



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1604

Appeal MA-020191-1

Timmins Police Services Board



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NATURE OF THE APPEAL:

The requester (now the appellant) made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Timmins Police Services Board (the Police) for access to an e-mail or fax and all reports pertaining to a robbery at a pizzeria.

Initially, the Police issued a decision denying access to the record on the basis of section 8 (law enforcement) of the *Act*. The appellant appealed this decision. Subsequent to the filing of the appeal, and during mediation, the Police identified additional records responsive to the request. The Police then issued a supplementary decision denying access to the records in their entirety on the basis of section 38(b) (discretion to refuse requester's own information) in conjunction with section 14 (personal privacy) in addition to section 8. There are five distinct records at issue in this appeal: an e-mail; a general occurrence report; and, three separate supplementary reports.

Mediation was unsuccessful in resolving the issues in dispute. The matter proceeded to the inquiry stage.

I sought and received representations from the Police. The non-confidential portions of the Police's representations were shared with the appellant. The appellant provided very brief representations in response.

CONCLUSION:

The e-mail contains the personal information of the appellant and also of other individuals, and is exempt under section 38(b) of the *Act*. The general occurrence and supplementary reports contain the personal information of other individuals only, and these records are exempt under section 8.

DISCUSSION:

PERSONAL INFORMATION

In order to assess the application of the claimed exemptions, I must first determine whether or not the records contain personal information and, if so, to whom that information relates. The term "personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including any identifying number assigned to the 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.

Having examined the records before me, I find that the e-mail contains the personal information of the appellant and another identifiable individual. The information includes the names and addresses of these individuals, as well as views or opinions of one individual about the other individual [paragraph (g) of the section 2(1) definition]. Hence, the information meets the requirements for "personal information".

The other four records contain the personal information of individuals other than the appellant including their name, age, sex and address. As such, the information meets the requirements for personal information as described in paragraphs (a) and (d) of the definition.

As at least one of the records contains the personal information of the appellant, section 36(1) of the *Act* is applicable to this appeal. Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access. Under section 38(a), an individual can be denied access to their own personal information in instances where the exemption in section 8, among others, would apply to the disclosure of that information. Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and an 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 the circumstances of this appeal, the Police relied upon sections 8, 14, and 38(b) to deny access to the records at issue. While I indicated in the Notice of Inquiry delivered to the Police that the application of section 38(a) was also potentially at issue, I received no representations in that regard from the Police. Indeed, it appears from the representations from the Police that sections 8 and 14(3)(b), exclusive of section 38, were applied to the latter four records - the occurrence report and the supplementary reports - as they contained no personal information of the appellant. On the other hand, section 38(b) was applied to the e-mail record because that record contains the personal information of the appellant and another identifiable individual.

INVASION OF PRIVACY

Introduction

As indicated, I have found that the e-mail record contains the personal information of both the appellant and another identifiable individual; therefore, section 38(b) is the appropriate section to consider for this record.

In relation to the remaining four records, however, which contain only the personal information of individuals other than the appellant, section 38(b) does not apply.

Where section 38(b) applies, 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 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 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.

With reference to section 14(3), 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 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Sections 38(b) and 14

Representations

The Police made confidential representations in this regard. My summary of these representations, as disclosed to the appellant, was as follows:

I applied section 38(b) to deny access to the e-mail document. The author of the e-mail document supplied the information in confidence and with the expectation that the author's identity would not be disclosed.

Without having made explicit reference to the specific provisions of section 14, it is nevertheless clear to me that the Police denied access to the e-mail because to disclose the e-mail would constitute an unjustified invasion of the personal privacy of the author of the e-mail. The Police appear to have considered that the personal information is highly sensitive and that the author supplied their personal information in confidence. These criteria, among others, are enumerated in section 14(2) of the *Act* at paragraphs (f) and (h).

For his part, the appellant only had this to say in respect to the substantive issues in the appeal:

I know the names of the person who sent the false fax/e-mail [a named individual] and signed [an identified individual's] name to it. I would like these reports to use in my defense in a court case to show someone as to having malicious intent towards me.

