

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4041

Appeal MA20-00018

Toronto Police Services Board

April 27, 2021

Summary: After suffering injuries at an incident to which the police were called, a cyclist made a request to the police for records about the incident. The police granted partial access to the records, withholding some of the information on the basis that disclosure of the remaining information would be an unjustified invasion of the personal privacy of other individuals under section 38(b) of the *Act*.

In this order, the adjudicator orders disclosure of the name and address of a particular individual, after weighing the presumption for law enforcement investigations (section 14(3)(b)) against the interests of the appellant to a fair determination of rights (section 14(2)(d)). The adjudicator also orders disclosure of some of the withheld information that does not constitute personal information of any individual. The adjudicator upholds the balance of the police's decision.

In reaching this conclusion, the adjudicator rejected the appellant's claims that disclosure was authorized by other legislation (section 14(1)(b)).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. c. M.56, sections 14(1)(a), 14(1)(b), 14(2)(d), 14(2)(f), 14(2)(h) and 14(3)(b); *Highway Traffic Act*, R.S.O. 1990, c. H.8, sections 199 and 200.

Orders Considered: Orders MO-2980, MO-1946-I, MO-1937, MO-3423, MO-3911, MO-3875 and MO-3028.

OVERVIEW:

[1] The Toronto Police Service was called to an incident involving an injured cyclist.

The officer who attended spoke to the cyclist and witnesses, including the driver of a car and another individual. No one was charged with a crime or offence as a result of the incident. The cyclist wishes to commence a civil claim against the driver of the car for damages.¹

[2] Counsel for the cyclist made a request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the police report, field notes and witness statements from the incident.

[3] The police located the responsive records and issued a decision in which they granted partial access to the cyclist, now the appellant. The police withheld some of the information about the driver and the other witness on the basis of the personal privacy exemptions in sections 14(1) and 38(b). The police specifically relied on the presumption in section 14(3)(b) (investigation into possible violation of law) to support the position that disclosure of the personal information would be an unjustified invasion of personal privacy.

[4] The appellant appealed the police's decision and raised, among other considerations, the possible application of the factor favouring disclosure of personal information at section 14(2)(d) (fair determination of rights) as an issue on appeal.

[5] An IPC mediator attempted to resolve the appeal but no resolution was possible and the appeal was transferred to the adjudication phase.

[6] I conducted a written inquiry into the appeal in which I invited and received representations from the police, the appellant, and the affected parties (i.e. the driver and the other witness). When necessary, I will refer to the affected parties individually as the driver and the witness.

[7] The non-confidential portions of the police's and the appellant's representations were shared with each other and the affected parties in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] The affected parties object to the disclosure of the withheld information and made confidential representations, which were not shared with any other parties in this appeal. The details of the affected parties' confidential representations are not described in this order; however, I wish to assure those parties that I have taken their views into consideration.

[9] As will be described more fully below, the appellant's main focus in the appeal is to obtain the driver's name, address, license, and insurance particulars so that he may

¹ This information is drawn from the non-confidential representations of the parties filed in this appeal.

commence a law suit for damages.

[10] For the reasons set out below, I order the police to disclose parts of the records that include the driver's name and address because I find that in the circumstances of this appeal, the section 38(b) exemption does not apply to that information. I also order the police to disclose some of the withheld information on the basis that it is not personal information. I uphold the balance of the police's decision.

RECORDS:

[11] The withheld information contained in a nine-page "General Occurrence Hardcopy" and two pages of hand-written notes.

ISSUES:

- A. Do the records contain the "personal information" of the appellant, the driver and/or the witness?
- B. Would disclosure of the information at issue be an "unjustified invasion" of personal privacy of the driver and/or the witness within the meaning of section 38(b) of the *Act*?
- C. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain the "personal information" of the appellant, the driver and/or the witness?

[12] The police assert that the records contain the personal information of the appellant and other individuals. The appellant does not specifically address this issue.

[13] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual," including information such as: an individual's age or marital status (paragraph (a)), any identifying number, symbol or other particular assigned to the individual (paragraph (c)), the address or telephone number of the individual (paragraph (d)), the views or opinions of another individual about the individual (paragraph (g)), or the individual's name if it appears with other personal information about the individual (paragraph (h)).

