

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2767

Appeal MA11-467

Peterborough Lakefield Community Police Services Board

July 16, 2012

Summary: The appellant sought records relating to a number of occurrences investigated by the police. The police granted partial access to the records responsive to certain items of the appellant's 28-item request, denied access to some and refused to confirm or deny the existence of records pertaining to six of the items pursuant to sections 8(3) (law enforcement) and 14(5) (personal privacy). The appellant appealed this decision and indicated that she believed additional records should exist. Records responsive to items 8, 11, 12, 13, 24 and 25 of the request, if they exist, would contain the personal information of the appellant and other identifiable individuals. The police have properly invoked section 14(5) and 38(b) to refuse to confirm or deny the existence of records responsive to these six items. Although the appellant expressed her belief that additional records should exist, she did not provide any evidence to support this position, and the adjudicator declined to deal with the issue.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) definition of personal information, 14(3)(b), 14(5), 38(b).

OVERVIEW:

[1] The appellant submitted a multi-part request (28 items) to the Peterborough Lakefield Community Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records about herself

and other identified individuals (affected parties) relating to a number of different incidents from 1989 to the date of the request.

[2] After notifying certain affected parties, the police issued a decision answering some of the appellant's questions and granting partial access to the responsive records. The decision went on to deny access to the remainder of the identified records (which respond to 15 of the 28 items) pursuant to the discretionary exemptions at sections 8(1)(e), 8(1)(l) (law enforcement) and 38(b), with reference to the factors in sections 14(2)(f) and 14(2)(i) (personal privacy) of the *Act*. With respect to 6 of the 28 items, the police also refused to confirm or deny the existence of any records pursuant to sections 8(3) (law enforcement) and 14(5) (personal privacy) of the *Act*. The police stated further that some of the requested records do not exist (with respect to 11 of the 28 items). In regards to certain specific questions posed by the appellant in her request (2 of the 28 items), the police stated that "[t]his is not a request for records and as such, it falls outside the scope of [the *Act*]." Finally, the police stated that some information was removed from the records because it is not responsive to the appellant's request.

[3] The appellant appealed the decision made by the police.

[4] During mediation, the police answered some of the appellant's outstanding questions about the records and disclosed an additional record to her.

[5] The appellant informed the mediator that she does not take issue with the information that was withheld on the basis that it was not responsive. She also advised that she is not pursuing access to the police codes which were withheld pursuant to sections 8(1)(e) and 8(1)(l) of the *Act*. Accordingly, this information and these exemptions are not at issue insofar as they pertain to the records identified by the police.

[6] In addition, the appellant indicated that she does not want this office to seek consent from the affected parties and that she is not pursuing access to any of the records which were withheld pursuant to section 38(b), based on the application of the considerations referred to in sections 14(2)(f) and 14(2)(i), because they contain other individuals' personal information. Consequently, the section 38(b) exemption is not at issue with respect to the records identified by the police.

[7] As a result of the above, none of the records identified by the police remain at issue in this appeal.

[8] The appellant indicated that she believes more records should exist. On this basis, the reasonableness of the search undertaken by the police for responsive records was raised as an issue in this appeal.

[9] The appellant also indicated that she wants access to the records responsive to items 8, 11, 12, 13, 24 and 25 of her request, if they exist, and takes the position that the police should not be able to refuse to confirm or deny their existence pursuant to sections 8(3) and 14(5) of the *Act*.

[10] Accordingly, sections 8(3) and 14(5) remain at issue in this appeal. Given that some of these records (if they exist) may relate to the appellant, the police added section 38(a) to the appeal, in conjunction with section 8(3), and section 38(b) remains at issue in conjunction with section 14(5). Although the police are not specific about the exemptions that support their position, it appears that the police continue to rely on the exemptions referred to above in support of their position that sections 8(3) and 14(5) would apply to any other records, if they exist. In addition, in light of the specific items requested and all discussions held during mediation, it is clear that the records sought by the appellant pertain to criminal investigations. Accordingly, the law enforcement investigation presumption at section 14(3)(b) is relevant in the circumstances of this appeal.

[11] As further mediation could not be effected, the matter was referred to the adjudication stage of the appeal process. During the inquiry into the appeal, I sought and received representations from the police. These representations were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. The appellant did not submit representations.

[12] In this order, I decline to consider the appellant's general assertion that additional records should exist, as she has not provided a reasonable basis for such a conclusion. I find that the records, if they exist, would contain the personal information of the appellant and other identifiable individuals. I find further that the police have properly invoked section 14(5) and 38(b) to refuse to confirm or deny the existence of records responsive to items 8, 11, 12, 13, 24 and 25 of the appellant's request. Because of this decision, it is not necessary to consider the possible application of sections 38(a)/8(3).

RECORDS:

[13] The police provided the appellant with a chart of the records that it identified as being responsive to her request. After disclosure, the records remaining at issue, if they exist, would respond to items 8, 11, 12, 13, 24 and 25 of the appellant's request.

PRELIMINARY ISSUE: REASONABLE SEARCH

[14] As I indicated above, the appellant believes additional records should exist. During the mediation stage of the appeal, the appellant did not specify the basis for her belief that additional records should exist. Rather, her allegation was very general. According to the information provided at the intake and mediation stages by the

appellant, she was advised that she would be asked to identify her search issues in greater detail at the adjudication stage.

[15] The police have provided several affidavits from the individuals involved in conducting the searches which were undertaken. The appellant did not submit representations elaborating on her reasons for believing that additional records exist.

