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

# ORDER MO-2038

## Appeal MA-050093-1

## Ottawa Police Services Board

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

## NATURE OF THE APPEAL:

The Ottawa Police Service (the Police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> I am writing to request the complete police report regarding your file [named file number]. This file is concerning my 93 Volkswagan Jetta being towed on December 19, 2004 from [named address]. The police towed the car for reason of the vehicle being abandoned. My car was in parking spot #238, registered to the owner of suite 811. The manager of the building made a serious error in stating that the parking spot was registered to the owner of suite 701. In fact, [named individual], the owner of suite 811, owned the parking spot, was given written notification by her building management that she did indeed have access to that spot, and [named individual] gave me permission to be there.

The Police located a record responsive to the request and identified information relating to a third party who might have an interest in the disclosure of the record (the affected party). The Police notified the affected party seeking his views on the disclosure of his information. The affected party did not respond to the notice.

The Police then granted partial access to the record. Access to the remaining information was denied on the basis that it falls within the exemption in section 38(b), in conjunction with section 14(1) (unjustified invasion of privacy) and the presumption in section 14(3)(b) (compiled as part of a law enforcement investigation).

The requester, now the appellant, appealed the decision to deny access to any information.

During mediation the appellant advised the mediator that she had not received a copy of the portions of the record to which she was granted access. The Police advised the mediator that it is the policy of the Ottawa Police Service not to provide copies of record by mail. Rather, a requester is now required to come to the police station to pick up the record in person, and access to the record will be granted upon production of identification.

The appellant then advised the mediator that she made several appointments to attend at the police station but that her job is demanding and she had to cancel them. She explained that she works late every evening and that it is very difficult for her to attend at the police station to pick up the record.

During the mediation stage of this appeal, the appellant was unable to find an opportunity to pick up the record for the purpose of trying to mediate a settlement of this appeal and did not wish to discuss the record until she has obtained a copy of them. The appellant takes the position that the portions of the record to which she has been granted access should be mailed to her by the Police. The appellant requested that this matter be raised as an issue in this appeal.

As further mediation was not possible, the appeal was transferred to me for adjudication.

I began my inquiry by sending a Notice of Inquiry to the Police and received representations in return. I also sent a copy of the Notice to the affected party whose information is being sought. The Notice sent to the affected party was returned to this office and a current address could not be located. Accordingly, representations were not received from the affected party.

I then sent a copy of the Notice of Inquiry to the appellant, enclosing a copy of the Police's representations. The appellant chose not to submit representations.

## RECORDS:

The record at issue in this appeal consists of an eight-page document entitled "General Occurrence Hardcopy". The portions of information that have been denied are found on pages 1, 2, and 3 of the record.

## DISCUSSION:

### METHOD OF ACCESS

#### General principles

Where an institution makes a decision to disclose records, or parts of records, in response to a request under the *Act*, section 19 sets out the framework in which this disclosure is to take place. Section 19 reads:

> Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20, 21 and 45, within thirty days after the request is received,
>
> (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
>
> (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

Section 23 describes the two ways in which access to a record may be granted, that is, either by allowing inspection of the record or by providing a copy of the record. Section 23 reads:

> (1) Subject to subsection (2), a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of

its length or nature, in which case the person shall be given an opportunity to examine the record or part.

(2) If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

(3) A person who examines a record or a part and wishes to have portions of it copied shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.

**Representations**

As noted above, during mediation the appellant made it clear that it is her position that the Police have not complied with their obligations under the *Act* to provide her with access to the portions of the record that they are prepared to disclose. The appellant argues that the portions of the record to which she has been granted access should be mailed to her by the Police and that she should not be obliged to attend at the police station to retrieve them.

The Police submit:

> …On February 7, 2005, a letter was sent to the appellant advising of our decision to grant partial access [to the requested record]. In the decision letter we also requested that the appellant contact us in order to make arrangements to pick up the record being released. The appellant made several appointments to pick up the documents however cancelled all of them. The appellant was advised that if she could not attend during the hours that the Freedom of Information Office was open that the document could be left at the front Information Desk at 474 Elgin Street and could be picked up anytime (24 hours a day, 7 days a week) upon presenting identification to ensure she was in fact the individual to whom the information relates.
>
> The appellant appealed our decision to deny access to some information and also advised the mediator that she wished the document mailed to her. It is our position that anyone who requests access to personal information must first produce identification to ensure that they are in fact the individual to whom the personal information relates. The mediator advised that if we sent it by courier that the signature on the letter and that on the delivery receipt should match. That is certainly true however, we have no way of knowing if the individual who sent the letter is in fact the individual to whom the information relates. Any individual can send a request to us, with signature on the bottom, however we have no way of knowing the true identity of the individual without first viewing their identification. This Police Service has a strict policy that personal information

> will not be released to an individual unless the individual can produce proper identification. This is to ensure that personal information is not released unlawfully and in breach of the *Municipal Freedom of Information and Protection of Privacy Act*. I would think that the appellant would be pleased to know that the Ottawa Police Service takes the release of her information very seriously and that we take every step to ensure that her privacy is protected.
>
> As stated above arrangements can be made for the appellant to attend the police station, at her convenience, and upon production of identification will be supplied with the document. It should be noted that the appellant lives in close proximity to the police station (approximately 10 blocks) and would not have to be driving from one end of the city to the other to pick up the information.

**Finding**

I disagree with the appellant's position that by requiring her to attend at the police station to retrieve the copies of the record to which she is granted access the Police are in breach of their obligation to provide access to the record under section 23 of the *Act*. As required by section 23(1) the Police are prepared to give her a copy of the record to be disclosed to her; however, they are imposing the limitation that she attend at the police station to retrieve them, in order to verify her identity given that the record relates to her personal information.