[14] Based on my review of them and considering them as a whole, I agree with the police that the records contain the personal information of the appellant and the affected parties. Because the records, when viewed as a whole, contain the appellant's

personal information, the police's decision must be made under section 36(1) of the *Act*. Section 36(1) of the *Act* gives individuals (like the appellant in this case) a general right of access to their own personal information, subject to certain exemptions, including the discretionary personal privacy exemption in section 38(b) that the police rely on in this appeal.

[15] As is clear, the police disclosed large portions of the records and have only withheld those portions that they say contain the personal information of the affected parties. I have examined the withheld information to determine whether it consists of the personal information of the affected parties.

[16] Based on my review, I find that while most of the withheld information consists of the personal information of the affected parties, some information does not. I have highlighted (in green) the information that does not consist of personal information on the copy of the records provided to the police with this order. Because the police have not made any alternative exemption claims for this information, I will order it to be disclosed.

[17] I will now consider the police's claims under section 38(b) to withhold the affected parties' personal information.

Issue B: Would disclosure of the information at issue be an "unjustified invasion" of personal privacy of the driver and/or the witness within the meaning of section 38(b) of the *Act*?

[18] To withhold the information at issue, the police rely on the discretionary personal privacy exemption at section 38(b) of the *Act*.² Section 38(b) states,

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

(b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

[19] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. The section 38(b) exemption is discretionary and the institution may also decide to disclose the information to the

² In contrast, where a record contains personal information of another individual but not the requester, the exemption claim is assessed under mandatory personal privacy exemption in section 14(1), which prohibits an institution from disclosing that information unless an exception applies.

requester.³

[20] In the context of this appeal, sections 14(1) to (3)⁴ provide guidance in determining whether the unjustified invasion of personal privacy threshold in section 38(b) is met.⁵ 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 section 38(b) exemption does not apply.

[21] If section 14(1) does not apply, the *Act* requires me to determine whether disclosure would be an unjustified invasion of personal privacy by considering and weighing the factors and presumptions in sections 14(2) and (3) and balancing the interests of the parties.⁶ The list of factors under section 14(2) is not exhaustive and other circumstances that are relevant must be considered.⁷

[22] The police argue that disclosure would constitute an unjustified invasion of personal privacy and point specifically to sections 14(3)(b) and 14(2)(h) in support of their arguments.

[23] The appellant disagrees and argues on the basis of sections 14(1)(a), 14(1)(d) and 14(2)(d), that disclosure would not constitute an unjustified invasion of personal privacy.

[24] Viewing all of the representations as a whole, including the confidential representations of the affected parties and the records themselves, it is also necessary to consider whether section 14(2)(f) applies in this appeal.

Sections 14(1)(a) (consent) and (d) (authorized by another Act)

[25] I will deal first with the appellant's section 14(1) arguments. For the reasons set out below, I find that section 14(1) does not apply to the information at issue.

Section 14(1)(a) – consent

[26] The appellant refers to section 14(1)(a), which would apply if the affected parties provided consent to the disclosure of their personal information to the appellant. In relation to this issue, the appellant points to statutory duties that the driver may have had to report information about the incident to investigating police officers and other parties.

³ The police's exercise of discretion is discussed further at Issue C, below.

⁴ Although section 14(4) is ordinarily relevant to this issue, it is not in the circumstances of this appeal and I therefore do not address it in this order.

⁵ Order MO-2980.

⁶ Orders MO-2954 and Order P-239.

⁷ Order P-99.

[27] Although invited to do so, the driver does not consent to disclosure under the *Act*. The driver's decision not to consent to disclosure under the *Act* is a separate issue than whether the driver has complied with other accident reporting duties that he may have had.

[28] Because the driver does not consent, section 14(1)(a) does not apply.

Section 14(1)(d) – authorized by another Act

[29] The appellant relies on section 14(1)(d), which states [emphasis added]:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure.

[30] In order for section 14(1)(d) to apply, there must either be specific authorization in the statute for the disclosure of the type of personal information at issue, or there must be a general reference to the possibility of such disclosure in the statute together with a specific reference to the type of personal information to be disclosed in a regulation.

