Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4050

Appeal MA19-00397

Halton Regional Police Services Board

May 12, 2021

Summary: The Halton Regional Police Service (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all notes and reports of an identified police officer relating to the appellant's daughter for a specified period. The police took the position that the appellant could not exercise a right of access to responsive records relating to her daughter pursuant to section 54(c) of the *Act*. However, the police did locate one record that mentioned the appellant during the specified period and partially disclosed it to the appellant. The police initially relied on section 38(b) (personal privacy) to deny access to a portion they withheld. At mediation, the appellant took the position that the police failed to conduct a search for records involving her daughter. The police then issued a revised decision in which they refused to confirm or deny the existence of responsive information relating to the appellant's daughter under section 14(5) (refuse to confirm or deny) of the *Act*. During the course of adjudication, the appellant's daughter, now 17, provided a written consent to the disclosure of her information in records that may, or may not, exist. In this order, the adjudicator upholds the police's decision not to disclose an individual's telephone number to the appellant. He does not uphold the police's decision to refuse to confirm or deny the existence of responsive information relating to the appellant's daughter for the specified period, whether within the withheld notebook entries or any other record, and orders the police to produce an access decision relating to the request for information relating to the appellant's daughter.

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

OVERVIEW:

[1] The Halton Regional Police Service (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (the Act or MFIPPA)* for access to all notes and reports of an identified police officer relating to the appellant's daughter for a specified period.

[2] In their initial decision letter, the police advised the appellant that they were unable to search for records pertaining to her daughter because "you confirmed that you do not have any legal documentation stipulating that you have custody of your children…". In other words, the police took the position that the appellant could not exercise her daughter's right of access pursuant to section 54(c) of the *Act*. Under this section, a requester can exercise another individual's right of access under the *Act* if they can demonstrate that the individual is less than sixteen years of age, and that the requester has lawful custody of the individual.

[3] However, the police located an officer's notes pertaining to a specified occurrence number for the same time period in the access request, mentioning the appellant herself. The police explained in their decision letter that in response to an earlier access request they partially disclosed to the appellant an officer's notes pertaining to the specified occurrence but while addressing the request before me, they discovered that they had missed another officer's notebook entries relating to the appellant for that same specified occurrence. The police decided to provide some information in this other officer's notebook entries to the appellant. The police relied on section 38(b) (personal privacy) and section 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(e) and (l) (law enforcement), to deny access to the portion of the notebook entries they withheld. They also took the position that some information in the notebook entries was not responsive to the request.

[4] The requester (now the appellant) appealed the police's access decision.

[5] At mediation, the appellant advised the mediator that she was not taking issue with the police's determination that certain information in the notebook entries was non- responsive to her request nor with their decision to withhold information under section 38(a) in conjunction with sections 8(1)(e) and (l) of the *Act*. Accordingly, that information and the application of those exemptions is no longer at issue in the appeal. However, the appellant maintained her position that she should be provided with the information in the notebook entries the police identified as being subject to section 38(b).

[6] Also at mediation, the appellant took the position that the police failed to conduct a search for records involving her daughter (as opposed to herself). The police then revised their position and issued a decision in which they refused to confirm or deny the existence of responsive information pertaining to her daughter under section 14(5) of the *Act*. The appellant also challenged this decision.

[7] I commenced my inquiry by sending the police a Notice of Inquiry setting out the facts and issues in the appeal. The police provided responding representations and asked that portions not be shared due to confidentiality concerns. I then sent a Notice of Inquiry to the appellant along with a copy of the police's non-confidential representations. The confidential portion of the police's representations was not shared, in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7. The appellant did not provide responding representations.

[8] In the course of the inquiry, I received consent from the appellant's daughter, who had reached 17 years of age, to the disclosure of any information pertaining to her in records that may, or may not exist[1].

[9] In this order, I uphold the police's decision not to disclose the telephone number of an identifiable individual to the appellant. I do not uphold the police's decision to refuse to confirm or deny the existence of responsive information pertaining to the appellant's daughter, whether within the withheld notebook entries, or other records, as it relates to the access request at issue, and order the police to produce an access decision.

