



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

INTERIM ORDER MO-1398-I

Appeal MA_000270_1

Peel Regional Police Services Board



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NATURE OF THE APPEAL:

The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Peel Regional Police Services Board (the Police) for records which contain information about a complaint made against her by a named individual (the affected person) and any records generated by the Police as a result of the complaint.

The Police located responsive records and granted partial access to them. The Police withheld the remaining portions of the records on the basis of the exemption in section 38(b) (invasion of privacy) of the *Act* with reference to section 14(3)(b) (personal information compiled and identifiable as part of an investigation into a possible violation of law). In addition, some information was withheld as it was not responsive to the request.

The appellant appealed this decision to the Commissioner's office.

During mediation, the appellant agreed not to pursue the information that was withheld as being not responsive to the request. In addition, the appellant narrowed the scope of the request to what the named individual said to the Police. As a result, only a portion of the information originally withheld by the Police remains at issue. These portions of the records are described below.

I sent a Notice of Inquiry to the Police, initially. They submitted representations in response, and the non-confidential portions of them were sent to the appellant along with a copy of the Notice of Inquiry. The appellant did not respond to the Notice.

RECORDS:

The portions of the records remaining at issue in this appeal consist of the responsive information on page 3 (police officer's notes) and the information on the bottom of page 8 and the top of page 9 (occurrence report).

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Section 2(1) of the *Act* defines "personal information", in part, as recorded information about an identifiable individual. The Police indicate that the records contain the substance of information provided to a police constable by the affected person when he attended her residence for the purpose of investigating her complaint of harassing telephone calls made by the appellant. The Police submit that the records contain the personal information of both the appellant and the affected person. I find that the records pertain to a matter involving both the appellant and the affected person and the information contained in them qualifies as the personal information of both individuals. I find further that the information about the appellant in the records is so intertwined with that of the affected person that it is not severable.

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.

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 head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

For the purpose of determining whether disclosure of personal information would 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) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if 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 16 exemption.

The Police claim that all of the information which has been withheld from the records falls within the presumption in section 14(3)(b) of the *Act* as this information was compiled and is identifiable as part of a law enforcement investigation into an allegation of harassing telephone calls contrary to section 372(3) of the *Criminal Code*. The Police note that criminal charges were not laid in this case as the affected person did not wish to pursue them.

I am satisfied that the records at issue were compiled and that they are identifiable as part of an investigation into a possible violation of the *Criminal Code* and their disclosure would constitute a presumed unjustified invasion of personal privacy. Further, this presumption still applies, even if, as in the present case, no charges were laid (Orders P-223, P_237 and P_1225).

None of the provisions in section 14(4) apply to the information at issue in this appeal. The appellant has not raised the public interest override in section 16, nor do I find, independently, that it applies.

With respect to their exercise of discretion under section 38(b), the Police make the following statement:

The content of the records in question clearly falls within the applicability of subsection 14(3)(b) and, therefore, the exercise of discretion relative to section 38(b) is not relevant.

In my view, the Police have misconstrued the meaning and intent of section 38(b). Once it is determined that a record contains the personal information of the requester, the provisions in Part II of the *Act* must be considered in determining whether access should be given to the requested information. As I indicated above, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. This reflects one of the primary purposes of the *Act* as set out in section 1, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure.

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 other words, section 38(b) contemplates that, even where the institution makes a determination that disclosure of a record would constitute an unjustified invasion of privacy, the head may, in his or her discretion, decide to disclose that record regardless (see: Interim Order MO-1277-I). In these cases, the institution must make a two step determination: first, to determine whether disclosure would constitute an unjustified invasion of privacy; and second, to determine whether, in the particular circumstances of the case, the head's discretion should be exercised in favour of disclosure or non-disclosure. It is, in part, this exercise of discretion that the Commissioner will examine on appeal.

In Interim Order MO-1277-I, Assistant Commissioner Tom Mitchinson made the following comments regarding a head's exercise of discretion under Part II of the *Act*:

As stated earlier, this appeal involves a request that should have been processed by the Police under Part II of the *Act*, which provides the Police with discretion to balance two competing interests - in this case, the appellant's client's right of access to his personal information, and the affected person's right to privacy. If the Police conclude that the balance weighs in favour of disclosure, the records may be released to the appellant, even if the Police have concluded that this disclosure would represent an unjustified invasion of the affected person's privacy.

In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed.

In Order P-344, I considered the question of the proper exercise of discretion as follows:

... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.

In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

My reasoning in Order P-344 is equally applicable to the exercise of discretion under section 38(b) of the *Act* in the present appeal.

In my view, the comments made by Assistant Commissioner Mitchinson are similarly applicable in the circumstances of this appeal. Based on the representations provided by the Police, I find that they have not turned their minds to the relevant circumstances of this particular case in balancing the appellant's right of access to her own personal information and the affected person's right to privacy. Therefore, I have decided to return this matter to the Police for the purpose of properly exercising discretion in deciding whether or not to claim exemption for the records at issue pursuant to section 38(b) of the *Act*.

INTERIM ORDER:

1. I find that the records at issue satisfy the requirements of section 14(3)(b) of the *Act*.
2. I order the Police to consider the exercise of discretion under section 38(b) with respect to the record and to provide me with representations as to the factors considered in doing so by **March 12, 2001**. The representations concerning the exercise of discretion should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
3. I remain seized of this appeal in order to deal with the exercise of discretion under section 38(b) by the Police with respect to the records.

Laurel Cropley
Adjudicator

February 19, 2001