Representations

[31] The appellant refers and relies on section 200(1)(c) of the *Highway Traffic Act*.⁸ Section 200 of the *Highway Traffic Act* states:

200 (1) Where an accident occurs on a highway, every person in charge of a vehicle or street car that is directly or indirectly involved in the accident shall,

(a) remain at or immediately return to the scene of the accident;

(b) render all possible assistance; and

(c) upon request, give in writing to anyone sustaining loss or injury or to any police officer or to any witness his or her name, address, driver's licence number and jurisdiction of issuance, motor vehicle liability insurance policy insurer and policy number, name and address of the registered owner of the vehicle and the vehicle permit number.
R.S.O. 1990, c. H.8, s. 200 (1); 1997, c. 12, s. 16.

⁸ R.S.O. 1990, c. H.8.

Penalty

(2) Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not less than \$400 and not more than \$2,000 or to imprisonment for a term of not more than six months, or to both, and in addition the person's licence or permit may be suspended for a period of not more than two years. 2009, c. 5, s. 54.

[32] The appellant states that section 200(1)(c) of the *Highway Traffic Act* requires the driver to provide their personal details to the appellant.

[33] In reply, the police state that the *Highway Traffic Act* does not apply to the incident because it was not a "motor vehicle accident" within the meaning of the *Highway Traffic Act*. In support of this contention, the police provided additional details about the incident.

[34] In sur-reply on this point, the appellant argues that the incident qualifies as a motor vehicle accident within the meaning of the *Highway Traffic Act*.

[35] As described below, it is not necessary for me, nor is it my role, to make findings about what happened at the incident, so I have not summarized the parties' submissions on this point.

Finding – section 14(1)(d) does not apply

[36] The issue I am required to determine under section 14(1)(d) is whether the *Highway Traffic Act* expressly authorizes the police to disclose the information at issue under the *Freedom of Information and Protection of Privacy Act*, as argued by the appellant. For the reasons that follow, I find that in this appeal section 200(1)(c) of the *Highway Traffic Act* does not provide sufficient authorization to permit the police to disclose the information at issue.

[37] A point of significant disagreement between the police and the appellant is whether the incident was a "motor vehicle accident" and whether the *Highway Traffic Act* applies to the incident at all. For purposes of section 14(1)(d), I need not determine or make findings about whether the *Highway Traffic Act* applies to the kind of incident that occurred because I find that even if it did, the *Highway Traffic Act* does not contain sufficient authority to permit the police to disclose the information at issue under section 14(1)(d) of the *Act*.

[38] This office has considered whether the *Highway Traffic Act* is sufficient authorization for purposes of section 14(1)(d) before. In Order MO-1937 the adjudicator stated:

Previous orders of this office have said that the interpretation of the words "expressly authorizes" in section 14(1)(d) of the *Act* closely mirrors the

interpretation of similar words in section 28(2) of the *Act* and its provincial counterpart, section 38(2) of the *Freedom of Information and Protection of Privacy Act* [Orders M-292, M-1154, MO-1366, MO-1693]. In the Commissioner's Compliance Investigation Report I90-29P, the following comments are made about the latter section:

The phrase "expressly authorized by statute" in subsection 38(2) of the [provincial] Act requires either that the specific types of personal information collected be expressly described in the statute or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute, i.e., in the form or in the text of the regulation.

In this case, although section 200(1)(c) of the *Highway Traffic Act* refers to specific information, it authorizes disclosure by individuals who are involved in the accident, not by the Police. In my view, this is fatal to the possible application of section 14(1)(d).

[39] I agree with and adopt the reasoning of the adjudicator in Order MO-1937.⁹ Specifically, I find that section 200(1)(c) of the *Highway Traffic Act* does not contain sufficient language to "expressly authorize" the police to disclose the information at issue under the *Act*. Section 200, in general, deals with the obligations of those involved in an accident to cooperate and disclose information to law enforcement or others involved at the scene of the accident, not the obligations and duties of the police to disclose information to third parties or the public.

