techniques or procedures [Orders PO-2034 and P-1340].

The submissions made by the Police are contained in the confidential portion of their representations. I am, therefore, unable to provide details that would describe the technique in any way and/or explain its purpose and use for to do so would reveal the very information that the Police seek to withhold. The Police take the position that the technique is used in law enforcement for investigative purposes and information about this technique is consistently maintained in a confidential manner. The Police also explain how its disclosure could reasonably be expected to hinder or compromise its effective utilization by law enforcement agencies.

Based upon my review of the information at issue and the Police’s representations, I find that the information at issue discloses an investigative technique, and that disclosure could reasonably be expected to hinder or compromise its effective utilization by law enforcement agencies [Order PO-2582]. Accordingly, I find that the discretionary exemption at sections 38(a) in conjunction with 8(1)(c) applies to the information at issue. Therefore, subject to my review of the Police’s exercise of discretion, the information at issue is exempt under sections 38(a) in conjunction with 8(1)(c).

EXERCISE OF DISCRETION

I will now determine whether the Police exercised their discretion under sections 38(a) and (b), and if so, whether I should uphold their exercise of discretion.

General principles

The sections 38(a) and 38(b) exemptions are discretionary, and permit 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

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 has a right of access to his own personal information and that they attempted to give him as much access as possible to his own personal information while trying to protect both the law enforcement interests and the privacy of the affected persons. The Police submit that they considered the sensitive nature of the records as well as the relationship between the appellant and the other named parties in their exercise of discretion. The Police were not aware of any sympathetic or compelling need on the part of the appellant to receive the information in the records.

Analysis/Findings

Based upon my review of the information in the records that I have found subject to sections 38(a) and 38(b) and the Police's representations, I find that the Police exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. The personal information at issue in the records contains sensitive information of other individuals gathered in the course of law enforcement investigations. The law enforcement technique information that is subject to section 38(a) is sensitive information that is significant to the Police. Therefore, I uphold the Police's exercise of discretion.

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORD

Section 14(5) of the *Act* states:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

Section 14(5) gives an institution the discretion to refuse to confirm or deny the existence of a record in certain circumstances.

A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section

provides institutions with a significant discretionary power that should be exercised only in rare cases (Order P-339).

Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and
2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.

(Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, (2004) O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802)

Would the disclosure of the existence of a record reveal personal information?

Under part one of the section 14(5) test, the Police must demonstrate that disclosure of a record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual (paragraph (h)).

Having reviewed the submissions of the Police, I am satisfied that, if a record exists, it would contain the personal information of the appellant and other identifiable individuals. As stated above, the appellant in his request sought all police reports about him from May 2009 until the date of the request. The records at issue in this appeal are police investigation reports concerning alleged violations of law involving the appellant and other identifiable individuals. These records contain the personal information of the appellant and other identifiable individuals. Similarly, if additional records did exist, they would contain the personal information of the appellant and other identifiable individuals.

Would disclosure of a record constitute an unjustified invasion of personal privacy?

I must now determine whether disclosure of a record, if it exists, would constitute an unjustified invasion of privacy of individuals other than the appellant. Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. The Police submit that if a record exists, the personal information in it would fall within the presumption in section 14(3)(b). As stated above, this section reads:

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

Due to confidentiality concerns, I am not able to reveal the Police's representations on this issue. However, based on their representations and the application of section 14(3)(b) to the records in this appeal, I am satisfied that if a record exists, the presumption at section 14(3)(b) would apply to the personal information in it. After considering the Police's representations, I am also satisfied that they have properly considered all relevant factors in exercising their discretion and in arriving at their decision that access to a record that is responsive to the request, if it exists, should be denied under section 38(b) of the *Act*.

Would disclosure of the fact that the record exists (or does not exist) in itself convey information to the requester in such a way that disclosure would constitute an unjustified invasion of personal privacy?

Section 38 contains no parallel provision to section 14(5). Since I have found that if a record exists it would contain the appellant's personal information, the question arises whether the Police can rely on section 14(5) in this case. In Order M-615, Senior Adjudicator John Higgins stated:

Section 37(2) provides that certain sections from Part I of the *Act* (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information.

However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.

Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence

of a record if its requirements are met, even if the record contains the requester's own personal information.

I agree with the Senior Adjudicator's analysis and findings. Based on all of the information before me, I am satisfied that disclosure of the fact that any additional record exists (or do not exist) would in itself convey information to the appellant. Further, I find that the nature of the information conveyed is such that its disclosure would constitute an unjustified invasion of privacy. Accordingly, I find that section 14(5) may be invoked in the circumstances of this appeal and that neither sections 14(4) nor 16 apply in the circumstances of this appeal.

Accordingly, I find that the Police may refuse to confirm or deny the existence of any additional records that might be responsive to the appellant's request.

ORDER:

1. I uphold the decision of the Police to refuse to confirm or deny the existence of any additional responsive records.
2. I order the Police to disclose to the appellant by **August 25, 2011 but not before August 19, 2011** the personal information related solely to the appellant. For ease of reference, I have provided the Police with a copy of the pages of the records that contain this information.
3. I uphold the Police's decision to withhold the remaining information in the records.
4. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the information in the records disclosed to the appellant pursuant to provision 2.

Original Signed By: _____ July 20, 2011
Diane Smith
Adjudicator