[16] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹ The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.²

[17] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.³

[18] As I indicated above, the appellant did not submit representations in this appeal. In my view, her vague assertions that additional records should exist are not sufficient to provide a reasonable basis for concluding that this assertion has any validity. In the absence of representations from the appellant, I will not review this issue further.

ISSUES:

A: If records exist for which section 14(5) have been claimed, would they contain personal information?

B: Does the discretionary exemption at section 38(b) in conjunction with section 14(5) apply to the information at issue?

DISCUSSION:

A: If records exist for which section 14(5) have been claimed, would they contain personal information?

[19] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates, whether or not that record exists. That term is defined in section 2(1) as follows:

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order MO-2246.

“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;

[20] 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.⁴

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

⁴ Order 11.

(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.

[22] 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.⁵

[23] 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.⁶

[24] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁷

[25] The police concede that if records exist, they would contain the appellant's personal information as the requests pertain to information that the police have about her. In addition, referring to the requests, the police indicate that, if records exist, they would also contain the personal information of other identifiable individuals, either because the appellant identified them by name in her requests and/or the types of records requested would likely contain the personal information of persons other than the appellant. The police submit that any information about individuals other than the appellant, if it exists, would pertain to them in their personal capacities.

[26] Based on the submissions made by the police, and my review of the portions of the appellant's request at issue in this discussion, I accept the position taken by the police that the records, if they exist, would contain the appellant's personal information as well as the personal information of other identifiable individuals. Accordingly, my analysis under section 14(5) will be conducted using the discretionary exemption at section 38(b).

⁵ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁷ Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

B: Does the discretionary exemption at section 38(b) in conjunction with section 14(5) apply to the information at issue?

[27] 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.

[28] 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.

[29] 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.

Refusal to confirm or deny the existence of a record: Has the institution properly applied section 14(5) of the Act in the circumstances of this appeal?

[30] Section 14(5) reads:

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.

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

[32] 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.⁸

[33] 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

⁸ Order P-339.

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.

[34] 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.⁹

Part one: disclosure of the record (if it exists)

Definition of personal information

[35] Under part one of the section 14(5) test, the institution must demonstrate that disclosure of the 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. I found above that records responsive to the six parts of the appellant's request remaining at issue, if they exist, would contain the personal information of individuals other than the appellant.

Unjustified invasion of personal privacy

[36] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of privacy" under section 14(5).

[37] The police indicate that they rely on the presumption in section 14(3)(b) as the basis for refusing to confirm or deny the existence of records responsive to items 8, 11, 12, 13, 24 and 25. The police note that, "[f]or items #8, 11, 12, and 13, the request is specifically for 'intelligence reports', 'Crimestoppers tips' and 'surveillance reports.' For items #24 and 25, the request is in regards to a homicide case."

[38] Based on the submissions made by the police and my review of the appellant's request, it is clear that she is seeking information pertaining to law enforcement investigations. Accordingly, I find that the presumption in section 14(3)(b) would apply to any records responsive to these six items of the appellant's request, if they exist.

⁹ 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.

Accordingly, subject to my discussion of the exercise of discretion below, disclosure of records responsive to the six items at issue, if they exist, would constitute an unjustified invasion of privacy of the affected parties.

Part two: disclosure of the fact that the record exists (or does not exist)

[39] Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[40] The police note that the six items of the request at issue seek specific information about identified individuals or information that could lead to the identification of individuals. They submit that confirming the existence or non-existence of records would provide specific information about these individuals in relation to law enforcement investigations.

Exercise of Discretion

[41] The section 38(b) and 14(5) exemptions are discretionary, and permit an institution to disclose information, or in this case, refuse to confirm or deny the existence of records, 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.

[42] 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.

[43] With respect to the exercise of discretion under sections 38(b) and 14(5), the police state:

This institution is aware that the appellant should have a right of access to her own personal information. However, in these circumstances, the appellant's right of access was weighed against the expectation of privacy of other individuals...The nature of the records at issue and the extent to which they would invade the personal privacy of others...was found to have greater weight in exercising this institution's discretion in refusing to confirm or deny the existence of the records.

Analysis and findings

[44] Based on the representations made by the police and my review of the specific information set out in the six items of the request, I am satisfied that confirmation that a record exists or does not exist would provide the appellant with information about identifiable individuals and their involvement in law enforcement investigations.

[45] In particular: in item 8, the appellant seeks information that led to the arrest of a named individual; in item 24, the appellant seeks information about an identifiable individual in connection with the rape-murder of another named individual; in item 25, the appellant seeks confirmation that a named individual was charged in the death of another named individual; in the remaining three items, the appellant seeks crimestoppers tips and surveillance reports concerning herself and in reference to another named individual.

[46] After considering the submissions made by the police regarding their exercise of discretion, I find that they took into account only relevant considerations and that their decision was made in good faith. On this basis, I uphold the police's exercise of discretion under sections 14(5) and 38(b).

[47] After considering the evidence before me, as discussed above, I find that conveying the existence or non-existence of records to the appellant would constitute an unjustified invasion of the personal privacy of the individuals identified or identifiable in her requests.

[48] Accordingly, I find that the police are entitled to invoke section 14(5) and 38(b) to refuse to confirm or deny the existence of records relating to items 8, 11, 12, 13, 24 and 25 of the appellant's request.

[49] Because of the findings I have made in this order, it is not necessary for me to consider the other exemptions claimed by the police.

ORDER:

I uphold the decision of the police.

Original signed by: _____
Laurel Cropley
Adjudicator

July 16, 2012