



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2036

Appeal MA-050259-1

Ottawa Police Services Board



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NATURE OF THE APPEAL:

The Ottawa Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to a copy of the “whole police report as well as the statements of all witnesses” with respect to a specified police investigation of an incident involving the requester that occurred at his son’s school. The Police identified the responsive records and granted partial access to them. Access to the remaining portions of the responsive records was denied on the basis that the information was exempt under the invasion of privacy exemption in section 38(b) of the *Act*.

The requester (now the appellant) appealed the Police’s decision.

During the request stage, the Police contacted four individuals who were involved in the incident and who provided statements to the Police to inquire as to whether they were prepared to provide their written consent to the release of their statements to the appellant. Two of the four individuals (the affected parties) consented to the release of their statements to the appellant.

During the mediation process, the mediator contacted the two affected parties who did not consent to the release of their written statement at the request of the appellant. The mediator spoke to one of the affected parties who confirmed that he or she remained opposed to the release of his or her statement to the appellant. The other affected party did not return the mediator’s telephone inquiry. Also during mediation, the appellant narrowed the scope of his appeal to include only the undisclosed information on pages 4, 5 and 6 of the responsive record.

As further mediation was not possible, the matter was moved to the adjudication stage of the appeals process. I sought and received the representations of the Police, initially, and provided a complete copy of them to the appellant, along with a Notice of Inquiry. The appellant also provided me with his submissions. Along with his representations, the appellant indicated that he wished to make a request for the correction of certain “omissions and one factual error” contained in the records that were disclosed to him by the Police. The appellant is advised to direct this request to the Police directly, in accordance with section 36(2) of the *Act*.

RECORDS:

The undisclosed portions of Pages 4, 5 and 6 of the computer print out entitled “General Occurrence Hardcopy”

DISCUSSION:

PERSONAL INFORMATION

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].

Findings with respect to personal information

In the present appeal, the record clearly contains the personal information of the appellant as it describes in detail his actions on the date that the report was prepared (section 2(1)(h) of the definition). The record also contains the personal information of the appellant's wife and son, including their names and other personal information about them (section 2(1)(h) of the definition).

In addition, I find that the record also contains the personal information of members of the school staff who were involved in the incident with the appellant on the day in question (the affected parties). While all of these individuals were engaged in the conduct of their professional or employment duties at the school, I find that because of the fact that the appellant has made certain allegations against one of the individuals, impugning his professionalism, the information relating to this individual has assumed a personal character. The references to this individual in the record falls within the ambit of the section 2(1)(g) of the definition of personal information.

In addition, owing to the nature of the encounters involving the appellant that are described in the record, I find that they also contain information that relates to three other school employees in a personal, rather than strictly a professional, way under section 2(1)(h) of the definition as it identifies them by name and includes other personal information about them.

Accordingly, I find that the records at issue in this appeal contain the personal information of the appellant, his wife and son and the four affected parties who are school employees within the meaning of section 2(1)(h) of the definition.

INVASION OF PRIVACY

General Principles

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. Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met. Section 14(1)(a) provides an exception to the prohibition

against the disclosure of personal information in situations where the person to whom the information relates consents to the release of their personal information. In the present appeal, two of the affected parties provided the Police with their consent to the disclosure of their personal information to the appellant, and the Police disclosed the information to him.

The only other exception which may have some application in the circumstances of this appeal is set out in section 14(1)(f), which states:

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

if the disclosure does not constitute an unjustified invasion of personal privacy.

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). 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].

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].

Representations of the parties

In this case, the Police argue that the presumption in section 14(3)(b) applies to the personal information contained in the record because it was:

. . . compiled by members of the Ottawa Police Service during an investigation into allegations of Threats/Harassment and was used to determine if an offence under the Criminal Code of Canada had been committed. The information contained in these records was used to investigate the offence and to prosecute the offender(s) should charges be laid.

The Police go on to add that:

Police investigation reports into the conduct of citizens are both confidential and privileged to the investigative body to maintain fairness and presumption of innocence. . . If charges had been laid there would have been a disclosure process for the appellant. However, after the incident was fully investigated it was determined that criminal charges were not warranted . . .

Section 14(3)(b) states:

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 appellant argues that he was present at the time that the events described in the record took place and that the complete record includes his own statements to the investigating officer. The appellant argues that in order to clear his name, he requires access to all of the contents of the record. This argument gives rise to the possible application of the consideration favouring disclosure which is described in section 14(2)(d) of the *Act*, which states:

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;

Findings

In determining whether the personal information which remains undisclosed is exempt under section 38(b), I have reviewed the pertinent occurrence report and the representations of the parties. In response to a complaint from the school's principal and vice-principal, the Police attended at the school and conducted an investigation into whether the conduct of the appellant warranted the laying of charges under the *Criminal Code*. The investigating officer recorded various personal information from the individuals she interviewed, including the appellant.

In my view, it is clear that the personal information in the record, which relates primarily to individuals other than the appellant, was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code* prohibitions against threatening and/or harassment. Therefore, I find that section 14(3)(b) of the *Act* applies to the personal information at issue.

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*, cited above]. I have considered the application of the exceptions contained in section 14(4) of the *Act* and find that the personal information at issue does not fall within the ambit of this section.

In summary, section 14(3)(b) applies to the personal information at issue, which means that disclosure of this information is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) and the “public interest” override at section 16 are not applicable in the circumstances of this appeal. Therefore, I find that the personal information at issue is exempt 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)].

The Police submit that this office should uphold their exercise of discretion, identifying the factors taken into account in exercising discretion not to disclose all of the record to the appellant. The Police specifically argued that:

We therefore determined that the privacy rights of the other individuals outweighed the access right of the appellant to this information.

After careful consideration of the contents of the records at issue, to protect the process and to safeguard the rights and privacy of all parties involved we exercised our discretion to deny access to the requester.

The appellant’s representations do not address whether the Police erred in exercising their discretion under section 38(b).

In my view, the Police considered the relevant factors in their exercise of discretion and did not consider irrelevant ones. I also note that the Police severed and disclosed all personal information in the records that pertains exclusively to the appellant and withheld the personal information that relates primarily to other individuals who did not provide their consent to its disclosure. I find that the exercise of discretion by the Police was proper.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Donald Hale
Adjudicator

_____ March 27, 2006