

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3656

Appeal MA17-273-2

Kingston Police Services Board

September 11, 2018

Summary: The appellant submitted a multi-part request to the Kingston Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) seeking access to information about incidents that occurred at a specified address involving named individuals. The police refused to confirm or deny the existence of records responsive to some parts of the request relying on section 14(5) of the *Act*. The appellant appealed the decision. During the inquiry, the matter was narrowed and the only issue remaining on appeal was the police's refusal to confirm or deny the existence of responsive records to one part of the request, as clarified by a subsequent letter. In this order, the adjudicator upholds the police's refusal to confirm or deny the existence of records responsive to that part of the request because she accepts that disclosure of the very fact of their existence or non-existence would itself convey information that ought to be withheld under the *Act*.

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") and 14(5).

OVERVIEW:

[1] The appellant submitted request to the Kingston Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

1. All records ([specified file number]) regarding inventarisation [sic] I have done in November 2015, on [specified address], tenants: [named individual] and [named

individual]. I sent the following email to my husband after I delivered to [specified address] to note that we will be doing inventarisation [sic].

2. The record for the usage by [named individual] of our address and making another false claim to get ~\$7000.
3. The confirmation that [named individual] called police while our gardener [named individual] has been working on [specified address], but no charges were [laid] against him.
4. Information about the calling child protective service on a [specified address] incorrectly assigned to me.

[2] The police issued a decision granting partial access to the records responsive to item 1 of the request. Access to the portions that were withheld was denied pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*, taking into account the presumption against disclosure for information compiled as part of a law enforcement investigation at section 14(3)(b).

[3] The appellant appealed the decision to this office claiming that the police had not issued a decision letter responding to the entirety of her request within the time set out in section 19 of the *Act*. Appeal MA17-273 was opened.

[4] During the processing of Appeal MA17-273, the police issued a supplemental decision letter reusing to confirm or deny the existence of any records responsive to items 2 and 3 of the request, pursuant to section 14(5) of the *Act*. In their supplemental decision letter, the police noted:

Items 2 and 3 appear to only refer to named third parties and do not appear to relate to you at all. If such records existed (and I am neither confirming this nor denying this) then even the acknowledgement of the existence of such records could constitute an unjustified invasion of personal information.

It would be the position of the Kingston Police that if such records did exist, they would clearly be in the context of a Police investigation and therefore the release of such records (or even their existence) would constitute an unjustified invasion of personal privacy as defined in section 14(3)(b).

[5] With respect to item 4, the police advised that no responsive records were located and noted that such information may relate to a child protective services investigation in which the police were not involved. The police referred the requester to the relevant Child and Family Services agency.

[6] As the police had issued a decision responding to the remaining items of the appellant's request, Appeal MA17-273 was closed.

[7] The appellant subsequently advised that she was appealing the police's decision to deny access to portion of the records responsive to item 1 of her request as, well as the police's supplemental decision that addressed items 2, 3 and 4 of her request. As a result, Appeal MA17-273-2 was opened.

[8] During mediation, the appellant initially advised that she seeks access to the information responsive to item 1, which was withheld under section 14(1) of the *Act*. She also advised that she is appealing the police's decision to refuse to confirm or deny the existence of records responsive to items 2 and 3. Finally, the appellant advised that she believes that records responsive to item 4 of her request should exist and therefore, the reasonableness of the police's search for such records is also at issue.

[9] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage for an Adjudicator to conduct and inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal, to the police, initially.

[10] In between the police's receipt of the Notice of Inquiry and its submission of representations, the appellant sent the police and this office a letter by email in which she indicates that she now only seeks information listed in points A and B of the letter, which relate to item 3 in her original request. Those points state:

- a. The information with names deleted as before and only provided dates when police [were] called [to specified address] between [specified dates] and that there were no charges ...
- b. Please provide confirmation of the comment I received from [the police's Freedom of Information Coordinator] by phone that they did not pursue the investigation on [specified date] or charges because tenants stated that property manager asked them to empty garage....

[11] The police interpreted the appellant's clarification letter as indicating that the only information that she continues to seek access to is information that relates to item 3 of her original request, as clarified by points (a) and (b) as set out above. As a result, the police take the position that the appellant is no longer seeking access to third party personal information, thereby removing Issues B and C in the Notice of Inquiry from the scope of the appeal. Their interpretation of the clarification letter also led them to take the position that the appellant no longer seeks records responsive to item 4 of her original request and therefore, that the issue of reasonable search (Issue E in the Notice of Inquiry) is also no longer at issue. The appellant does not dispute this interpretation.

[12] Reflective of their interpretation of the clarification letter, the police provided this office with representations on Issue D of the Notice of Inquiry, addressing only their reliance on section 14(5) of the *Act* to refuse to confirm or deny the existence of any records responsive to item 3 of the appellant's request, as clarified by items (a) and (b) of her letter.

