Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-4069

Appeal MA19-00093

Halton Regional Police Service

June 21, 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 any audio/video recordings of interviews of the requester's two daughters conducted by two named police officers, along with any written notes. The police took the position that the appellant could not exercise a right of access to responsive records relating to her daughters pursuant to section 54(c) of the *Act*. The police also denied the requester access to any records that may exist under sections 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(e) (endanger life or safety) and 8(1)(l) (facilitate commission of an unlawful act) as well as section 38(b) (personal privacy). At mediation, the police issued a revised decision in which they refused to confirm or deny the existence of responsive information relating to the appellant's daughters under section 14(5) (refuse to confirm or deny) of the *Act*. During the course of adjudication, one of the appellant's daughters, now 16, provided a written consent to the disclosure of her information in records that may, or may not, exist. In this order, the adjudicator finds that the appellant may exercise any right or power conferred on her 14 year old daughter in accordance with section 54(c) of the *Act*, 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), 14(5), and 38(b); *Children's Law Reform Act*, RSO 1990, c C.12, section 20(4).

**Order Considered:** Order M-615.

## 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 any audio/video recordings of interviews of the requester's two children conducted by two named police officers, along with any written notes. In particular, the request read:

> On [specified date] [identified detective constable] and [identified detective] audio recorded interviews with 2 of my children [named children]. I am requesting copies of these videos along with any written notes.

[2] In their initial decision letter, the police wrote to the appellant that "you confirmed that you do not have any legal documentation stipulating that you have custody of your children…". In other words, it would appear that the police took the position that the appellant could not exercise her daughters' 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 the individual is less than sixteen years of age and the requester has lawful custody of the individual.

[3] The police also denied the requester access to any records that may exist under section 38(a) (discretion to refuse requesters own information), in conjunction with sections 8(1)(e) (endanger life or safety) and 8(1)(l) (facilitate commission of an unlawful act) as well as section 38(b) (personal privacy).

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

[5] In the course of mediation the police issued a new decision letter indicating that, instead of the originally claimed exemptions, they were now only relying on the provisions allowing the police to refuse to confirm or deny the existence of a responsive record: sections 8(3) (law enforcement) and 14(5) (personal privacy).

[6] 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*.

[7] Representations were exchanged between the police and the appellant in accordance with this office's Practice Direction 7. I also sent a letter to the children's father inviting his representations on the possible application of section 54(c) of the *Act*. The father did not provide responding representations.

[8] In their representations, the police advised that they were no longer relying on the application of section 38(a) in conjunction with section 8(3) of the *Act* to deny access to the requested information. Accordingly, the application of those sections is no longer at issue in the appeal.

[9] In the course of adjudication, one of the appellant's children named in the

request who had reached 16 years of age, consented in writing to the disclosure of any information pertaining to her in records that may, or may not, exist.[1]

[10] In this order, I find that the appellant may exercise any right or power conferred on her 14 year old daughter in accordance with section 54(c) of the *Act* and do not uphold the police's decision to refuse to confirm or deny the existence of responsive records. I order the police to issue another access decision to the appellant.

## ISSUES

A. Can the appellant exercise a right of access on behalf of her daughter who is less than sixteen years of age pursuant to section 54(c) of the *Act*?

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

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

## DISCUSSION:

### Issue A: Can the appellant exercise a right of access on behalf of her daughter who is less than sixteen years of age pursuant to section 54(c) of the *Act*?

[11] Although the police's position changed during the course of mediation with respect to some of the applicable sections of the *Act*, from the outset it appears that they took the position that the appellant could not exercise her children's right of access under the *Act*. They ultimately expressly relied on section 54(c) of the *Act* in support of their position.

[12] I find below under Issue B that any responsive records, if they existed, would contain the personal information of the appellant's children named in the request. One of the appellant's children named in the request, who is now 16, consented to the disclosure of any personal information pertaining to her in records that may, or may not, exist. The appellant's other daughter named in the request remains under the age of sixteen.

---

[1] As a result of one of the appellant's daughters 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 this daughter's right of access pursuant to section 54(c) of the *Act*. However, I must still consider whether the appellant may exercise her other 14 year old daughter's right of access under section 54(c).

[13] Accordingly, this still raises the potential application of section 54(c) of the *Act*, which reads:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual;

[14] Under this section, a requester can exercise another individual's right of access under the *Act* if the individual is less than sixteen years of age, and the requester has lawful custody of the individual.

