



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-170

Appeal M-9200332

London Police Services Board



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ORDER

BACKGROUND:

The London Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to reports and statements pertaining to a fire which occurred at a particular time and place in the City of London.

The Police notified five individuals named in the records of the request and invited them to submit their views regarding disclosure of the records. One individual consented to the disclosure of his statement, and it was provided to the requester. The notices sent to the other four individuals were returned to the Police as either unclaimed or no longer at the address.

The Police granted partial access to the records but withheld certain parts pursuant to sections 8(1)(l), 8(2)(a) and 38(b) of the Act.

During mediation, the appellant narrowed the number of records sought to four witness statements and the statement of the investigating officer. Further mediation was not successful and notice that an inquiry was being conducted to review the decision of the Police was sent to the Police and to the appellant.

Representations were received from both parties. The Police provided representations in the alternative on the application of section 38(b) in the event that the personal information contained in the records was found to be that of both the appellant and other individuals.

On June 30, 1993, while the representations were being considered, the Ontario Court (General Division) (Divisional Court) issued its decision in the case of John Doe et al. v. Information and Privacy Commissioner et al. (unreported). This decision interpreted several provisions of the provincial Act in a way which differed from the interpretation developed in orders of the Commissioner. Since similar statutory provisions were also at issue in the present appeal, it was determined that copies of the Divisional Court decision should be provided to the parties along with a statement that the Commissioner's Office planned to follow the interpretation established by the Court.

Since a new approach to the operation of the Act was being adopted the appellant and the Police were provided with the opportunity to change or to supplement the representations previously submitted. Additional representations were received from the appellant and the Police. In making this order, I have considered these representations together with those previously submitted.

RECORDS AT ISSUE:

Record 1: Witness Statement (page 12)

Record 2: Case submission of investigating officer (page 88, withheld portion only) (Page 99 and [IPC Order M-170/August 6, 1993])

Page 140 are duplicates of Page 88).

- Record 3: Witness Statement (pages 94-97)
- Record 4: Witness Statement (pages 103-104)
- Record 5: Witness Statement (pages 105-110)
- Record 6: Witness Statement (page 111)

ISSUES:

- A. Whether the information contained in the records qualifies as personal information as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes and the personal information relates solely to individuals other than the appellant, whether section 14(1) of the Act applies.
- C. If the answer to Issue A is yes and the personal information relates to the appellant and other individuals, whether section 38(b) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as personal information as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

...

- (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,
- ...
- (g) the views or opinions of another individual about the individual,
- ...

I have reviewed the records and find that they all contain home addresses, birth dates, some employment information and personal opinions of identifiable individuals other than the appellant. On this basis, this information qualifies as personal information, however, with the exception of Record 4 and the last page of Record 6, the personal information relates solely to individuals other than the appellant. The personal information contained in Record 4 and the last page of Record 6 relates to the appellant and to other identifiable individuals.

ISSUE B: If the answer to Issue A is yes and the personal information relates solely to individuals other than the appellant, whether section 14(1) of the Act applies.

In Issue A, I found that, with the exception of Record 4 and the last page of Record 6, the records contain personal information which relates solely to individuals other than the appellant. Section 14(1) of the Act is a mandatory exemption which prohibits the disclosure of personal information to any person other than to the individual to whom the information relates, except in the circumstances listed in sections 14(1)(a) through (f) of the Act.

The appellant submits that section 14(1)(c) of the Act applies. In my view, the only other exception to the mandatory exemption contained in section 14(1) which has potential application is section 14(1)(f). These sections read:

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

- (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 14(1)(c), the appellant submits that the witnesses who made the statements and the police officer who investigated the incident in question, knew or should have known that their statements would be used in court proceedings if charges were to be laid. Such statements would, therefore, eventually constitute part of the court record which is a record available to the general public.

The various witness statements and the officer's statement were prepared and obtained as part of a police investigation into a possible violation of law. In my view, the specific purpose for the collection of the personal information was to assist the Police in determining whether a violation of law had occurred and, if so, to assist them in identifying and apprehending a suspect. The records are not currently maintained in a publicly available form, and it is my view that section 14(1)(c) does not apply.

Since section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. In the Divisional Court decision, the Court addressed the question of the interrelationship between sections 21(2), (3) and (4) of the provincial Freedom of Information and Protection of Privacy Act. These provisions are similar to sections 14(2), (3) and (4) of the Act. At page 28 of the Court's decision, the majority of the court states:

The words of the statute are clear. There is nothing in the section to confuse the presumption in s.21(3) with the balancing process in s.21(2). There is no other provision in the Act and nothing in the words of the section to collapse into one process, the two distinct and alternative processes set out in s.21. Once the presumption has been established pursuant to s.21(3), it may only be rebutted by the criteria set out in s.21(4) or by the "compelling public interest" override in s. 23. There is no ambiguity in the Act and no need to resort to complex rules of statutory interpretation.

Putting the matter somewhat differently, and with reference to the provisions contained in the municipal Act, where personal information falls within one of the presumptions found in section 14(3) of the Act, a combination of the circumstances set out in section 14(2) of the Act which weigh in favour of disclosure cannot collectively operate to rebut the presumption.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

I have considered the approach advanced by the Divisional Court and adopt this reasoning for the purposes of this order.

Section 14(3) of the Act lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Police submit that section 14(3)(b) of the Act applies to the information contained in the records. This section reads as follows:

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;

The Police submit that the personal information was compiled by members of a police service during an investigation into allegations that the offence of arson had been committed. On this basis, I am satisfied that the presumption contained in section 14(3)(b) applies and that the disclosure of the information at issue would constitute an unjustified invasion of personal privacy of other individuals.

I have considered section 14(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 16 of the Act applies.

I am of the view that all of the records in this appeal (with the exception of Record 4 and the last page of Record 6) are properly exempt from disclosure under section 14(1) of the Act.

ISSUE C: If the answer to Issue A is yes and the personal information relates to the appellant and other individuals, whether section 38(b) of the Act applies.

In Issue A, I found that Record 4 and the last page of Record 6 contain the personal information of the appellant and other individuals. Section 36(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 38 provides a number of exemptions to this general right of access.

One such exemption is found in section 38(b) of the Act, which reads:

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

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

Section 38(b) introduces a balancing principle. The Police must look at the information and weigh the requester's right of access to his or her personal information against the rights of other individuals to the protection of their privacy. If the Police determine that the release of the information would constitute an unjustified invasion of the personal privacy of other individuals, then section 38(b) gives the Police the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. In my discussion of Issue B, I found that the presumption contained in section 14(3)(b) of the Act applied to a group of records which were created in identical circumstances and which contained the same type of information as that found in Record 4 and the last page of Record 6. I find that the section 14(3)(b) presumption applies equally to the personal information contained in these two records and that the release of this information would constitute an unjustified invasion of the personal privacy of other individuals. For these reasons, Record 4 and the last page of Record 6 qualify for exemption under section 38(b) of the Act.

Section 38(b) of the Act is a discretionary exemption. I have reviewed the representations provided by the Police regarding their exercise of discretion in favour of denying access. I find nothing improper in the exercise of discretion and would not alter it on appeal.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Tom Wright
Commissioner

August 6, 1993