[40] My jurisdiction is limited to reviewing the police's decision under the *Act*, not the obligations of other individuals at the scene of the incident or otherwise enforcing the *Highway Traffic Act*.

[41] I find that section 14(1)(d) does not apply to the information at issue but this does not end the matter. I will now consider and weigh the relevant factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.

Section 14(3) presumptions and section 14(2) factors

[42] The purpose of this section of the order is to determine whether disclosure of the withheld information would constitute an unjustified invasion of the personal privacy of the affected parties. To do so, I must consider, weigh and balance relevant presumptions and considerations guided by the *Act*.

⁹ Also followed in Order MO-1946-I.

[43] I will first determine which presumptions and considerations are relevant to the present appeal. I will then will weigh the relevant considerations and balance the interests of the parties.

[44] The reasons that follow explain why I have determined that disclosure of the name and address of the driver would not constitute an unjustified invasion of the driver's privacy but that disclosure of any of the remaining information (of the driver and the witness) would.

Section 14(3)(b) – investigation into violation of law

[45] If the appeal did not deal with records that also contain the appellant's personal information, a finding that section 14(3)(b) applied would create a *presumption* that disclosure of the information would constitute an unjustified invasion of personal privacy.¹⁰ However, because this appeal deals with records that also contain the appellant's personal information, if section 14(3)(b) is established, it is simply weighed and considered with the other relevant considerations.¹¹

[46] Section 14(3)(b) states,

A disclosure of information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) 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;

[47] A finding that the section 14(3)(b) presumption is present will weigh in favour of withholding the personal information at issue. It is well established that section 14(3)(b) may still apply even if no criminal proceedings were commenced against any individuals, such as the circumstances of the present appeal.¹² Section 14(3)(b) only requires that there be an investigation into a possible violation of law.¹³

Representations

[48] As noted above, the police submit that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law. Referring to Order MO-3423, which involved similar circumstances, the police submit that I should

¹⁰ A presumption that could only be rebutted under section 23 of the *Act*, which permits disclosure when there is a compelling public interest that overrides the privacy protection.

¹¹ See Orders MO-2954 and MO-2980 for further discussion on this point.

¹² See for example Order MO-3911.

¹³ Orders P-242 and MO-2235.

find that section 14(3)(b) applies to the information at issue.

[49] The appellant does not dispute that the information at issue was collected as part of an investigation into a possible violation of law, but he does not specifically address the implications of the presumption in section 14(3)(b).

Finding – section 14(3)(b) is a relevant consideration and weighs in favour of privacy protection of the personal information of the driver and the witness

[50] Based on my review of the records and the background context, I find that the records were created as part of an investigation into a possible violation of the law, even though no charges were laid. I find therefore that the section 14(3)(b) presumption applies to the information at issue and weighs in favour of a finding that disclosure of the withheld information would constitute an unjustified invasion of the personal privacy of both the driver and the witness. Although this factor must be weighed against other present factors, it is my view that the presumptive nature of section 14(3)(b) means that it should be given greater weight.

Section 14(2)(d) – fair determination of rights

[51] The appellant says that section 14(2)(d) applies and that the appellant's interests in pursuing a law suit against the driver should weigh heavily in favour of disclosure of the personal information.

[52] A finding that the section 14(2)(d) factor applies would weigh in favour of disclosing the personal information at issue. Section 14(2)(d) states,

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[53] For section 14(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and,

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹⁴

Representations

[54] The appellant submits that he suffered serious injuries as a result of the incident and he believes that the driver is responsible for the injuries. He intends to commence a civil action for damages against the driver. He argues that if the information at issue is not disclosed, he will not be able to identify the driver and owner of the car and will therefore be unable to commence the law suit and recover compensation from the driver. The appellant's representations focus specifically on the need for the "name, driver's licence, insurance particulars, and address" of the driver.

[55] The police do not appear to dispute that section 14(2)(d) is a relevant factor but they submit that the appellant's interests in a fair determination of his rights do not outweigh the privacy rights of other individuals. The police quote from a passage in Order MO-2980, which emphasizes that even if certain information is relevant to a fair determination of rights, this interest must be balanced against an individual's right to privacy. The quoted passage in Order MO-2980 also indicates that prior IPC orders have found that the existence of disclosure and discovery procedures under the *Rules of Civil Procedure*¹⁵ have been found to reduce the weight to be given to the section 14(2)(d) factor.

