



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER MO-2031-I

Appeal MA-050185-1

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 access to information related to an incident in which the requester's car was struck by a rock thrown off a bridge. The rock shattered her windshield. The requester had been advised by the investigating police officer that a young boy was found to be throwing rocks at cars on that road.

The requester stated:

I am now asking for the name and address of the parents of the boy to send the bill for repair to them, in hopes they will accept it and pay at least part if not all this bill.

The Police located a responsive record and contacted an individual identified by the investigating officer as the parent of the person allegedly responsible, asking for her views regarding disclosure of this information.

The Police then refused access to the information requested, stating in a letter to the requester:

Following third party notification, access to the name, address and phone number of the parent of the person responsible for the incident has been denied pursuant to subsections 14(1)(f), 14(3)(b) and 38(b) of the *Municipal Freedom of Information and Protection of Privacy Act*.

The requester (now the appellant), appealed that decision.

This office appointed a mediator to attempt to resolve this appeal. During the mediation process, the mediator contacted the parent of the individual alleged by the investigating officer to be responsible (the affected person) to discuss whether she would consent to the disclosure of her name and address to the appellant. She confirmed that she did not consent to disclosure of this information.

As mediation did not resolve this appeal, it moved on to the adjudication stage and I was assigned as adjudicator. I initially sent a Notice of Inquiry setting out the facts and issues to the Police and the affected person and invited them to provide representations. I received representations from both the Police and the affected person. I then invited representations from the appellant. I sent her a Notice of Inquiry together with the representations of the Police in their entirety as well as a copy of the representations of the affected person with identifying information severed. I received representations from the appellant.

RECORDS:

In response to a request for copies of any responsive records, the Police provided this office with a sheet of paper on which the name and address of the affected party was typed. The Police did not provide a copy of the record from which this information was copied. At my request, the Police subsequently provided a three-page occurrence report dealing with the incident in question.

DISCUSSION:

PERSONAL INFORMATION

Does the record contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide 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 meaning of “about” the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The meaning of “identifiable”

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Analysis and findings

The “record” that the Police initially provided to this office contained only the name, address and telephone number of the affected person. This is the personal information of the affected person. However, the record from which the Police copied this information, an occurrence report, also contains the name, address and telephone number of the appellant, which is the appellant's personal information.

Although the Police have created a record containing the requested information, the original record containing the information is the occurrence report. Unlike the record created by the Police, the occurrence report contains the personal information of both the appellant and the affected party. The question of whether the record contains the appellant's personal information determines whether this matter proceeds under Part 1 or 2 of the *Act*. A record containing the appellant's personal information will be dealt with under Part 2, which gives the appellant a higher right of access than Part 1 (Order M-352). In the circumstances of this appeal, in order to respect the right of individuals to have access to their own personal information set out in section 1 of the *Act*, I have decided to treat the occurrence report as the responsive record.

I find that the record at issue, the occurrence report, contains the personal information of both the appellant and the affected person.

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

Does the discretionary exemption at section 38(b) apply to the information at issue?

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, 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.

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. I will return to the question of the Police's exercise of discretion later in this order.

Initially, the Police alleged that disclosure of the affected person's name, address and telephone number would be an unjustified invasion of her privacy and exempt under section 38(b) in conjunction with the presumption in section 14(3)(b) (information compiled as part of an investigation into a possible violation of law). However, in their representations, the Police attempted to withdraw their reliance on section 38(b) and to rely solely on section 14(1) because the "record" that they created contains only the personal information of the affected person and not the personal information of the appellant.

As indicated above, both section 38(b) and 14(1) exempt personal information from disclosure on the basis of unjustified invasion of personal privacy. Section 38(b), which may apply where a record contains both the requester's information and that of another individual or individuals, is a discretionary exemption, and therefore in deciding whether to apply this exemption, an institution must balance an appellant's interest in disclosure against another individual's interest in privacy. In contrast, section 14(1), which may apply where a record contains only the personal information of an individual or individuals other than the requester, is a mandatory exemption. As stated above, individuals have a "higher" right of access to records containing their own personal information, and this is reflected in the difference between the mandatory character of section 14(1) and the discretionary character of section 38(b). When the record contains the requester's personal information, the Police have discretion to disclose it even if it could be exempt.

Therefore, where a record contains the personal information of both the appellant and another individual, an institution is not entitled to avoid exercising its discretion by creating a new record that does not contain the personal information of the appellant. Accordingly, the Police may not substitute section 14(1) for section 38(b) as the basis for their exemption claim.

I find that the question of whether the personal information of the affected person is exempt must be determined under section 38(b) rather than section 14(1).

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met. If any of paragraphs 14(1)(a) through (e), or 14(4)(a) or (b) applies, disclosure is not an unjustified invasion of personal privacy. Section 14(3) identifies information whose disclosure is *presumed* to be an unjustified invasion of personal privacy. If no section 14(3) presumption applies, section 14(2) outlines factors and circumstances to be considered in determining whether disclosure is an unjustified invasion of personal privacy.

