



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

ORDER MO-2039

Appeal MA-050155-1

Ottawa Police Services Board



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NATURE OF THE APPEAL:

The Ottawa Police Service (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from the requester's lawyer for the contact information of two witnesses found on a specific Motor Vehicle Accident Report. The Motor Vehicle Accident Report related to an incident that occurred on August 30, 2004, in which the requester was involved.

The Police notified the two witnesses that a request had been made for information relating to them and asked that they advise them of their views regarding the disclosure of their statements and contact information to the requester. Both witnesses objected to the disclosure of their information.

The Police issued a decision letter denying access to the witness contact information pursuant to section 38(b) (invasion of privacy), in conjunction with section 14(1) and the presumption in section 14(3)(b) (investigation into a possible violation of law).

The requester's lawyer, now the appellant, appealed the decision. In his letter of appeal, the appellant raised the factor listed in section 14(2)(d) (fair determination of rights) of the *Act* as a factor to be considered in this appeal.

During mediation, the mediator contacted the two witnesses specified in the request to determine whether they would reconsider their previous position and consent to disclosure of their statements to the Police as well as their contact information. Both witnesses advised the mediator that they continue to object to the disclosure of the information that relates to them.

When the appeal was filed, the Police inadvertently provided this office with a copy of other records relating to the accident. The mediator asked the appellant if he would be interested in obtaining access to other information relating to the accident. He indicated that he would.

Accordingly, during mediation, the mediator asked the Police whether they would consider a clarified request from the appellant and make a new decision regarding access to the additional information. The Police accepted the clarified request and issued a revised decision granting partial access to those records. Access was denied to the portions of those records that were withheld pursuant to section 38(b), in conjunction with section 14(1) taking into account the presumption in section 14(3)(b).

Despite the further disclosure obtained by the appellant, he advised the mediator that he wishes to pursue access to all of the information in the records that have been withheld by the Police.

As further mediation was not possible the file was transferred to the adjudication stage of the appeal process.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Police, initially, and received representations in return.

I also sent a Notice of Inquiry to four individuals who might have an interest in the disclosure of the information (affected parties). These affected parties are the two witnesses who supplied witness statements and the two drivers who supplied driver statements to the Police. Both witnesses and one of the drivers advised this office that they did not wish to disclose their statements to the appellant but did not wish to submit representations. The other driver advised, in writing, that she consents to the release of her statement to the appellant. Accordingly, I will order the Police to disclose that affected party's driver statement, identified as record 4 below, to the appellant.

I then sent a copy of this Notice of Inquiry together with a copy of the Police's representations to the appellant. The appellant provided representations in response.

RECORDS:

The records at issue in this appeal are outlined in the table below:

Record No.	Description	Withheld in Full or in Part	No. of Pages
1	Motor Vehicle Accident Report	In part	1
2	Witness Statement	In full	1
3	Witness Statement	In full	1
4	Driver Statement	In full	1
5	Driver Statement	In full	1
6	General Occurrence Report	In part	13

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether section 38(b) of the *Act* applies to exclude the information from disclosure, it is first necessary to establish whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"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 if 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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The Police submit that the records contain personal information:

Personal information contained throughout the records at issue pertain to the individuals that witnessed the accident and other individuals who were interviewed during the investigation into the accident. The names, dates of birth, race, origin, contact information and employment history are considered personal information and is listed in the records at issue in this appeal.

The appellant agrees that the records contain personal information. The appellant submits:

Our request for the full accident report, including witness statements, and the names and contact details of the witnesses will include personal information about the victim, the drivers and the witnesses to the accident pursuant to s. 2(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (the Act). The

names, contact information, employment history, view or opinions of the witnesses to the motor vehicle accident encapsulates our access request.

Having reviewed the records, I agree with the positions put forward by both parties and find that the records at issue contain the personal information of the type described above belonging to the witnesses and drivers involved in the incident. I find that the records contain information about the witnesses and drivers that qualifies as their “personal information”, including their names, ages, addresses and telephone numbers. The records also contain the view and opinions of those individuals about the incident. In addition, given the appellant’s involvement in the incident, the records also contain personal information belonging to him, including his name, age, address, and telephone number. Accordingly, I find that all of the records contain the personal information of both the appellant and other individuals involved in the incident. I note however, that all of the personal information that relates solely to the appellant has been disclosed to him.

Previous orders have established that if a record contains the personal information of a requester, a decision regarding access must be made in accordance with the exemption at section 14(1), found in Part I of the *Act* [Orders M-352 and MO-1757-I]. However, in circumstances where a record contains both the personal information of the appellant and another individual, the request falls under Part II of the *Act* and the relevant personal privacy exemption is the exemption at section 38(b) [Order M-352]. Some exemptions, including the invasion of privacy exemptions (sections 14(1) and 38(b)) are mandatory under Part I but discretionary under Part II and thus, in the latter case, an institution may disclose information that it could not disclose if Part I is applied [Order MO-1757-I].

