



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-525

Appeal M-9500125

Metropolitan Toronto Police Services Board



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NATURE OF THE APPEAL:

The Metropolitan Toronto Police Services Board (the Police) received a request for information about complaints received by the Police concerning harassing phone calls being made by a named individual.

The Police claimed the application of the following exemption contained in the Act:

- refusal to confirm or deny the existence of a record - section 14(5).

The requester appealed this decision. A Notice of Inquiry was sent to the Police and the appellant. Representations were received from both parties.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

In my view, a record of the nature requested, if it exists, would contain information which would qualify as the personal information of the named individual as defined by section 2(1) of the Act.

Section 14(5) of the Act provides the Police with the discretion to refuse to confirm or deny the existence of records responsive to the appellant's request. This section states that:

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.

A requester in a section 14(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(5), the Police are denying the requester the right to know whether a record exists, even if one does not. This section provides institutions with a significant discretionary power which, in my view, should be exercised only in rare cases.

In my view, the Police, in relying on this section must do more than merely indicate that the disclosure of the records would constitute an unjustified invasion of personal privacy. Rather, the Police must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of **this** information would constitute an unjustified invasion of personal privacy.

I must first determine if the disclosure of records of the type requested, if they exist, would constitute an unjustified invasion of personal privacy.

The Police submit that records of the nature requested, if they exist, would concern themselves with an investigation into allegations of criminal harassment involving an identifiable individual.

Sections 14(2) and (3) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the

requester. Section 14(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy. Section 14(3)(b) of the Act provides that:

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;

In my view, records of the type requested by the appellant from the Police, if they exist, would have been "compiled and identifiable as part of an investigation into a possible violation of law", as described in section 14(3)(b). Accordingly, in my view, the presumption of an unjustified invasion under section 14(3)(b) applies to the personal information which would be contained in records of the type requested, if they exist.

The only way in which a section 14(3) presumption may 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 section 14(4) and find that none of the personal information which might be contained in the type of record requested in this appeal falls within the ambit of this provision. In addition, the appellant has not argued the public interest override set out in section 16. The appellant, however, submits that the exception found under section 14(1)(b) of the Act applies. This section states that:

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

in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

The appellant states that he and his family, some of whom suffer from ill health, are receiving harassing phone calls which are most distressing to them. While I can appreciate their concerns about these disturbing incidents, it is my view that this is not the type of fact situation contemplated by this section of the Act. Accordingly, I find that the circumstances of this appeal do not satisfy the requirements of "compelling circumstances affecting the health or safety of an individual".

I find, therefore, that as the presumption described in section 14(3)(b) has not been rebutted, the disclosure of personal information which may be contained in records of this sort, if they existed, would constitute an unjustified invasion of personal privacy. Such information would, therefore, be properly exempt from

disclosure.

I must now determine whether the disclosure of the very fact that records responsive to the request exist would result in an unjustified invasion of the personal privacy of an individual.

The Police state that simply confirming whether such records exist would constitute, in itself, an unjustified invasion of another individual's personal privacy as it would reveal that the individual has been the subject of a police investigation.

Again, sections 14(2) and (3) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the requester. Section 14(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy. Section 14(3)(b) of the Act provides that:

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;

I agree with the submissions of the Police that simply confirming the existence of any responsive records could reveal personal information about an identifiable individual, particularly the fact that this individual had been the subject of a criminal investigation. In my view, the Police have provided sufficient evidence to establish that the disclosure of the existence or non-existence of records responsive to the appellant's request would constitute a presumed unjustified invasion of the personal privacy of other individual(s) under section 14(3)(b) of the Act.

The only way in which a section 14(3) presumption may 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 section 14(4) and find that personal information about an individual which would fall within the law enforcement presumption would not fall within the ambit of this provision. In addition, the appellant has not argued the public interest override set out in section 16.

As the section 14(3)(b) presumption has not been rebutted, the disclosure of the fact that records of the sort requested exist would constitute an unjustified invasion of privacy. Again, such information would be properly exempt from disclosure.

Section 14(5) is a discretionary exemption. The Police have provided representations on their exercise of discretion in favour of claiming the application of this section. I find nothing improper in the manner in which this determination was made and will not disturb it on appeal.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ May 15, 1995