



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1743

Appeal MA-030265-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for any information in their possession relating to contact the Police may have had with a named individual. The requester has been retained by the Office of the Public Guardian and Trustee (OPGT), who are the court appointed representatives of the estate of the named individual's deceased mother. The requester is attempting to locate the named individual because he is the closest relative to his mother and would be entitled to inherit her assets.

The Police refused to confirm or deny the existence of any records related to the named individual, pursuant to section 14(5) of the *Act*.

The requester (now the appellant) appealed the Police's decision

Mediation of the issues was not successful in resolving the appeal, so it was transferred to adjudication.

I initiated my inquiry by sending a Notice of Inquiry to the Police, who submitted representations in response. I then sent the Notice, along with the non-confidential portions of the Police's representations, to the appellant, who in turn responded with representations.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD - INVASION OF PRIVACY

Introduction

Section 14(5) reads as follows:

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 institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases (Order P-339).

For this reason, in relying on section 14(5), the Police must do more than merely indicate that the disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. The Police must establish that disclosing the mere existence or non-existence of the requested records would convey information to the requester, and that this disclosure would constitute an unjustified invasion of privacy (Orders M-328, M-1096, MO-1179, MO-1395 and P-808, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996]

O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)).

Before the Police can exercise discretion to claim section 14(5), they must provide sufficient evidence to establish that:

1. Disclosing the records (if they exist) would constitute an unjustified invasion of personal privacy; and
2. Disclosing the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

(Order MO-1179)

Part 1: disclosure of the records (if they exist)

Definition of Personal Information

An unjustified invasion of privacy can only result from the disclosure of personal information. Under section 2(1), “personal information” is defined, in part, to mean recorded information about an identifiable individual, including 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 (paragraph (h)).

Any record responsive to the appellant’s request would, by definition, contain information about the named individual in the context of any interaction he may have had with the Police. Therefore, I find that any such record would be “about” the named individual in a personal sense, and would fall within the scope of the definition of “personal information”.

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. Section 14(2) lists some criteria for the Police to consider in making this determination; and section 14(3) identifies certain types of information, the disclosure of which is presumed to 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 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.)).

In this case, the Police appear to argue that disclosing any responsive information, if it exists, would constitute a presumed unjustified invasion of privacy under section 14(3)(b), since any such information would have been compiled and would be identifiable as part of its “law enforcement” mandate.

I do not accept the Police's position.

The appellant points out in his request that the OPGT has in its possession certain assets that once belonged to the named individual's deceased mother. The appellant has been hired by the OPGT to attempt to locate the son in order that the assets can be transferred to him, and is approaching the Police in that context. His request is broad and general in nature. He is not seeking access to records that would necessarily confirm that the named individual had been suspected of or charged with a criminal offence, or even that he was a witness to a crime under investigation by the Police. For example, had the named individual applied for a job with the Police, his job application would be a responsive record, which would clearly fall outside the scope of section 14(3)(b) or any other presumption or factor establishing an unjustified invasion of privacy under sections 14(2) or (3) of the *Act*.

Therefore, I find that disclosing any responsive records, if they exist, would not necessarily constitute an unjustified invasion of personal privacy, and therefore part 1 of the test for exemption under section 14(5) has not been established.

Part 2: disclosure of the fact that records exist (or do not exist)

Because the requirements of part 1 have not been established, it is not necessary for me to deal with part 2. Nevertheless, I find that the requirements of part 2 are also not established in the context of this appeal.

Under part 2, the Police must demonstrate that disclosing the fact that records exist (or do not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosing it would constitute an unjustified invasion of personal privacy.

For the same reasons outlined above with respect to part 1, I find that disclosing the fact that records do or do not exist would not convey information sufficient to establish an unjustified invasion of privacy. If records do not exist, then the named individual's privacy is clearly not unjustifiably invaded; and if they do exist, the nature and scope of the appellant's request is broad enough to capture records that could be in the possession of the Police yet fall outside its law enforcement mandate.

Therefore, I find that the Police have failed to establish the requirements of section 14(5) and I will order the Police to provide the appellant with a new decision.

ORDER:

1. I do not uphold the section 14(5) exemption claimed by the Police.

2. I order the Police to issue a revised decision letter to the appellant pursuant to section 19 of the *Act*, using the date of this order as the date of the request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

January 27, 2004