[13] In their representations, the police advised that in their view, their submissions on Issue D, their reliance on section 14(5) of the *Act*, are subject to the confidentiality criteria set out in this office's *Code of Procedure* and *Practice Direction Number 7*. On review of their representations, I agreed with the police that the information set out therein would be exempt if contained in a record subject to the *Act*. Accordingly, in the interests of procedural fairness, I prepared a summary of the police's representations on Issue D, refuse to confirm or deny, that the police agreed could be shared with the appellant in the "Background" section of the Notice of Inquiry.

[14] I then sent a copy of the Notice of Inquiry to the appellant, seeking her representations. The appellant provided representations in response that do not dispute the police's interpretation of the issues on appeal in light of her clarification letter breaking down her original item 3. The appellant's representations only address matters related to records responsive to item 3 of her request, the existence of which the police have refused to confirm or deny.

[15] Accordingly, the sole issue that remains to be determined in this order is whether the police are entitled to rely on section 14(5) to refuse to confirm or deny the existence of records responsive to item 3 of the appellant's request, as clarified by items (a) and (b) of her subsequent letter.

[16] In this order, I uphold the police's decision to refuse to confirm or deny the existence of records responsive to item 3 of the appellant's request, pursuant to section 14(5) of the *Act*.

RECORDS:

[17] The records that remain at issue are any responsive records relating to item 3 of the appellant's request (clarified by items (a) and (b) of her letter), the existence or which the police refuse to confirm or deny.

ISSUES:

- A. Would the records, if they exist, contain "personal information" as defined in section 2(1)?
- B. Have the police properly applied the refuse to confirm or deny provision at section 14(5) of the *Act*?

DISCUSSION:

A. Would the records, if they exist, contain "personal information" as defined in section 2(1)?

[18] The police have refused to confirm or deny the existence of records responsive

to the request on the basis that section 14(5) of the *Act* applies because their disclosure would constitute an unjustified invasion of personal privacy. In order for an unjustified invasion of privacy to occur it must first be determined that the records, if they exist, would contain "personal information."

[19] The term "personal information" is defined, in part, in section 2(1) of the *Act* 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;

[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.¹

¹ Order 11.

Analysis and finding

[21] As section 14(5) can only apply if the records (if they exist) contain personal information, I will consider whether, based on the evidence before me, any responsive records would contain information that can be defined as “personal information.” For the reasons that follow, I find that if responsive records exist, they would.

[22] In item 3 of her request, the appellant seeks access to records that provide confirmation that a named individual called the police with a complaint against another named individual in an identified circumstance. The appellant also seeks information relating to any investigation that resulted from that communication, including confirmation that no charges were laid. Considering the nature of the information that the appellant seeks and the types of records in which it would be contained, I accept that any responsive records that might exist would contain the personal information of identifiable individuals other than the appellant. Specifically, responsive records, if they exist, would contain the personal information of the identified complainant and the identified individual against whom the suspected complaint might have been made, which would reveal their respective involvement in a police complaint or investigation. For the individual against whom the suspected complaint might have been made, it would also reveal whether or not charges were laid against them. Any responsive records that might exist would therefore contain the personal information of identifiable individuals other than the appellant of the type contemplated by paragraphs (b) and (h) of the definition of personal information in section 2(1) of the *Act*. They also would likely contain the contact information of the complainant and possibly that of the other individual named in the request, which would consist of personal information of the types set out in paragraphs (a), (c) and (d) of the definition that term. There is no evidence that any responsive records, if they exist, would contain the personal information of the appellant.

[23] I acknowledge that the appellant has indicated in her clarification letter that she does not seek the names of any individuals identified in any responsive record that might exist. However, given that her request specifically seeks records relating to a named individual regarding a complaint about another named individual, disclosure of any responsive records that might exist would clearly reveal the personal information of those identifiable individuals, even if their names were severed.

[24] I am satisfied that any responsive records, if they exist, would contain the personal information of identifiable individuals, other than the appellant, in accordance with the definition of that term in section 2(1) of the *Act*.

B. Have the police properly applied the refuse to confirm or deny provision at section 14(5) of the Act?

[25] 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.

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

[27] 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.²

[28] 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.

[29] 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.³

Analysis

[30] For the following reasons, I accept that the police are entitled to apply section 14(5) to refuse to confirm or deny the existence of records responsive to item 3 of the appellant's request.

² Order P-339.

³ Orders PO-1809 and 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.

Part one: Would disclosure of the record (if it exists) be an unjustified invasion of personal privacy?

[31] Under part one of the section 14(5) test, the police 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. As set out above, I have found that any records responsive to item 3 of the request, if they exist, would contain the personal information of identifiable individuals, other than the appellant, and not the personal information of the appellant.

[32] To determine whether the disclosure of personal information can be considered to be an unjustified invasion of personal privacy, the factors and presumptions in sections 14(2), (3), and (4) provide guidance. Section 14(2) provides some factors for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[33] Where a record does not contain the requester's own personal information (as would be the case in this appeal if any responsive records were to exist), once a presumed unjustified invasion of personal privacy is established under section 14(3), it can only be overcome if section 14(4) or the "public interest override" at section 16 applies.⁴ In the circumstances before me, the exceptions at section 14(4) do not apply and the public interest override was not raised.

