



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

ORDER MO-2623

Appeal MA10-61

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 information report and a specific assault report involving the requester.

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(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, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry, setting out the facts and issues to the Police seeking their representations, initially. I received representations from the Police. I sent a copy of the Police's representations to the appellant, along with a Notice of Inquiry, seeking his representations. I also received an email objecting to the disclosure of an identifiable individual's personal information in the records to the appellant. The appellant did not provide representations.

RECORDS:

The records are two Niagara Regional Police *General Occurrence Hardcopy* documents. The severed portions of the records which are at issue in this appeal consists of the dates of birth, home addresses and phone numbers, employment history, driver licence numbers, details of race and middle names of the individuals in the records other than the appellant. The Police have also severed from the records the non-responsive information, which consists of the information related to the printing and preparation of the records.

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's and a named subject in each report. The information includes the names, addresses telephone numbers, descriptors, identifying numbers, etc. The information is about individuals in their personal capacity.

Analysis/Findings

Based upon my review of the records, I find that they contain the personal information of the appellant and other identifiable individuals in their personal capacity. The Police have disclosed the appellant's personal information to him. All that remains at issue in this appeal is the personal information of identifiable individuals other than the appellant. As stated above, the personal information at issue consists of the other individuals' dates of birth, home addresses and phone numbers, employment history, driver licence numbers, race and middle names as set out in paragraphs (a) to (d) and (h) of the definition of personal information in section 2(1) of the *Act*. Accordingly, I will determine whether the personal privacy exemption in section 38(b) applies to this information.

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). 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;

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).

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 two possible violations of the law. The Police were investigating a possible assault and a possible threatening, both offences under the *Criminal Code of Canada*.

Analysis/Findings

Based upon my review of the records and the Police's representations, I find that the personal information in the records was compiled and is identifiable as part of an investigation into possible violations of law under the *Criminal Code of Canada*. Accordingly, the presumption in section 14(3)(b) applies to this information 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).

EXERCISE OF DISCRETION

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

General principles

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

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 the privacy of the other involved parties. 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 records and the Police's representations, I find that they exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. The Police have withheld from the records only the personal information of the individuals other than the appellant. This is sensitive information of these individuals gathered in the course of a law enforcement investigation. Therefore, I uphold the Police's exercise of discretion.

ORDER:

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

Original signed by: _____

Diane Smith
Adjudicator

_____ May 13, 2011