[56] Regarding section 14(2)(d), the police also submit that when individuals provide information to law enforcement agencies, they expect that it will be maintained in confidence. These arguments are more relevant to those made by the police under section 14(2)(h) and I will return to them below.

[57] Although the police do not appear to dispute the relevance of this factor, the police (and the appellant) used a considerable portion of their representations to discuss whether the *Highway Traffic Act* applied to the incident and, generally speaking, whether the driver's conduct was culpable. I have not repeated the details of these competing allegations and positions because I will make no finding about the possible application of the *Highway Traffic Act* or the merits of any possible civil claim that the appellant may make against the driver.

¹⁴ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

¹⁵ R.R.O. 1990, Reg. 194.

Finding – section 14(2)(d) is a relevant consideration and weighs in favour of disclosure of some of the driver’s personal information

[58] In my view, section 14(2)(d) is a relevant consideration that weighs in favour of disclosure of some of the information at issue.

[59] The appellant has established the elements of the above-described four part test. He has a right and an intention to commence a lawsuit for damages arising from the incident. As I understand it, the claim will be based on the common law or statutory duties of the driver. In reaching this conclusion, I make no finding or assessment about the merits of a potential claim.

[60] The identity and some contact information for the driver is significant to a potential lawsuit and I find that the identity of the driver and his address is required for the law suit. However, the remaining personal information of the driver and the personal information of the witness is not necessary or required to commence a lawsuit and so this factor has no bearing on disclosure of that information.

[61] As noted by the police by referencing Order MO-2980, the IPC has found in previous orders that the existence of disclosure processes available to parties under the *Rules of Civil Procedure* reduces the weight that should be given to the section 14(2)(d) factor. As an alternative to the procedures under the *Act*, the appellant could commence a law suit against the driver as an unnamed defendant and then use the *Rules of Civil Procedure* to obtain the driver’s name and contact information. Like the adjudicator in Order MO-2980,¹⁶ I agree that the existence of other possible methods of access does not preclude the appellant from exercising his access rights under the *Act*; however, this fact also reduces the weight that I will give to this factor when balancing it with other interests.

Section 14(2)(f) – highly sensitive

[62] It is also necessary to consider whether section 14(2)(f) is a relevant factor. Although not specifically raised by any party, both the representations and information at issue touch on considerations that are relevant to this factor.

[63] Section 14(2)(f) states,

A head in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive;

¹⁶ Also followed in other orders including Order MO-3875.

[64] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁷ If section 14(2)(f) applies, it would weigh in favour of withholding the personal information at issue.

[65] The adjudicator in Order MO-2980 discussed whether disclosure of an individual's name and address could be considered highly sensitive in a similar case involving a request to the Toronto police for contact information of a dog owner by a person who suffered a dog bite.

[66] The adjudicator in Order MO-2980 found that whether names and addresses are highly sensitive must be determined on a case by case basis. He observed that an individual's name and address is not always sensitive information, citing the fact that most individuals appear in publicly-available directories. However, he also observed that the collection of witness' names and addresses by law enforcement agencies could result in the information being more sensitive information, although not necessarily highly sensitive.

[67] Taking into account that no criminal charges were laid in the dog bite incident, the adjudicator in Order MO-2980 found that the sensitivity of the personal information at issue was reduced. He accepted that disclosure of an individual's name and contact information to the requester might cause distress but not significant personal distress necessary for section 14(2)(f) of the *Act* to apply.

[68] I agree with the analysis of the adjudicator in Order MO-2980 and apply it to the circumstances of the present appeal. I find that that names and addresses of both the driver and the witness is not highly sensitive information. I accept that disclosure of their names and addresses may cause distress, but I am unable to conclude that it would cause significant personal distress.

[69] The withheld personal information contains more than just names and addresses. Without disclosing the nature of that information and in reliance in particular on the confidential representations made by the affected parties, I find that disclosure of the remaining information would cause significant personal distress to both the driver and the witness. This consideration weighs heavily in favour of withholding the personal information that does not consist of names and addresses.