[34] As previously mentioned, the police provided confidential representations in support of its decision to refuse to confirm or deny the existence of responsive records. I have considered those representations when reaching my determination with respect to the matters before me in this appeal. In the summary of those representations that was provided to the appellant in the Notice of Inquiry, it was stated that the police submit that the disclosure of any responsive records that might exist would be an unjustified invasion of personal privacy of the individuals identified in the request because that personal information would have been compiled or identifiable as part of an investigation into a possible violation of law. The police submit that disclosure of any responsive records that might exist would therefore amount to a presumed unjustified invasion of that individual's personal privacy under section 14(3)(b) of the *Act*.

[35] Section 14(3)(b) 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

⁴ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

necessary to prosecute the violation or to continue the investigation.

[36] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires there be an investigation into a possible violation of law.⁵ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁶

[37] I have considered the representations of the police and the wording of the request (and clarification) which suggests the nature and content of any records that might be responsive to the request, if they exist. I find disclosure would constitute a presumed unjustified invasion of personal privacy as contemplated by section 14(3)(b). The request itself is for records documenting communications between the police and a specified individual. The appellant clarifies that she seeks access to records that confirm the individual contacted the police and also records that confirm that an investigation into the matter was not pursued and charges were not laid. Based on the evidence before me, I accept that any responsive records, if they exist, would properly be described as personal information compiled and identifiable as part of an investigation into a possible violation of law. I also accept that their disclosure would be presumed to be an unjustified invasion of personal privacy of the individual to whom they relate.

[38] As I have found that disclosure of the responsive records, if they exist, would amount to a presumed unjustified invasion of personal privacy under section 14(3), I find that the police have satisfied part one of the section 14(5) test.

Part two: Would disclosure of the fact that the record exists (or does not exist) in itself convey information to the requester, and is the nature of the information conveyed such that disclosure would constitute an unjustified invasion of personal privacy?

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

[40] The summary of the police's confidential representations set out that it is their view that simply confirming the existence of any record that might be responsive to the request would effectively confirm the events as detailed by the appellant, whether or not those events were supported by the record. The police also submit that confirming whether or not records responsive to the request exist could provide false confirmation of details that may or may not be true.

[41] Considering the representations of the police and the evidence before me, I find disclosure of the fact that records containing the type of information requested exist or do not exist would reveal personal information about identifiable individuals and would

⁵ Orders P-242 and MO-2235.

⁶ Orders MO-2213, PO-1849 and PO-2608.

be an unjustifiable invasion of those individuals' personal privacy.

[42] Disclosure of the existence of responsive records would confirm the fact that the individuals identified in the request have been involved with the police in the context of a law enforcement matter. I accept that this type of information qualifies as the personal information of these individuals as defined in paragraphs (b) and (h) of the definition of that term in section 2(1), as well as under the introductory wording of that section. As a result, disclosure of the very existence of the records would reveal personal information that was compiled and is identifiable as part of an investigation into a possible violation of law and would therefore be a presumed unjustified invasion of personal privacy under at section 14(3)(b).

[43] Disclosure of the non-existence of responsive records would also reveal the personal information of the individuals in question as it would confirm the fact that the suspected complainant did not make contact with the police, an investigation was not pursued and charges were not laid against the other individual identified in the request. In my view, this type of information qualifies as the personal information of the identified individuals within the meaning of paragraphs (b) and (h) of the definition of that term in section 2(1), as well as the introductory wording of that section. No considerations favouring disclosure of the non-existence of responsive records, if they exist, have been raised, nor do I find that any apply. Accordingly, given that the appellant's personal information is not at issue (if the records exist), in the absence of any consideration favouring disclosure I find that disclosure of the non-existence of responsive records would also be an unjustified invasion of the personal privacy of individuals other than the appellant.

[44] Accordingly, I find that the disclosure of the existence or non-existence of responsive records would itself convey information to the appellant, and the nature of the information conveyed is such that its disclosure would constitute an unjustified invasion of personal privacy of identifiable individuals.

[45] Accordingly, I find that the police have established the second of the two requirements that must be met for section 14(5) to apply.

[46] Section 14(5) is a discretionary exemption. I must therefore review the police's exercise of discretion in deciding to rely on this section to refuse to confirm or deny the existence of records responsive to item 3 of the request, if they exist. On appeal, this office may review the police's decision in order to determine whether it exercised its discretion and, if so, whether it erred in doing so.

[47] I may find that the police erred in exercising their discretion and send the matter back to the police for a re-exercise of discretion based on proper consideration if it is determined that they have exercised their discretion in bad faith or for an improper purpose, they took into account irrelevant considerations, or they failed to take into account relevant considerations.

[48] In the circumstances of this appeal, based on the representations of the police

and the nature of the information that any responsive records that might exist would contain, I am satisfied that the police considered relevant considerations and did not act in bad faith or for an improper purpose.

[49] Accordingly, I conclude that the police exercised their discretion appropriately in relying on section 14(5) to refuse or deny the existence of records responsive to item 3 of the appellant's request and I will uphold their decision to do so.

ORDER:

I uphold the decision of the police.

Original Signed by: _____
Catherine Corban
Adjudicator

September 11, 2018 _____