[15] If a requester meets the requirements of this section, then he or she is entitled to have the same access to the personal information of the child as the child would have. The request for access to the personal information of the child will be treated as though the request came from the child him or herself.[2]

[16] The consequences of the application of section 54(c) are significant. In the usual case, that is, where section 54(c) does not apply, if an individual requests access to a record containing his or her own personal information as well as the personal information of another individual, the institution may refuse to disclose the information if disclosure would be an unjustified invasion of the personal privacy of the other individual.

[17] By contrast, where section 54(c) is invoked, since the person with custody essentially "steps into the shoes" of the child, any personal privacy rights of the child on whose behalf the request is made are not considered in determining whether to grant access to the person with custody.

[18] The issue is whether the appellant has lawful custody of her younger daughter under 16 such that section 54(c) applies.

### *The police's first representations*

[19] The police explain that when they first spoke with the appellant regarding her access to information request, she advised that she was separated from the children's father and that she had no legal documentation stipulating that she has any custodial rights to her children (i.e., no separation agreement or custody order).

[20] The police submit that while they accept that the appellant's younger daughter is under the age of sixteen, the lawful custody of her daughter is still an issue. They argue that by her own admission during the telephone call, the appellant is separated from

---

[2] Order MO-1535.

the children's father, and she has no legal documentation indicating she has custody of the children.

[21] In support of their argument, the police rely on section 20(4) of the *Children's Law Reform Act*[3] (the *CLRA*), which read at the time of the request[4]:

> Where the parents of a child live separate and apart and the child lives with one of them with the consent, implied consent or acquiescence of the other of them, the right of the other to exercise the entitlement of custody and the incidents of custody, but not the entitlement to access, is suspended until a separation agreement or order otherwise provides.

[22] The police submit that:

> Even if the children do reside with the appellant (i.e., she has access), until a separation agreement or order is in effect, she does not have custody of the children and therefore cannot act on her children's behalf. Until it is demonstrated that the appellant does have custody of the children and section 54(c) applies, it would be unethical and a breach of the *Act* to even conduct a name search of the [police's] local records to determine whether or not responsive records of the children exist, let alone providing confirmation of the existence of records.

### *The appellant's representations*

[23] The appellant takes the position that the police mischaracterized her call and states that during the phone call she explained that she always had full custody of all her children, who reside with her.

[24] She submits that since a court order is only available if custody is disputed, it is unreasonable to expect every parent looking for information on behalf of their children to have one.

### *The police's reply representations*

[25] The police state that they do not dispute that the appellant has access to her younger daughter but the custody of her younger daughter is still at issue. They submit:

---

[3] RSO 1990, c C.12.

[4] Section 20(4) now reads: If the parents of a child live separate and apart and the child lives with one of them with the consent, implied consent or acquiescence of the other, the right of the other to exercise the entitlement to decision-making responsibility with respect to the child, but not the entitlement to parenting time, is suspended until a separation agreement or order provides otherwise. This changed wording does not alter my findings in this matter.

> … Generally, the necessity to obtain a custody/access order only arises when parents are unable to come to an amicable decision to establish a separation agreement regarding the custody and access of the children. While a custody/access order may not be necessary for the appellant and the children's father, as per the *Children's Law Reform Act*, a separation agreement is required regardless of whether or not the custody of the appellant's children has ever been an issue.

***Analysis and finding***

[26] I do not interpret the former wording of section 20(4) of the *Children's Law Reform Act* in the manner suggested by the police. In this case, because the mother resides with her children, the formerly worded section 20(4) impacts the right of the father, not the mother, to exercise the entitlement of custody and the incidents of custody, until a separation agreement or order otherwise provides. The police have acknowledged that the children reside with their mother. The children's father provided no representations to challenge this. There is no evidence of any separation agreement or order. In all the circumstances, I am satisfied that the mother has custody of her child for the purposes of section 54 (c).[5] In my view, therefore, the appellant may exercise any right or power conferred on her child under section 54(c) of the *Act*.

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

[27] 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, in the police's submission, 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."

[28] 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

[5] See *MSG v RMB*, 2012 CanLII 3673 (ON HPARB) at paragraph 31 and *Jordan v. Jordan*, 2006 CanLII 3478 (ON SC) at paragraph 31.

> 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;

[29] 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.[6]

### *The police's representations*

[30] The police submit that the appellant specifically requested records of her two children. They state that if the records existed, they would contain personal information including, but not limited to, the children's names, address, date of birth, voices, and statements. Furthermore, they submit that if responsive records existed they would likely contain statements and opinions of the children about other individuals.

[31] The police submit that:

> The appellant has requested access to her children's records, not records relating to information she provided to the police. Therefore, the records, if they exist, would primarily contain the personal information of the appellant's children, not the appellant.