Do any of the exceptions in paragraphs (a) to (e) of section 14(1) apply?

Sections 14(1)(a) to (e) provide:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
- (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
- (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;
- (e) for a research purpose if,
 - (i) the disclosure is consistent with the conditions or reasonable expectations of

disclosure under which the personal information was provided, collected or obtained,

- (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
- (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations;

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

I find that none of the exceptions in paragraphs (a) to (e) of section 14(1) apply.

Does the presumption in paragraph (b) of section 14(3) apply?

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the “public interest override” at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In this appeal, the Police claim that the presumption at paragraph (b) applies.

Section 14(3)(b) provides:

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

- (b) 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;

Principles, representations, analysis and findings

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].

Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086]

In their representations, the Police state:

In section 14(3)(b), the presumed invasion of privacy addresses the fact that when personal information is supplied to or collected by a law enforcement agency, the use of that information will be restricted to that which is required to investigate/adjudicate the matter. The personal information gathered pertains exclusively to an identifiable individual and was collected in the course of investigating an incident.

...

The occurrence was investigated as a suspicious incident. Due to the age of the alleged suspect criminal sanctions could not be pursued, which does not discount the fact that an investigation was conducted.

The appellant does not dispute this. Her representations are directed at other concerns.

I am satisfied on the basis of the representations of the parties together with my review of the record itself that the affected person's personal information was compiled and is identifiable as part of an investigation into a possible violation of the criminal law. Therefore, disclosure of this information would be presumed to be an unjustified invasion of the affected person's privacy under section 14(3)(b).

Accordingly, it is exempt from disclosure unless section 14(4) or section 16 applies.

If paragraph (a) or (b) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). These paragraphs apply only to personal information that relates to certain financial matters, contracts and employment responsibilities of officers, employees, and contractors of institutions. It has no application to the personal information of the affected person.

Section 16 provides that an exemption from disclosure under section 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. The appellant does not allege that there is a compelling public interest in this case, and although I am sympathetic with the appellant's reasons for wanting this information, my review of the record and representations in this case does not indicate that section 16 applies in this case.

As the personal information at issue is subject to the presumption in section 14(3)(b), and sections 14(4) and 16 do not apply, I find that it is exempt from disclosure under section 38(b).

EXERCISE OF DISCRETION

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution 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 institution 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)].

This office has identified a number of considerations that may be relevant in exercising discretion, which were set out in the Notice of Inquiry provided to the Police. Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information

- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

Representations, analysis and findings

In her representations, the appellant states:

I wish to add comments that pertain to the responsibility for this incident. ...I have been made to bear the responsibility for all of this in more than one way. ... I must repair the damaged windshield as no insurance policy will let you drive with a damaged vehicle. ...I...am on a very limited income, which does not allow for extra costs. ...I have attempted to provide all necessary information to put this issue in front of some department or authority to make the issue clear for the sake of the enormous danger that it posed.

In their representations, the Police state:

When personal information is supplied to or collected by a law enforcement agency, the use of that information will be restricted to that which is required to investigate/adjudicate the matter. ... The [Police] attempted to contact the third party and in the absence of a response, could not justifiably release this information.

...[T]he IPC contacted the affected party, who refused to give consent for the release of their personal information. Therefore, releasing this personal information against the wishes of the affected party would be in direct violation of protecting personal privacy.

[B]ecause of the nature of information collected by law enforcement institutions and the circumstances under which the information is collected, the balance is tipped heavily towards protection of the privacy of third parties.

It might be argued from the requester's perspective, that disclosure of the third party information in this case might be "relevant to a fair determination of [the principal's] rights". However, Commissioner's Orders 12 and P-224 state that, "Although release of a person's name and address may be relevant to a fair determination of another's rights, disclosure must be balanced against the protection of the privacy rights of individuals".

Although the Police refer to the balancing principle in their representations, there is no indication that they made any attempt to determine the circumstances of the requester or that they gave any real consideration to whether the requester has a sympathetic or compelling need to receive the information. The only effort to consider the appellant's perspective is their acknowledgement of the possibility that disclosure of the information might be relevant to a fair determination of rights. However, they dismissed this concern without any effort to determine whether this is the case. It is apparent from their representations that the Police made no real effort to balance competing interests. Rather, they fettered their discretion because of their erroneous beliefs that, "When personal information is supplied to or collected by a law enforcement agency, the use of that information will be restricted to that which is required to investigate/adjudicate the matter" and that "in the absence of a response [from the affected person], [the Police] could not justifiably release this information".

In my view, the Police fettered their discretion by treating this matter as if they have no discretion and as a result did not take into account relevant factors.

ORDER:

1. I order the Police to re-exercise their discretion, taking into account the representations of the appellant and the affected person, which I will provide with this order, and provide a new decision or representations to this office, to the appellant and to the affected person by **March 30, 2006**.
2. This office remains seized of this matter to consider the re-exercise of discretion by the Police.

Original signed by: _____
John Swaigen
Adjudicator

March 15, 2006