



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

ORDER M-718

Appeal M_9500436

Metropolitan Toronto Police Services Board



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NATURE OF THE APPEAL:

The appellant represents the driver who was involved in an automobile accident (the driver). The appellant is attempting to locate and interview a witness to the accident (the witness). The appellant believes that the witness will provide testimony that would assist in exonerating the driver in any court proceedings.

The appellant submitted a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Metropolitan Toronto Police Services Board (the Police). The request was for the address of the witness. The appellant enclosed copies of the Motor Vehicle Accident Report and field investigation notes of the accident which included the name of the witness. The appellant indicated that he had originally received this information from the Police who had investigated the accident.

The Police notified the witness at the address she gave at the time of the accident. Prior to sending this notification, the Police had conducted an address check through the Ministry of Transportation to determine if this was the current address. The Ministry of Transportation records showed the current address of the witness as the one to which the letter was sent. The notification was returned marked "refused at address" and "wrong address". The appellant was advised that the witness was no longer at the address he had requested.

The Police issued a decision denying access to the address the witness gave at the time of the accident pursuant to section 14(1) of the Act (invasion of privacy). The appellant filed an appeal of this decision.

A Notice of Inquiry was sent to the appellant and the Police. Representations were received from both parties. As it appeared that the record might contain the personal information of the driver, a Supplementary Notice of Inquiry was sent to the parties in which they were asked to comment on the possible application of section 38(b) of the Act. This section provides the Police with the discretion to refuse to disclose to an individual his or her own personal information when to do so would constitute an unjustified invasion of another individual's personal privacy. Both parties again provided submissions in response to the Supplementary Notice.

It was not possible to notify the witness as no current address was available for this individual.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual and 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.

Both the Police and the appellant agree that the information at issue constitutes the personal information of the witness. The Police maintain that the personal information relates to the investigation of a motor vehicle accident by the Police and relates to a particular vehicle involved in the collision. The Police state that nowhere in the statement is there a reference to any individual. Therefore they submit that, because no personal information of the driver is at issue, section 38(b) does not apply.

It is true that the name of the driver does not appear in the statement itself. However, the statement forms part of and appears on the back of a document entitled "SR-LD-401B Motor Vehicle Accident Report". The balance of the document includes the report itself as well as the accident investigation field notes. These portions contain detailed information about the driver, the car and the circumstances which resulted in the accident. In this context I believe that the requested information should be analysed under section 38(b), rather than section 14(1) of the Act.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information. In this situation, the requester is not required 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 personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions in section 14(3) applies to the personal information, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The Police do not refer to any specific provisions in section 14(2) or (3) as providing the basis for their decision under section 14(1) to deny access to the address of the witness. Section 14(1) is a mandatory exemption. As part of the inherent obligation of the Office of the Information and Privacy Commissioner to ensure the integrity of Ontario's access and privacy scheme, I must consider whether any of these sections apply. In addition, I must consider all the relevant circumstances of this case.

The appellant states that section 14(3)(b) of the Act is the only presumption that might apply in this case. This section states:

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 Motor Vehicle Accident Report, which contains the name and address of the witness and her statement, documents the investigation. In my view, it is reasonable to conclude that this information was compiled and is identifiable as part of the Police investigation, which was an investigation into possible violations of the provisions of the Highway Traffic Act. Accordingly, the presumption in section 14(3)(b) applies to the address of the witness.

However, the appellant submits that the exception clause in section 14(3)(b) applies in this case. He states that disclosure of the address of the witness is necessary to “prosecute the violation or to continue the investigation”. He submits that the address of the witness is “necessary” for the determination of the alleged Highway Traffic Act violation against the driver.

The Concise Oxford Dictionary, 8th Edition, defines “prosecute” as “institute proceedings against (a person)”. In this case, proceedings under the Highway Traffic Act have already commenced against the driver. Therefore, it cannot be said that the information is necessary to “prosecute” the alleged violation. Moreover, it cannot be said that the appellant will use the address of the witness to “prosecute” the violation. Rather it will be used to assist the appellant in defending the charges against the driver.

The appellant also suggests that the address of the witness is necessary in order for him to “continue the investigation” as he will use it in an attempt to locate the witness for the purposes of testifying at the trial. This interpretation of the exception assumes that the “investigation” referred to in the exception need not be confined to the Police investigation but could include any investigation conducted by any party, including the investigative activity of a private party seeking to enforce its legal rights.

In Order M-249, I considered this issue and made the following comment:

In my view, the exception contained in the phrase “continue the investigation” refers to the investigation for which the personal information was compiled, i.e. the investigation “into a possible violation of law”.

There is nothing in the appellant's submissions which persuade me that this interpretation should not apply in this case. It is, therefore, my view that the personal information requirements for a presumed unjustified invasion of personal privacy under section 14(3)(b) have been established and that, in the circumstances of this appeal, the exception does not apply.

The appellant also submits that section 14(2)(d) is a relevant consideration in this appeal. He states that the information supplied by the witness is of crucial importance to the ability of the driver to receive a fair trial. In this regard, the appellant has provided this office with the details of a recent case in which he was involved where the identification of a witness to a motor vehicle accident was also at issue. The appellant indicated that until he had subpoenaed the police officer, interviewed him and reviewed his notes he was unable to identify or locate independent witnesses. The appellant also indicated that the presiding judge questioned why neither counsel was able to tender these witnesses at trial. However, the appellant did not indicate why this matter had not been resolved through usual means of disclosure.

In the present case, the appellant has the name of the witness. The Police also advised him that the address they have is no longer valid. Furthermore, as noted above, where one of the presumptions in section 14(3) applies, it can only be rebutted if section 14(4) or 16 applies. This result is dictated by the findings of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767.

I have considered the application of section 14(4) of the Act and find that none of the personal information at issue falls within the ambit of this provision. In addition, the appellant has not raised the application of section 16 of the Act.

I find that the disclosure of the personal information at issue would constitute an unjustified invasion of the personal privacy of the witness and therefore, the exemption in section 38(b) of the Act applies.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Anita Fineberg
Inquiry Officer

February 23, 1996