Section 14(2)(h) – supplied in confidence

[70] The police submit that section 14(2)(h) is relevant and weighs in favour of privacy protection. Section 14(2)(h) states,

¹⁷ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all relevant circumstances, including whether,

(h) the personal information has been supplied by the individual to whom the information relates in confidence

[71] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁸

Representations

[72] The police begin by explaining that records created and maintained by law enforcement agencies are unique and therefore give rise to special considerations. The police say that because of the nature of their work and the *Act*, they have a greater responsibility than most institutions to safeguard the privacy interests of individuals who have provided personal information to police officers in the course of law enforcement activities. The police say that their investigations involve an element of trust and an expectation that they will act responsibly with the personal information that they collect.

[73] The police reiterate the purpose of section 14(2)(h), citing Order MO-3028. They say that any time an individual provides their personal information to the police, there is an expectation that the information will be held in confidence. The police elaborate that if such information was "routinely disclosed" it could negatively impact the trust that the public has in the police and that this mistrust would deter the public from cooperating with the police when responding to any incidents. Further, the police say that disclosure of the withheld information would invalidate the obligations the police have to maintain confidentiality over the personal information that they collect.

[74] The appellant denies that disclosure would have any impact on the public's overall cooperation with law enforcement investigations. He argues that there is no expectation of confidentiality in the context of traffic accident investigations. In support, he refers to section 199 of the *Highway Traffic Act*, which outlines the duty of those involved in accidents to report information to proper authorities.

[75] He also argues that one of the reasons why the police investigate, create, and maintain records is to assist society in adjudicating fault for the purpose of potential civil actions. He submits, "Every motorist knows that they are required to cooperate

¹⁸ Order PO-1670.

with police investigating a traffic accident, and every motorist knows that they can be found civilly liable if they were negligent.”

[76] In reply, the police concede that there is no expectation of confidentiality in the context of traffic accident investigations. However, they say that the incident at issue was not a traffic accident investigation and that the ordinary considerations therefore do not apply.

Finding – section 14(2)(h) is a relevant consideration and weighs in favour of privacy protection of the personal information of the witness but is not relevant to the information of the driver

[77] As it relates to the driver, I find that there is no objective basis to conclude that he had an expectation of confidentiality over the personal information that he provided to the police at the scene of the incident. He is a driver responsible for his car at an accident scene involving other people that was investigated by the police. In reaching this conclusion, I have taken into account that the police accept that people involved in traffic accident investigations may not have an expectation of confidentiality over information disclosed to the police.

[78] I acknowledge that the driver’s expectations may have changed after he was told that the police would not be charging him with any offence; however, I am unable to conclude that when he supplied the information to the police initially he had any objective basis to expect it would be maintained in confidence and this factor is therefore not relevant to determining whether disclosure of his personal information constitutes an unjustified invasion of personal privacy.

[79] As it relates to the witness, I find that there is an objective basis to conclude that they had an expectation of confidentiality over all of the personal information that they provided to the police at the scene. I find therefore that the section 14(2)(h) factor applies and weighs in favour of withholding that information.

Conclusion, weighing and balancing the interests of the parties

[80] To summarize, I have made the following findings above:

- The section 14(3)(b) presumption for information gathered in the course of law enforcement applies and weighs heavily in favour of a finding that disclosure of the withheld information would constitute an unjustified invasion of the personal privacy of both the driver and the witness.
- The section 14(2)(d) consideration involving the appellant’s fair determination of rights is relevant and weighs in favour of disclosure of the driver’s name and address.

- With the exception of the names and addresses of the driver and the witness, the section 14(2)(f) consideration for highly sensitive information weighs in favour of withholding all of the remaining personal information.
- The section 14(2)(h) consideration for information supplied in confidence applies and weighs in favour of withholding the witness' personal information.

[81] Taking all of the above considerations into account and balancing the interests of the parties, I find that it would not be an unjustified invasion of personal privacy to disclose the name and address of the driver only. However, I agree with the police that disclosure of the remaining information would constitute an unjustified invasion of personal privacy under section 38(b).