RECORD

[10] At issue in this appeal are portions of a police officer's notebook that the police withheld under section 38(b), in addition to the police's application of section 14(5) to any responsive information relating to the appellant's daughter, if it exists.

ISSUES

A. Do the notebook entries the police located and records pertaining to the appellant's daughter, if they exist, contain "personal information" as defined in section 2(1) of the *Act*? Whose personal information is it?

B. Does the discretionary exemption at section 38(b) of the *Act* apply to the withheld personal information in the notebook entries?

C. Have the police properly applied the refuse to confirm or deny provision at section 14(5) of the *Act* (personal privacy) to any responsive information relating to the appellant's daughter, if it exists?

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[1] As a result of the appellant's daughter being more than 16 years of age and subsequently providing her consent to the disclosure of her personal information in any records that may, or may not exist, it is not necessary for me to consider the police's original position that the appellant could not exercise her daughter's right of access pursuant to section 54(c) of the *Act*.

DISCUSSION:

Issue A: Do the record the police located and the records pertaining to the appellant's daughter, if they exist, contain "personal information" as defined in section 2(1) of the *Act*? Whose personal information is it?

[11] The police have taken the position that the notebook entries contain "personal information". In addition, the police have refused to confirm or deny the existence of records responsive to the request for information pertaining to the appellant's daughter on the basis that section 14(5) of the *Act* applies because their disclosure would constitute an unjustified invasion of personal privacy.

[12] To determine which part of the *Act* applies, and whether disclosure would constitute an unjustified invasion of privacy, it must first be determined that the records, if they exist, would contain "personal information", and if so, whose.

[13] The term "personal information" is defined in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
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> (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;

[14] 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.[2]

The representations

[15] The police submit that the notebook entries pertaining to the appellant contain personal information including the name, telephone number, address, sex, and views, opinions, or statements of involved parties. In reference to the refusal to confirm or deny the existence of records relating to the appellant's daughter, the police submit that the appellant specifically requested records of her daughter. Therefore, if records existed, the police submit that they would likely contain personal information including, but not limited to, the daughter's name, address, date of birth, and possibly contain statements and opinions of the daughter about other individuals.

[16] The appellant did not provide representations in response to this issue during the inquiry.

Analysis and finding

[17] As noted above, under section 2(1) of the *Act*, "personal information" is defined to mean recorded information about an identifiable individual. I have reviewed the notebook entries and I find that they contain the personal information of the appellant and another identifiable individual. Furthermore, with respect to section 14(5), records responsive to the request for information pertaining to the appellant's daughter, if they exist, would inevitably contain information that would qualify as the personal information of the appellant's daughter and more likely than not, the appellant, as well as other identifiable individuals, that meets the definition of personal information under section 2(1) of the *Act*.

Issue B: Does the discretionary exemption at section 38(b) of the *Act* apply to any withheld personal information in the notebook entries?

[18] 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.

[19] Under section 38(b), where a record contains personal information of both the

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[2] Order 11.

appellant 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 appellant. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the appellant.

[20] As set out above, the notebook entries contain the personal information of the appellant and the telephone number of an identifiable individual other than the appellant, which I found to be that individual's personal information.

[21] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy.

[22] If any of the section 14(1)(a) to (e) exceptions exist, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

[23] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would not be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in section 14(2) or (3) apply.

[24] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the decision-maker[3] must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[4] The police submit that this information falls within the section 14(3)(b) presumption and its disclosure would result in the unjustified invasion of the individual's personal privacy.

14(3)(b): investigation into violation of law

[25] The police submit that the personal information in the notebook entries was compiled and is identifiable as part of an investigation into a possible violation of law (section 14(3)(b)). They submit that they were investigating an occurrence that may have been an offence under the *Criminal Code*.[5] The appellant did not provide representations in response to this issue during the inquiry.

[26] Section 14(3)(b) reads:

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[3] The institution, or on appeal, the IPC.
[4] Order MO-2954.
[5] RSC 1985, c C-46.

