



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

ORDER MO-2510

Appeal MA08-453

Midland Police Services Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

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

NATURE OF THE APPEAL:

The Midland Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to an identified motor vehicle accident.

The Police located records responsive to the request, including occurrence reports, police officers' notes, and photographs. The Police notified two affected parties to seek their views with respect to whether the information relating to them in the records could be disclosed to the requester. One affected party consented to the disclosure of the information relating to him. The other affected party objected to any such disclosure.

The Police then sent a decision letter to the requester that granted him partial access to the responsive records. They denied access to portions of the occurrence reports and police officers' notes pursuant to the discretionary exemption in section 38(b) (personal privacy) of the *Act*, read in conjunction with the presumption in section 14(3)(b).

The Police also advised the requester of the fee to access the responsive photographs. The requester subsequently paid this fee and obtained these photographs.

The requester, now the appellant, appealed the Police's decision to deny access to portions of the occurrence reports and police officers' notes.

During the mediation stage of the appeal process, the appellant confirmed that he was not seeking access to the information in the records that was identified as non-responsive to his request. In addition, the appellant stated that he was seeking access to the severed information in the occurrence reports and police officers' notes that related to four individuals (the affected parties).

The mediator attempted to contact the four affected parties to determine whether they would consent to the disclosure of the information relating to them. The mediator was unable to contact one of the affected parties (affected party A). Of the three remaining parties, two of them (affected parties B and C) did not consent to disclosure, but also provided some additional information to this office. The final individual (affected party D) provided partial consent to disclose certain personal information relating to him, but did not consent to the release of his name, address, date of birth and telephone number.

In light of the partial consent obtained from one of the affected parties, the Police sent a revised decision letter to the appellant that provided him with access to additional information in the records at issue. The Police continued to deny access to other portions of the records pursuant to discretionary exemption in section 38(b) of the *Act*, read in conjunction with the presumption in section 14(3)(b).

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. A Notice of Inquiry identifying the facts and issues in this appeal was sent to the Police, initially, and the Police indicated that they would not be providing representations in response. The Notice of Inquiry was then sent to the appellant, who also chose not to provide representations.

This appeal was subsequently transferred to me to complete the inquiry process.

RECORDS:

The records at issue in this appeal consist of the withheld portions of a one-page occurrence report (page 1), a one-page supplementary occurrence report (page 2), and nine pages of police officers' notes (pages 3-11). The information remaining at issue in this appeal consists of the withheld portions of pages 1 to 5 and 8-11.

DISCUSSION:

PERSONAL INFORMATION

General principles

As noted above, the Police claim that the personal privacy exemption in section 38(b) of the *Act* applies to the information in the record at issue that they have withheld from the appellant. However, the section 38(b) exemption only applies to information that qualifies as "personal information," as that term is defined in section 2(1) of the *Act*. Consequently, the first issue that must be considered in this appeal is whether the record at issue 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].

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 and PO-2225].

Sections (2.1) and (2.2) also relate to the definition of personal information. Section 2(2.1) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity." Section 2(2.2) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

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 and MO-2344].

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

I must determine whether the records at issue contain "personal information," as that term is defined in section 2(1) of the *Act* and, if so, to whom it relates.

As a whole, the occurrence reports and police officers' notes set out the information gathered by the Police for the purpose of investigating the circumstances surrounding a motor vehicle accident, and determining its causes, including whether the accident was caused by a criminal act. The records contain information relating to a number of individuals including the appellant (who was injured as a result of the accident), an individual who assisted the injured appellant (affected party A), and three individuals whose employment responsibilities include activities relating to road construction and/or road signage (affected parties B, C and D).

The Police disclosed most of the records to the appellant, including all statements made by any of the affected parties. However, the Police have withheld the names of the four affected parties, as well as other information relating to affected party D including his address, telephone number and birth date.

I have carefully reviewed the records at issue.

To begin with, I am satisfied that the records contain the personal information of the appellant. The occurrence reports and officers' notes relate to the accident involving the appellant and, using the record-by-record analysis of the records at issue (see Order M-352), these records contain the personal information of the appellant. This information falls within paragraph (h) of the definition of "personal information" in section 2(1) of the *Act*, because the appellant's name appears in these records along with other personal information about him.

Furthermore, I am satisfied that the name of the individual who assisted the injured appellant qualifies as his personal information. The Police recorded the name and observations of this individual, and there is no suggestion that this individual was involved in this matter in a professional or employment capacity. I find that affected party A's involvement in this matter is similar to that of a witness in a police investigation, and previous orders have established that the name of a witness in a police matter falls within paragraph (h) of the definition of "personal information" in section 2(1) of the *Act* (see, for example, Orders MO-1964 and MO-2152).