---

[6] Order 11.

[32] They add:

> Who the children did (or did not) speak to is their personal information; disclosure of these facts would be an unjustified invasion of the children's personal privacy. Furthermore, the Appellant has listed two officers who are members of the Child and Sexual Assault Unit of the Institution; if the Institution acknowledged the existence of responsive records of this nature, it would reveal the nature of the discussions the children had with the officers. This would be an unjustified invasion of the personal privacy of the children.

### *The appellant's representations*

[33] The appellant makes no specific representations on the content of the records but states that if there is an issue of privacy, her children are willing to sign any forms allowing her access to this information.

*Analysis and finding*

[34] In my view, records responsive to the request for information pertaining to the appellant's daughters, if they exist, would inevitably contain information that would qualify as the personal information of the appellant's daughters 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 C: Have the police properly applied the refuse to confirm or deny provision at section 14(5) of the *Act*?

[35] 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.

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

[37] The police rely on section 14(5) to refuse to confirm or deny the existence of records responsive the appellant's request, claiming that disclosure would constitute an unjustified invasion of personal privacy. Section 14(5) is found in Part I of the *Act* and there is no parallel provision in section 38. However, past orders of this office have determined that section 14(5) can apply in the context of a request for one's own personal information, which is otherwise determined under section 38(b). In Order M-615, for example, Adjudicator John Higgins stated:

> Section 37(2) provides that certain sections from Part I of the *Act* (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the

> requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information.
>
> However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.
>
> Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

[38] This reasoning has since been adopted in a number of subsequent orders.[7] I agree with this approach, and adopt it for the purpose of this appeal. Accordingly, I will consider whether section 14(5) applies in this case.

[39] 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 requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[8]

[40] 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.

[41] 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:

---

[7] See, for example, Orders MO-2984, MO-3235, MO-3293, and MO-3617.
[8] Order P-339.

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[9]

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

*Definition of personal information*

[42] 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 both the appellant's daughters, and likely that of the appellant and other identifiable individuals.

*Unjustified invasion of personal privacy*

[43] Where a record contains the personal information of both the requester 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 requester. Section 38(b) is found in Part II of the *Act*.

[44] 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.

[45] 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.[10]

*Consent - section 14(1)(a)*

[46] 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

---

[9] 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.
[10] Order MO-2954.

request.[11]

[47] 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,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[48] Given the wording of the access request before me, any responsive records that may exist, would be records generated in relation to the appellant's daughters.

[49] One of the appellant's daughters 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 and Part 1 of the test under section 14(5) is not satisfied.

[50] I found above that the appellant may exercise any right or power conferred on her younger daughter under section 54(c) of the *Act*. Accordingly, any information provided by that daughter would be subject to section 54(c). In this regard, the appellant stands in the shoes of her younger daughter under section 54(c). Disclosure of a requester's own information, on its own, cannot be an unjustified invasion of another individual's personal privacy.[12]

[51] Accordingly, releasing any personal information of her younger daughter to the appellant would also not result in the unjustified invasion of her younger daughter's personal privacy.

[52] 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 daughters named in the request.

[53] In the result, I find that the police have not satisfied part one of the section 14(5) test in relation to the appellant's daughters.

[54] Finally, as I wrote above, if records of the nature requested exist, they may contain the personal information of other identifiable individuals. However, given my findings under Part 2 below, it is not necessary for me to make a determination on this issue.

---

[11] See Order PO-1723.
[12] Order PO-2560.

***Part two: Disclosure of the fact that the record exists (or does not exist) would not constitute an unjustified invasion of personal privacy***

[55] For section 14(5) to apply, both parts of the test must be met. In that regard, my determination on whether Part 2 of the test is satisfied turns on the wording of the request. Based on that wording, the only personal information that would be revealed by confirming that records of the nature requested exist (or do not exist) is that of the appellant's daughters. Accordingly, based on the consent provided and the operation of section 54(c) of the *Act*, confirming that records of the nature requested exist (or do not exist) would not be an unjustified invasion of the personal privacy of the appellant's daughters and would reveal no personal information of any other identifiable individual.

[56] As a result, the police are not entitled to rely on section 14(5) of the *Act* to confirm or deny the existence of responsive records relating to the access request at issue.

## ORDER:

1. The appellant may exercise any right or power conferred on her 14 year old daughter in accordance with section 54(c) of the *Act*.

2. I do not uphold the police's decision to refuse to confirm or deny the existence of responsive 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: June 21, 2021

Steven Faughnan
Adjudicator