Furthermore, the correct approach is to review each record in its entirety, not only the portions remaining at issue, to determine whether it contains the requester’s personal information. This record-by-record analysis is significant because it determines whether the record as a whole (rather than only certain portions of it) must be reviewed under Part I or Part II of the *Act* [Order M-352].

Accordingly, as I have found that each of the records at issue in this appeal contain the personal information of the appellant, and each also contains the personal information of at least one if not all of the affected parties, I must review whether the information at issue qualifies for exemption under the discretionary exemption at section 38(b) of Part II of the *Act*.

RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

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 exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual (as is the case with the records at issue in this appeal) and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy,

the institution may refuse to disclose that information to the requester. I will therefore consider whether the disclosure of the personal information in the records would be an unjustified invasion of the personal privacy of the individuals and is exempt from disclosure under section 38(b).

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

On appeal, an analysis under section 38(b) requires that I must be satisfied that disclosure of the personal information at issue would result in an unjustified invasion of the personal privacy of the individuals to whom the information relates [Order M-1146]. Sections 14(2), (3) and (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met.

Section 14(2) lists criteria for the institution to consider in making a determination as to 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(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 whose disclosure does not constitute an unjustified invasion of personal privacy.

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

Unjustified invasion of another individual's personal privacy

Sections 14(3)(b) and 14(2)(d)

The Police take the position that disclosure of the information in the records is presumed to constitute an unjustified invasion of privacy under the presumption in section 14(3)(b) of the *Act*, which states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

is 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.

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

The Divisional Court has stated that once a presumption listed in section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A section 14(3) presumption can, however, be overcome if the personal information is found to fall under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest in the disclosure of the record exists [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

However, if no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The list of factors under section 14(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2) [Order P-99].

The appellant takes the view that the presumption at section 14(3)(b) is not applicable in the circumstances of this appeal and relies on the factor at section 14(2)(d) to support the disclosure of the information at issue. Section 14(2)(d) reads:

A head in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request.

The parties' representations

The Police claim that the presumption in section 14(3)(b) applies in the circumstances of this appeal. They submit:

The records at issue contain information that is considered to be the personal information of other individuals, as set out [above]. This information was collected for the sole purpose of interviewing all parties to ascertain if charges were warranted. Police investigation reports are compiled to investigate the conduct of citizens and are both confidential and privileged to the investigative body to maintain fairness and presumption of innocence...

...

The information was compiled and is identified as part of an investigation into a possible violation of law. The information was compiled by members of the Ottawa Police Service during an investigation [of] allegations that an offence under the *Criminal Code of Canada* or *Highway Traffic Act* may have been committed.

The appellant does not agree. He submits:

The discretionary exemption at section 38(b), in conjunction with the presumption of section 14(3) of the *Act* does not apply to the information at issue. The disclosure of the witnesses' statements and their contact details would in no way constitute an unjustified invasion of their personal privacy. As the [named appellant's] interest is in a fair determination of his rights, a factor found at section 14(2)(d) of the *Act*, outweigh these witnesses' interests in protecting their privacy. This factor must be considered because it is relevant to the information requested.

[The appellant] requests that he have access to the information at issue in order to allow him to know what happened on the night of the accident and to allow his lawyer to fully appreciate the particulars of the accident. By denying him access to the requested information, he is denied the right to fully prepare his claim, with all of the available facts, and is also being denied the chance to decide whether to pursue a claim at all. Access to the requested information is required in order to ensure completeness and accuracy.

Providing the witnesses' statements and their contact details would not unjustifiably invade their personal privacy and there would be no harm done to the witnesses in allowing access to this information. Furthermore, access to this information would further the appellant's access to justice.

In response to the Police services reference to the presumption found in section 14(3)(b) of the *Act*, and application of Order MO-1452 to these witness statements would find that they are purely "descriptive and not evaluative in nature." The witnesses' opinion or view of the events and circumstances surrounding the accident are "mere observations or records of fact" for a general police occurrence report. Order MO-1451 states that "occurrence reports and supplementary reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act* in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations".

Witnesses are regarded as concerned citizens assisting vulnerable individuals in usually traumatic settings. As such, a balance of competing interests must be

conducted with consideration of the descriptive nature of the information request to be disclosed.

Analysis and finding

I disagree with the appellant's arguments put forward to support his claim that section 14(3)(b) does not apply. For the presumption in section 14(3)(b) to be met, the information does not have to meet the definition of "report" and the fact that the witness statements or occurrence reports are purely "descriptive and not evaluative in nature" is of no consequence. Section 14(3)(b) requires only that the information is compiled and is identifiable as part of an investigation into a possible violation of law. Having carefully reviewed the information at issue and following a significant number of orders that have considered similar records [see, for example, Orders MO-1962, MO-2001, and PO-2438], I find that the information contained in the records at issue was compiled by the Police in the course of their investigation into the circumstances surrounding the incident in which the appellant was involved. I find that the undisclosed personal information relating to the witnesses and the driver is identifiable as part of the Police investigation into a possible violation of law; specifically the provisions of the *Criminal Code* and/or the *Highway Traffic Act*, thereby triggering the presumption of an unjustified invasion of privacy at section 14(3)(b).

