Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2893

Appeal MA12-259-2

The Greater Sudbury Police Services Board

May 30, 2013

Summary: The appellant sought access to the disciplinary records of three named police officers. The police refused to confirm or deny the existence of responsive records, citing the personal privacy exemption in section 14(5). This order upholds the police's decision and also finds that there is not a public interest in disclosure of this information under section 16.

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(1), 14(3)(d), 14(5), 16.

Orders and Investigation Reports Considered: Orders MO-2402, PO-3071.

OVERVIEW:

[1] The Greater Sudbury Police Services Board (the police) received an access request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*), for the following information:

> 1. On [date, a named police officer] testified that certain information in his notes was found in the "system." Who, when, and why was this information put onto my file.
>
> 2. A copy of the discipline record for [three named police officers].

[2] The police issued a decision letter advising the following in reference to the first part of the request:

> …be advised, that if the information that you are referring to is based on information from within our "system" and the information is considered police caution codes, then we will not confirm or deny the existence of any specific caution codes about an individual.

[3] Accordingly, the police refused to confirm or deny the existence of any records in relation to this part of the request in accordance with section 8(3) of the *Act*. The police further stated that "we contend that [the law enforcement exemptions at sections] 8(1)(c) and (g) [of the *Act*] applies to records of this type."

[4] The police also advised in their decision letter that the second part of the request was being denied pursuant to the exclusionary provision in section 52(3)3 of the *Act*.

[5] The requester, now the appellant, appealed the police's decision.

[6] During mediation, the appellant confirmed that as the first part of his request is similar to another request that is being dealt with at adjudication, he is no longer pursuing access to the information in this appeal.

[7] The police then issued a revised decision advising the appellant that in relation to the second part of the request, they "refuse to confirm or deny any existence of discipline records by any member of this police service" under the personal privacy exemption in section 14(5) of the *Act*. The police advised that:

> if such records exist it is our further opinion that such records would be denied pursuant to sections 52(3)3 of [the *Act*], as it is our opinion that discipline records from a member's personnel file are exempt from this *Act*.

[8] The appellant confirmed with the mediator that he is still seeking access to any records that would be responsive to the second part of his request and also raised the possible application of section 16 of the *Act*, as he believes that such records are matters of public interest.

[9] No further mediation could be conducted, and, as such, the appellant confirmed with the mediator that he wished to proceed to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry.

[10] I sent a Notice of Inquiry seeking the representations of the police on the application of section 14(5) of the *Act*. I received representations from the police, which were sent to the appellant, along with a Notice of Inquiry. The appellant provided

representations in response. Portions of the police's representations and all of the appellant's representations were not shared due to confidentiality concerns.

[11] In this order, I uphold the decision of the police to refuse to confirm or deny the existence of records. I also find that the appellant has not established the existence of a compelling public interest under section 16 that is sufficient to override the application of section 14(5) of the *Act*.

ISSUES:

A. If a record exists, would it contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Has the institution properly applied section 14(5) of the *Act* in the circumstances of this appeal?

DISCUSSION:

A. If a record exists, would it contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[12] 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. 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;

[13] 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.[1]

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

> (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.

[15] 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.[2]

[16] 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.[3]

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[18] The police state that if disciplinary records exist, they would identify the names of the police officers, any offences committed and any penalties or convictions imposed on them, including loss of time or pay, demotion or termination. The police also state that any records of disciplinary matters of specific police officers contain these officers' employment histories.

Analysis/Findings

[19] I agree with the police that information about the disciplinary matters of individual police officers would contain these officers' personal information, including their employment history and their names which appear with other personal information relating to the officers.[5]

[20] In making this finding, I rely on the findings of Adjudicator Steven Faughnan in Order PO-3071. In that order he considered the application of section 21(5) of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*)[6] to records related to judicial disciplinary investigations. In Order PO-3071, he stated that:

> In my view, because the subject individuals have been named in the appellant's request any record responsive to this part of the appellant's request would, by definition, contain information about the named individual in the context of any complaint made against them. Although the information in such a record, if it exists, relates to an examination into the conduct of the identified individual in that individual's professional role, I find that because the individual might have been the focus of an investigation into whether their conduct was appropriate, it has taken on a different, more personal quality. In that regard, I am following a long line of orders of this office that have held that information in records containing a complaint about the conduct of an individual and an examination of that conduct contains that individual's personal information under the definition at section 2(1) of the *Act*.[7]

[21] I adopt this analysis of Adjudicator Faughnan that information about an investigation into the alleged improper conduct of a named police officer is the personal information of this officer.

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[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[5] Orders M-348, PO-2477, PO-2524 and PO-2633.
[6] The equivalent to section 14(5) of *MFIPPA*.
[7] See Orders P-165, P-448, P-1117, P-1180 and PO-2525.