It appears to me that the appellant's representations raise the possible relevance of paragraph (d) of section 14(2) in that it is the appellant's view that disclosure of the personal information is relevant to a fair determination of his rights.

Findings

The presumption at section 14(3)(b) of the *Act* 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 Police did not claim the application of section 14(3)(b) to support their decision that disclosure of the e-mail would constitute an unjustified invasion of another individual's privacy under section 38(b). However, it is clear from the circumstances of this case that the Police compiled the e-mail, and it is identifiable, as part of their subsequent investigation into a possible robbery contrary to the *Criminal Code*, and therefore section 14(3)(b) applies. As indicated

above, the section 14(3)(b) presumption cannot be overcome by any factors, listed or unlisted, under section 14(2). In addition, I find that no exceptions under section 14(4) apply. Therefore, the e-mail qualifies for exemption under section 38(b) in conjunction with section 14(3)(b).

In addition, I find that the record is not reasonably severable pursuant to section 4(1) of the *Act*, and that the Police properly exercised their discretion in denying access to this record.

LAW ENFORCEMENT

Introduction

The Police assert that the sections 8 and 14 exemptions apply in respect of the latter four records at issue – the occurrence report and the three supplementary reports. If I find that the section 8 exemption applies to these records, however, I need not go further to consider the applicability of section 14.

The Police specifically claim the application of section 8(1)(a), which reads:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter.

The purpose of this exemption is to provide the Police with discretion to deny access to records in circumstances where disclosure could reasonably be expected to interfere with an ongoing law enforcement matter. The Police bear the onus of providing evidence to substantiate that a law enforcement matter is ongoing, and that disclosure of the records could reasonably be expected to interfere with the matter.

For a record to qualify for exemption under either of these two sections, the matter with which the disclosure could interfere must first satisfy the definition of "law enforcement", which is a term found in section 2(1) of the *Act*.

This section defines "law enforcement" to mean (a) policing, (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and (c) the conduct of proceedings referred to in clause (b).

Previous orders of this office have found that in order to establish that disclosure "could reasonably be expected to" result in a particular harm, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373 and *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 and 40 (Div. Ct.)].

Representations

In regard to section 8 specifically, the Police submit the following:

In my first decision letter to the appellant, I denied access pursuant to Section 8(1)(a). at the time of his request and continuing to date, this matter is still under investigation. I am providing you with a copy of an internal computer assignment to the investigating officer. It shows an assignment date [a specified date]. The Appellant submitted his request on June 23, 2002 while the investigation was still ongoing.

In the representations made in respect to the applicability of section 14(3)(b), the Police also provide evidence to indicate that the investigation is still ongoing.

The Police also made more detailed representations relating to the interference they submit could reasonably be expected to result from the disclosure of the information in the records. Because of the nature of the submissions made by the Police on this issue, I am unable to discuss them in further detail.

Apart from the representations by the appellant quoted earlier, the appellant had no other specific representations to make about this issue.

Findings

The occurrence and supplementary reports were produced in connection with a police investigation of a possible breach of the *Criminal Code*. I am satisfied that, in investigating the robbery of a pizzeria, the Police were engaged in "law enforcement" activities, as defined in section 2(1) of the *Act*.

Based on my review of the records and the representations before me, I am satisfied that the occurrence report and supplementary reports contain information that relates to an ongoing law enforcement matter. I also find that the representations of the Police provide detailed and convincing evidence sufficient to establish that disclosure of this information could reasonably be expected to interfere with the matter. Therefore, I find that the records are properly exempt under section 8(1)(a) of the *Act*.

As indicated above, given that the section 8 exemption applies to these records, I need not consider the applicability of the section 14(3)(b) presumption.

As a result, I find that the Police properly refused to disclose the records at issue under the exemption at section 8 of the *Act*.

ORDER:

I uphold the decision of the Police to deny access to the information at issue.

Original signed by:
Rosemary Muzzi
Adjudicator

January 13, 2003