Although the appellant submits that section 14(2)(d) applies, as noted above, the Divisional Court ruled in *John Doe v. Information and Privacy Commissioner* that once a section 14(3) presumption has been established, it may *only* be rebutted by the criteria set out in section 14(4) or by the "compelling public interest" override in section 16. It cannot be rebutted by either one or a combination of the factors set out in section 14(2). I have already found that the section 14(3)(b) presumption applies in the circumstances of this appeal. Consequently, the appellant cannot rely on section 14(2)(d) as a basis for finding that disclosure would not be an unjustified invasion of personal privacy.

In the circumstances of this appeal, I find that the section 14(3)(b) presumption is not rebutted by section 14(4) or the "public interest override" at section 16, which was not raised. The disclosure of the personal information of the witnesses and the driver contained in the record is therefore, presumed to constitute an unjustified invasion of that individual's personal privacy under section 14(3)(b). Accordingly, I find the information exempt under section 14(1) of the *Act*.

EXERCISE OF DISCRETION

As indicated above, the section 38(b) exemption is discretionary, and permits the Police to disclose information, despite the fact that they could withhold it. This involves a balancing of interests between the appellant's right of access to his own personal information and the affected parties' right to protection of their privacy. On appeal, this office may review the decision taken by the Police, in order to determine whether it erred in doing so [Orders PO-2129-F and MO-1629].

This office may find that the Police erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the Police for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

In their representations, the Police do not specifically address their exercise of discretion but make the following comments about their actions in response to the request that relate to it. The Police submit:

Although the appellant may have an interest in the information, the parties involved have a right to the protection of their privacy. Information collected by the police, from individuals, must be safe guarded in order to protect processes. If the information collected by the police is released without the consent of the individuals who supplied the information these individuals may be hesitant to assist police in the future as there would be no guarantee that the information would not be released.

...

During the formal request process this Police service tried to contact all involved parties to canvas for their consent to release their information to the requester. The affected parties did not consent and did not wish to have their information divulged to the requester. In many instances, passerby and witnesses often assist injured parties in the course of their day, without any hesitation, however, they often do not want their information to be shared or released to any requester as they do not feel the release of their personal information would be in their best interest. These individuals should be highly regarded as concerned citizens for assisting needy individuals in a traumatic setting, without the worry or concern for invasion into their privacy.

Later in their representations the Police reiterate:

Although the appellant may have an interest in information that has been supplied by other individuals, these same individuals have the right to their privacy and to know that the police will safeguard their information. If we decide to release information supplied by other individuals they will lose confidence in the police

to protect this information and will not be willing to come forward again to assist in a future investigation.

We therefore determined that the privacy rights of the other individuals outweighed the right of access by the appellant and denied him the information.

The Police also submit that they examined the factors in section 14(2) of the *Act* and, despite the fact that they are aware that a presumption in section 14(3) cannot be overcome by the factors set out in section 14(2), they did not feel that any of the factors would serve to mitigate the presumption at section 14(3). The Police submit further that the information does not fall under section 14(4).

The appellant responds with the following submissions about the Police's exercise of discretion:

Although a section 14(3)(b) presumption of an invasion of privacy may exist, the Ottawa Police Service erred in exercising its discretion granted in the *Act* because it failed to take into account the relevancy of section 14(2)(d). Institutions have the "discretion to disclose personal information of an affected person which is contained in a record also containing the personal information of the requested, *even* if it would be an unjustified invasion of that affected person's privacy [Order MO-1451]. In this case, the nature of the information requested does not constitute an unjustified invasion of these witnesses' personal privacy.

I have considered the representations of the Police, the appellant, and the contents of the records carefully. I have previously found that the presumption at section 14(3)(b) applies to the records and accordingly, that disclosure of the information at issue would result in a presumed invasion of the privacy of the affected parties touched by this appeal. The Police have demonstrated that in light of the discretion permitted by section 38(b) they have weighed the rights of the affected parties not to have their personal information disclosed against the circumstances put forward by the appellant and found that the balance fell in favour of protecting the affected parties' right of personal privacy. Additionally, as noted above, all of the personal information that relates solely to the appellant has been disclosed to him.

In the circumstances, I find nothing in the manner in which the Police exercised their discretion that would warrant an order for them to re-exercise it. I therefore find that the Police have properly exercised their discretion under section 38(b) not to disclose the remaining portions of the records to the appellant, in accordance with the *Act*.

ORDER:

1. As a result of the consent obtained by the affected party to whom the information relates, I order the Police to disclose Record 4 to the appellant. This information must be disclosed to the appellant immediately.

2. I uphold the decision of the Police to deny access to the remaining records and part of records at issue in this appeal.
3. In order to ensure compliance with this order, I reserve the right to require the Police to provide me with a copy of the record sent to the appellant pursuant to provision 1.

Order Signed By
Catherine Corban

March 31, 2006