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[27] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[6] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[7]

[28] In my view, the personal information falls within the scope of section 14(3)(b) because it was compiled and is identifiable as part of an investigation into a possible violation of law.

[29] In determining whether the disclosure of the identifiable individual's telephone number in the withheld notebook entries would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[8] In this appeal, the appellant did not raise any section 14(2) factors favouring disclosure of the other individual's personal information and in my view, none would apply.

[30] Accordingly, considering the presumption in section 14(3)(b) and balancing all the interests I find that disclosure of the individual's telephone number would be an unjustified invasion of their personal privacy.

[31] As a result, I find that this information qualifies for exemption under section 38(b) of the *Act*.

[32] The section 38(b) exemption is a discretionary exemption, meaning that the police can chose to disclose information even if it is exempt under section 38(b). Here, the police chose to withhold the telephone number and I see no error in the police's exercise of discretion. As a result, I uphold the police's decision not to disclose this information.

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[6] Orders P-242 and MO-2235.
[7] Orders MO-2213 and PO-1849.
[8] Order MO-2954.

Issue C: Have the police properly applied the refuse to confirm or deny provision at section 14(5) of the *Act* to any responsive information relating to the appellant's daughter, if it exists?

[33] The police have refused to confirm or deny the existence of responsive records relating to the appellant's request for access to information pertaining to her daughter.

[34] 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.

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

[36] An appellant 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 appellant 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.[9]

[37] 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 appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[38] 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

[9] Order P-339.

> Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[10]

Part one: disclosure of the record (if it exists) would not constitute an unjustified invasion of personal privacy

Definition of personal information

[39] 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. As noted above, records of the nature requested, if they exist, would inevitably contain information that would qualify as the personal information of the appellant's daughter and more likely than not, the appellant.

Unjustified invasion of personal privacy

[40] Where a record contains the personal information of both the appellant and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the discretionary exemption in section 38(b) of the *Act* allows an institution to refuse to disclose that information to the appellant. Section 38(b) is found in Part II of the *Act*.

[41] Sections 14(1), 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[42] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[11]

Section 14(1)(a)

[43] For section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.[12]

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[10] 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.
[11] Order MO-2954.
[12] See Order PO-1723.

[44] Section 14(1)(a) reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[45] Given the wording of the access request before me, at issue in this appeal, any responsive records that may exist, would be records generated in relation to the appellant's daughter.

[46] In the circumstances of this appeal, the appellant's daughter has consented to the disclosure of any of her personal information in any records that may exist. As a result, information relating to her falls within the scope of the section 14(1)(a) exception. Accordingly, releasing any personal information of the appellant's daughter to the appellant would not result in the unjustified invasion of the daughter's personal privacy under section 38(b).

[47] In my view, therefore, the disclosure of a record, if it exists, would not constitute an unjustified invasion of personal privacy of the appellant's daughter named in the request.

[48] In the result, I find that the police have not satisfied part one of the section 14(5) test.

[49] As both parts of the test must be met in order for section 14(5) to apply, it is not necessary for me to consider part 2 of the test. For the sake of completeness, however, I note that since the daughter has consented to the disclosure of records, if they exist, then it stands to reason that confirming that records relating to the daughter exist (or do not exist) would not be an unjustified invasion of her personal privacy.

[50] Accordingly, the police are not entitled to rely on section 14(5) of the *Act* to deny access to the responsive information or records pertaining to the appellant's daughter for the specified period if it exists (or does not exist).

ORDER:

1. I uphold the police's decision to withhold the telephone number of the identifiable individual as it appears in the notebook entries.

2. I do not uphold the police's decision to refuse to confirm or deny the existence of records relating to the access request at issue.

3. I order the police to produce an access decision in response to the appellant's access request, treating the date of this order as the date of the request and

subject to the provisions of sections 19, 21, 22 and 45 of the *Act*. The police are to send me a copy of the decision letter when it is sent to the appellant.

Original Signed by: May 12, 2021

Steven Faughnan
Adjudicator