[22] In this appeal, part 2 of the request remains at issue. In this part of the appellant's request, the appellant sought access to a copy of the discipline record for three identified police officers. Accordingly, I find that any responsive discipline records, if they exist, would contain the personal information of police officers that were subjected to a disciplinary investigation into their improper conduct.

B. Has the institution properly applied section 14(5) of the *Act* in the circumstances of this appeal?

[23] 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.

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

[25] 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]

[26] 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.

[27] 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:

[8] Order P-339.

> 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]

Representations

[28] The police submit under part 1 of the test that the ability for a police officer to carry on their regular duties associated with being a police officer must be done without being prejudiced or questioned by the mere existence of a disciplinary matter, unless certain circumstance exist with respect to legal requirements for disclosure of a police officer's record of convictions, which is determined by the Crown Attorney.

[29] The police submit under part 2 of the test that disciplinary matters of a police officer fall under the presumption in section 14(3)(d) as these matters relate to employment history. This section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > relates to employment or educational history;

[30] The police state that disciplinary penalties and punishment could include, but are not limited to, loss of time or pay, demotion or termination. The police also state that none of the exceptions in section 14(4) are applicable.

[31] The appellant submits that convictions and disciplinary records of police officers are public documents.

Analysis/Findings

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

[32] 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.

[33] 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). If any of paragraphs (a), (b) or (c) of section 14(4) apply to the record,

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[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.

if it exists, disclosure would not be an unjustified invasion of privacy. In this appeal, section 14(4) does not apply.

[34] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure is presumed to be an unjustified invasion of 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.[10]

[35] The appellant has sought access to the discipline records of three police officers. If discipline records did exist, they would contain information about these officers' positions, job responsibilities, career histories, performance appraisals, or other human resource-related characteristics. This information is normally associated with a person's employment history.[11] Accordingly, I find that any discipline records would contain the employment history of the police officers that are the subject of discipline proceedings, and therefore, the presumption in section 14(3)(d) would apply.

[36] I find that part 1 of the section 14(5) test has been met. I will now consider part 2 of the test.

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

[37] 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.

[38] Disciplinary records of police officers may be public documents in certain circumstances,[12] or disclosure of these types of records may be required in certain criminal proceedings.[13] However, the issue before me is not whether specific records are public documents but whether under the *Act* the police can, in the circumstances of this appeal, under section 14(5) confirm or deny the existence of disciplinary records of three named police officers.

[39] In Order PO-3071, Adjudicator Faughnan determined that confirming the existence of reimbursement records for investigations of judicial discipline would be tantamount to confirming that an investigation of a named member of the judiciary. Therefore, he found that section 21(5) of the provincial *Act* applied.

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[10] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[11] Order P-256.
[12] See *Police Services Act*, R.S.O. 1990, c. P.15, and https://www.oiprd.on.ca/CMS/Investigations/Results-of-disciplinary-hearings.aspx.
[13] *R. v. McNeil*, 2009 SCC 3, relying on *R. v. O'Connor*, [1995] 4.S.C.R. 411 and *R. v. Stinchcombe*, [1991] 3 S.C.R. 754.

[40] In Order MO-2402, the record was a copy of a report pertaining to a police investigation of certain circumstances relating to an identified individual. Adjudicator Faughnan determined that confirming whether an individual had been involved with the police in the context of a law enforcement investigation would constitute an unjustified invasion of personal privacy and that section 14(5) applied.

[41] I find that disclosure of the fact that records exist (or do not exist) in this appeal would in itself convey information to the appellant about whether the named police officers have been subject to disciplinary proceedings. The nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy under section 14(1).

[42] Accordingly, I find that the police have met both parts of the test under section 14(5). In making this finding, I have considered both the police's and the appellant's representations on this issue.

[43] I have also considered whether there is a compelling public interest in disclosure of the existence or non-existence of any disciplinary records about the three named police officers under section 16 of the *Act*.[14]

[44] Based on a careful review of the appellant's confidential representations in particular, I find that the appellant has not established the existence of a compelling public interest in the disclosure of the existence of disciplinary records of the three named police officers that is sufficient to override the application of section 14(5) of the *Act*. I find that the appellant's interest in the existence of these records is private in nature.[15] In addition, as stated above, I find that another public process or forum has been established to address any public interest considerations.[16]

ORDER:

I uphold the decision of the police to refuse to confirm or deny the existence of records.

Original signed by: May 30, 2013
Diane Smith
Adjudicator

[14] See section 16 of the *Act*.
[15] Orders P-12, P-347 and P-1439.
[16] See footnotes 12 and 13 and also see Orders P-123/124, P-391 and M-539.