Although the *Act* does not specify how access should be granted to records containing personal information (for example: by mail, by courier, in person), it is clear that personal information is to be safeguarded. Section 2(3) of Regulation 823 made under the *Act* states:

> A head shall verify the identity of a person seeking access to his or her own personal information before giving the person access to it.

In my view, because the record at issue contains the personal information of the appellant, the Police may, and are indeed required by section 2(3) of Regulation 823, to take whatever steps they feel are necessary to safeguard the security of the personal information contained in the record to ensure that the recipient is indeed the appellant. If, to do so, the Police have chosen to create a policy that requires requesters to attend at their offices to provide identification to police staff prior to their release of the record, in my view they are entitled to impose such a requirement. Moreover, the Police have made it clear that they have made arrangements to facilitate, as much as possible, the appellant's retrieval of the copies of the record to which she has been granted access by making them available for pick up at any time that is convenient for her. By taking these steps, I am satisfied that the Police have complied with their obligations under the *Act* both to provide access under section 23 to copies of the record to which the appellant is entitled, while at the same time ensuring that they meet their obligations under section 2(3) of Regulation 823, to safeguard personal information.

## PERSONAL INFORMATION

### General principles

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 record contains personal information of the affected party as well as that of the appellant:

> The information contained in the record is the personal information of one other individual and the appellant as defined in the *Act*. The information listed below is considered to be solely the personal information of another individual:
>
> 2(a) Information relating of the age, race, physical descriptor of the other individual;
> 2(d) The address and telephone number of the other individual;
> 2(h) The individual's name if it appears with other personal information (information as listed above).
>
> The statements made by the other individual are considered to be the mixed personal information of the appellant and the individual who supplied the information.
>
> Therefore, considering all above factors we assert that the information would qualify as personal information as defined by Section 2(1) of the *Act*.

Having reviewed the record, I agree with the position put forward by the Police and find that the record at issue contains the personal information of the type described above belonging to both the appellant and the affected party. I find that the record contains information about the affected party that qualifies as "personal information", as it includes the name, age, race, address and telephone numbers of the affected party. In addition, the record contains personal information belonging to the appellant including her name and address. Accordingly, I find that the record contains the personal information of both the appellant and another individual who was involved in the incident, the affected party. I note however, that the Police are prepared to disclose all of the personal information related to the appellant to her if she retrieves the record from the Police Station.

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 the record at issue in this appeal contains the personal information of the appellant as well as the personal information of an affected party, 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 record 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 record would be an unjustified invasion of the personal privacy of the individual 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.

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 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**

***Section 14(3)(b)***

The Police take the position that disclosure of the information in the record 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,
>
> (b) 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 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 another individual [other than the appellant], as set out in issue A [relating to "personal information"]. This information was collected for the sole purpose of interviewing all parties and ascertaining if charges are warranted.
>
> Police investigation reports into the conduct of citizens are both confidential and privileged to the investigative body to maintain fairness and presumption of innocence. The information was compiled and is identifiable as part of an investigation into a possible violation of law.

> The personal information of the other individual was compiled by members of the Ottawa Police Service during an investigation into an abandoned vehicle and was used to determine whether the vehicle may have been stolen and that an offence under the Criminal Code of Canada may have been committed. The information contained in these records was used to investigate this incident and prosecute any offender(s) should charges be laid.
>
> During the process we sent notification to the affected party, however, no response was received from that individual. Although the appellant may have the right to information that has been supplied by another individual and is about her, the individual who supplied the information has the right of 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 it, then these same individuals may be hesitant to assist police in the future as there would be no guarantee that the information would not be released.

I have examined the record at issue and agree that the information was compiled and is identifiable as part of an investigation by the Police into a possible violation of law, specifically, the *Criminal Code*. The fact that no criminal proceedings were subsequently undertaken has no bearing on the issue, since section 14(3)(b) only requires that there be an investigation into a possible violation of law [Order PO-1849]. Accordingly, I find that the undisclosed personal information contained in the record falls within the presumption of an unjustified invasion of personal privacy at section 14(3)(b) of the *Act*.

As I have found that the section 14(3)(b) presumption applies in the circumstances of this appeal, the factors listed in section 14(2) cannot be considered 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 complainant 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 her 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 make the following submission on their exercise of discretion:

> The factors set out in sections 14(4) and 16 were examined and we feel that nothing in these sections outweigh the purpose of the exemptions claimed under section 14(1)(f) and 14(3)(b).
>
> Section 4(2) of the *Act* was also considered and it is felt that the records to which access was denied, cannot be severed without disclosing the information that falls under one of the exemptions.
>
> The circumstances of the incident were looked at to see if the right of access to the appellant outweighed the privacy rights of the other individual. Disclosure of a record is in effect disclosure to the world and not just the appellant. We therefore feel that the privacy rights of the other individual outweighs the appellant's right to access. Since we could not obtain consent from the other individual we felt that the information should not be disclosed.
>
> 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 request.

I have considered the representations of the Police, the circumstances of this appeal and have reviewed the contents of the record at issue. I have previously found that the presumption at section 14(3)(b) applies to the record and accordingly, that disclosure of the information at issue would result in a presumed invasion of privacy of the affected party 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 party not to have their personal information disclosed against the appellant's right to this information and found that the balance fell in favour of protecting the affected party's right of personal privacy. In the circumstances, and in light of the partial access to the record that was granted to the appellant, 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 record to the appellant, in accordance with the *Act*.

## ORDER:

I uphold the head's decision not to disclose the portions of the record that remain at issue in this appeal.

Order Signed By
Catherine Corban

March 31, 2006