



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

ORDER MO-1378

Appeal MA-000264-1

York Regional Police Service



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NATURE OF THE APPEAL:

The appellant wrote to the York Regional Police (the Police) seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to negatives and all photographs produced from negatives taken by the Police of two named individuals on a specified date.

The Police identified five photographs and negatives responsive to the request and denied access to them on the basis of the exemption at section 14(1)(f) (unjustified invasion of personal privacy). The Police also stated that the presumption at section 14(3)(b) (personal information compiled as part of a law enforcement investigation) was applicable.

The appellant appealed the decision of the Police to this office. In his letter of appeal, the appellant stated that his grounds for appeal were as follows:

1. Sub-section 14(3)(b) of the *Act* has been misapplied and misinterpreted by [the Police] and, as a result [they] used it to deny my request.
2. Sub-section 14(3)(b) of the *Act*, makes no reference to photographs. [The Police] erroneously [applied their] view and failed to consider and disregarded the plain language of the sub-section.
3. [The Police] failed to confine and address the sub-section to the specific language thereof and instead went on a frolic and assigned a patently unreasonable interpretation of the *Act*.
4. In fact, the very same photographs that were taken by the police, which I am requesting, have already been disclosed and used in court in both Civil and Criminal court which were open to the public and, therefore, the photographs are both public knowledge and property.
5. Once all the information is made public with respect to evidence, transcripts etc. then, the information being requested should not and cannot be deemed as being personal information or an unjustified invasion of personal privacy as [the Police] would like us to think just by citing the wrong sub-section of the *Act* and, on the basis of [their] view as [they] put it.
6. An additional and very important factor which [the Police] failed to address which ultimately justifies granting my request is the fact that I presently possess [named individual's] Plaintiff's Production Book [specified court file number] Ontario Court (General Division). The book contains personal and medical information including three of her colour photographs in the size of 8 2" by 11". The reproduction of the same photographs is exactly what I have been requesting. Please take note that the book was in fact given to me by [named individual's] lawyer [named lawyer] in a civil proceeding.

7. Since [named individual] gave me her photographs through her lawyer it could no longer be presumed that disclosure of the same photographs would constitute an unjustified invasion of personal privacy in any way whatsoever. Therefore, subsection 14(3)(b) of the *Act* cannot be applied or referred to in any manner.
8. Take note that I am willing and able to provide to you or to anyone interested in having this book with the photographs for inspection in order to prove my claim that I possess it.
9. If [the Police] had knowledge of the fact that I possessed the Plaintiff's Production Book [they] would have had to grant my request. The lack of knowledge led [them] to render an unjust decision.
10. On the basis of the above noted information and, if you decide to grant part of my request with only [named individual] photographs it will be satisfactory.

During the mediation stage of the appeal, the appellant clarified that he was still seeking access to the photographs of both named individuals.

I sent a Notice of Inquiry setting out the issues in the appeal to the appellant, who sent representations in response. In the circumstances, I determined that it was not necessary for me to seek representations from the Police or the two named individuals.

RECORDS:

The records at issue in this appeal consist of five photographs and five corresponding negatives, which include pictures of both named individuals.

DISCUSSION:

PERSONAL INFORMATION

In order for the section 14 personal privacy exemption to apply, the information in question must qualify as "personal information". The term "personal information" is defined in section 2(1) of the *Act* as follows:

In this *Act*,

"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 where 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;

The appellant submits:

Under section 2(1) of the *Act* "personal information" is not defined in any paragraph to mean photographs, it is defined or regarded to mean recorded *written* information and, no written personal information has been requested.

In Order P-11, former Commissioner Sidney B. Linden stated:

It is clear from the wording of the statute that the list of examples of personal information under subsection 2(1) is not exhaustive. This leaves it open for [the adjudicator] to decide whether or not information contained in the records which does not fall under subsections (a) to (h) . . . constitutes personal information.

I agree with and adopt the former Commissioner's finding that information may qualify as personal information, despite the fact that it does not fall within any of the listed categories in paragraphs (a) through (h) [see also my Order PO-1834].

Further, in Order M-528, involving a request for photographs of police officers, former Inquiry Officer John Higgins found that the photographs constituted the personal information of the subject individuals.

In the circumstances, and consistent with Order M-528, I find that the photographs constitute personal information of the two named individuals.

UNJUSTIFIED INVASION PRIVACY

Section 14(1) of the *Act* prohibits an institution from disclosing personal information, unless one of the exceptions in paragraphs (a) through (f) applies. In the circumstances of this case, the only exception which could apply is section 14(1)(f). That exception permits disclosure of personal information where the disclosure would not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [Order P-1456, citing *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The Police state that the section 14(1)(f) exception does not apply to permit disclosure, and have cited the presumption of an unjustified invasion of personal privacy at section 14(3)(b). That section reads:

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 appellant submits:

Please note that my request for disclosure of the personal information on the basis of Section 14(3)(b) of the *Act* applies solely to the part of the paragraph . . . that states, “except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation”. Otherwise, I still maintain that this Section of the *Act* does not apply to exempt the information.

The purpose of the words “except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation” is to permit institutions involved in investigations into possible violations of law to disclose personal information strictly for the purpose of carrying out such investigations and related prosecutions. This exception does not apply in the circumstances of this case, where disclosure to the appellant pursuant to his access to information request clearly would not be in furtherance of a law enforcement investigation or prosecution. Therefore, I do not accept the appellant’s submission that this exception in section 14(3)(b) could apply.

It is clear that these photographs were compiled by the Police and are identifiable as part of an investigation into a possible violation of law, in particular the assault provisions of the *Criminal Code*. As a result, I find that section 14(3)(b) applies in the circumstances.

The appellant submits that the factor favouring disclosure at section 14(2)(d) applies. As indicated above, neither one nor a combination of factors may rebut the section 14(3)(b) presumption of an unjustified invasion of privacy. As a result, the section 14(1)(f) exception cannot apply to permit disclosure.

The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.

In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:

Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the *Act*.

In my view, this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.

ORDER:

I uphold the decision of the Police to withhold the photographs from the appellant pursuant to section 14 of the *Act*.

Original Signed By: _____ December 12, 2000
David Goodis
Senior Adjudicator