Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4051

Appeal MA19-00477

Halton Regional Police Services Board

May 18, 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. Initially, 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*. The police then issued a supplementary 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 does not uphold the police's decision to refuse to confirm or deny the existence of responsive records and orders the police to produce an access decision.

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(1)(a) and 14(5).

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] At the intake stage of the appeals process, the police issued a supplementary decision in which they refused to confirm or deny the existence of responsive records under section 14(5) of the *Act*.

[4] The appellant appealed the police's access decisions.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[6] 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. I then sent a Notice of Inquiry to the appellant along with a copy of the police's representations. The appellant did not provide responding representations.

[7] 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].

[8] In this order, I do not uphold the police's decision to refuse to confirm or deny the existence of responsive records.

ISSUES

A. Would responsive records, if they exist, contain "personal information" as defined 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*?

DISCUSSION:

Issue A: Would responsive records, if they exist, contain "personal information" as defined in section 2(1) of the *Act*?

[9] The police have refused to confirm or deny the existence of responsive records on the basis that section 14(5) of the *Act* applies because their disclosure would constitute an unjustified invasion of personal privacy. Accordingly, I must first determine whether records, if they exist,

[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.

would contain the personal information of the appellant's daughter, as only the disclosure of personal information would constitute an unjustified invasion of personal privacy.

[10] 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,
>
> (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;

[11] 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

[12] 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.

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

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[2] Order 11.

Analysis and finding

[14] In my view, records responsive to the request for access to 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 in accordance with the definition of personal information under section 2(1) of the *Act*.

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

[15] 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.

[16] 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.

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

[18] 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.[3]

[19] 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.

[20] 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

[3] Order P-339.

> able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[4]

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

Definition of personal information

[21] 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.

Unjustified invasion of personal privacy

[22] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

Section 14(1)(a)

[23] 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.[5]

[24] 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;

[25] 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.

[26] 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.

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[4] 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.

[5] See Order PO-1723.

[27] 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.

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

[29] 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.

[30] Accordingly, the police are not entitled to rely on section 14(5) of the *Act*.

ORDER:

1. 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.

2. 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 18, 2021

Steven Faughnan
Adjudicator