[82] To reach this conclusion, I have placed significant weight on the fact that the information at issue was gathered in a law enforcement investigation and that the only factor that weighs in favour of disclosure is section 14(2)(d), the fair determination of rights. In my view, because all of the other factors support privacy protection, it is appropriate only to order disclosure of only the information that is necessary to meet the interests advanced by section 14(2)(d).

[83] In summary, I find that disclosure of the information highlighted in yellow on the copy of the records provided to the police with this order would not constitute an unjustified invasion of personal privacy under section 38(b) and I will therefore order it to be disclosed.

[84] Because I have upheld the police's application of the section 38(b) exemption to withhold the remaining information, I must consider whether they exercised their discretion when they made that decision.

Issue C: Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[85] Although I have found that the section 38(b) exemption applies to some of the information at issue, the section 38(b) exemption is discretionary, and this office has a duty to review the police's exercise of discretion.

[86] The IPC's jurisdiction to review an institution's exercise of discretion emphasizes that even if a record is eligible for a discretionary exemption, the institution may nevertheless decide to disclose it. Review of the institution's exercise of discretion is separate from the IPC's jurisdiction to review whether a record is eligible for the exemption.

[87] An institution must exercise its discretion. This means that in addition to determining whether a discretionary exemption applies, it must also ask whether the record should nevertheless be disclosed.

[88] Also, an institution must not err when exercising its discretion. An institution may be found to have erred where, for example,

- it acts in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or,
- it fails to take into account relevant considerations.

[89] If an institution fails to exercise its discretion or it does so improperly, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁹ This office may not, however, substitute its own discretion for that of the institution.²⁰

[90] Relevant to the present appeal, this office has found in previous orders that following considerations are relevant:²¹

- the purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited and specific;
- 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;
- whether disclosure will increase public confidence in the operation of the institution;
- the relationship between the requester and any affected persons;
- 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.

¹⁹ Order MO-1573.

²⁰ Section 54(2).

²¹ Not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant: Orders P-344 and MO-1573.

Representations

[91] The police submit that they exercised their discretion properly and that it should therefore be upheld. They say that they took all relevant considerations into account, including the purpose of the *Act* and the interests protected by section 38(b) in good faith, unmotivated by any improper purpose. The police refer to Order MO-3681 as an example of when this office has upheld their exercise of discretion.

[92] The appellant's argument focused on whether the section 38(b) exemption applied and did not address specifically whether the police exercised their discretion. However, when I consider the appellant's arguments overall, I understand him to argue that the police ought to have disclosed the information at issue and he inherently makes the claim that the police did not take into account the appellant's interests when they withheld the information at issue.

Findings

[93] Recall that I have determined that some of the withheld information will be disclosed for the reasons described above. However, I have determined that the remaining withheld information is eligible for the section 38(b) exemption, subject only to my review of the police's exercise of discretion.

[94] There is no evidence that the police took into account irrelevant considerations or exercised their discretion in bad faith. I find that when exercising their discretion, the police had regard to appropriate considerations – namely the privacy interests of the affected parties and the interests of the appellant.

[95] The appellant objected to the weight given by the police to these competing interests. However, there is no basis to claim that the police did not take these interests into account.

[96] I find that the police properly exercised their discretion and I uphold it.

ORDER:

1. By **June 1, 2021**, but not before **May 27, 2021**, I order the police to disclose the information that I have found not to constitute personal information to the appellant. I have indicated this information by highlighting it in green in the copy of the records provided to the police with this order.
2. By **June 1, 2021**, but not before **May 27, 2021**, I order the police to disclose the information that I have found not to be eligible for the section 38(b) exemption to the appellant. I have indicated this information by highlighting it in yellow in the copy of the records provided to the police with this order.

3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require the police to provide the IPC with a copy the records sent to the appellant.
4. The timelines in this order may be extended if the police are unable to comply in light of the current COVID-19 pandemic. I remain seized of the appeal to address any timeline-related issues if the parties are unable to resolve them.

Original Signed by: _____

Valerie Jepson
Adjudicator

_____ April 27, 2021