However, a more complex issue is whether the withheld information relating to other three affected parties constitutes their "personal information" or "professional information." Previous orders have examined that issue, and Order PO-2225 sets out this office's current approach to the distinction between personal information and business/professional information. In that order, former Assistant Commissioner Tom Mitchinson addressed the issue of whether the name of an individual who operates a business is that individual's personal information or business information. The information at issue in that order was the names of non-corporate landlords who owed money to the Ontario Rental Housing Tribunal.

In his analysis, former Assistant Commissioner Mitchinson posed two questions that help to illuminate the distinction between information about an individual acting in a business capacity as opposed to a personal capacity:

... the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is

it one such as a business, professional or official government context that is removed from the personal sphere?

The analysis does not end here. I must go on to ask: *“is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual”*? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

I agree with this reasoning and adopt it for the purposes of this appeal. The records at issue in this appeal document a police investigation of a motor vehicle accident that took place on a road and include issues involving road construction and signage. Furthermore, after the accident occurred, the Police were also involved in ensuring that when they left the location where the accident occurred, appropriate signage was in place to warn drivers about the state of the road. Affected parties B, C and D are three individuals whose employment responsibilities include activities relating to road construction and/or road signage.

With respect to the first question posed in Order PO-2225 (“in what context do the names of the individuals appear?”), I find that the names of all three of these affected parties appears in a professional context, not a personal context.

However, that is not the end of the analysis. With respect to the information relating to all of these individuals, I must go on to ask the second question posed in Order PO-2225: *“is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual”*?

I find that if the withheld information relating to affected parties B and C was disclosed, it would *not* reveal something of a personal nature about them. There is nothing present in the records at issue that causes the information relating to these individuals to cross over into the “personal information” realm. The involvement of these two individuals was predominantly in the context of their employment responsibilities relating to road construction and/or road signage. Furthermore, as identified above, these two individuals were both contacted during the mediation stage of this appeal. Although both of these individuals stated that they did not consent to the disclosure of their personal information, they both also attached the following statement to their consent form sent to this office:

My involvement in the matter was in my capacity as an employee of [an identified employer]....

Based on my review of the information contained in the record relating to affected parties B and C, as well as based on the above statement made by these individuals, I am satisfied that the withheld information relating to these two individuals constitutes their “professional information” and does not qualify as “personal information.” As a result, their names are not exempt from disclosure under section 38(b) of the *Act*.

However, the information relating to affected party D is qualitatively different. Although this individual's employment responsibilities also include activities relating to road construction and/or road signage, the records indicate that this individual's conduct was scrutinized and questioned. Previous orders of this office have established that information about persons in their professional or employment capacity may qualify as their personal information if it involves an evaluation of that individual's performance as an employee or an investigation into his or her conduct as an employee [see, for example, Orders P-939, PO-2414, PO-2516, PO-2524, MO-2395].

I have carefully reviewed the withheld information in the records at issue. In my view, the information contained in these police records reveals something of a personal nature about affected party D, as this individual's conduct was scrutinized. Because the information relating to affected party D examines and relates to the conduct of this individual, and is contained in these records relating to a police investigation, it takes on a different, more personal quality. Consequently, I find that the information relating to affected party D reveals something of a personal nature about him. Even though such information appears in a professional context, its disclosure would reveal something inherently personal in nature about this individual.

In summary, I find that the withheld information in the records at issue relating to affected parties A and D constitutes their "personal information," as the information falls within paragraph (h) of the definition of "personal information," because their names appear with other personal information relating to them. However, the withheld names of affected parties B and C do not constitute the personal information of these individuals, and I will order that it be disclosed.

As an additional note, as identified above, affected parties B and C were contacted during the mediation stage of this appeal, and they both provided the statement set out above which identifies that their involvement in this matter was as employees. These affected parties were not contacted or invited to provide representations during the inquiry stage of this appeal, and I have found that the records do not contain their personal information, as their involvement in this matter was in their capacity as employees. However, as I have ordered that the information relating to these two individuals ought to be disclosed, I will be sending a copy of this order to each of them.

I will now determine whether the withheld personal information of affected parties A and D qualifies for exemption under 38(b) of the *Act*.

PERSONAL 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 the 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.

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

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 from disclosure under section 38(b).

Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. If paragraph (a), (b) or (c) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

Section 14(3) lists the types of information whose disclosure is presumed to 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).

The Divisional Court has stated that once a presumed unjustified invasion of personal privacy is established under section 14(3), it can only be overcome if section 14(4) or the "public interest override" at section 16 applies. It cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

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 under section 38(b) [Order P-239]. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99].

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.

Analysis and findings

I have found that the record at issue contains the personal information of the appellant, and that the withheld portions of the remaining records contain the personal information of affected parties A and D. The Police have withheld this information from the appellant under the discretionary exemption in section 38(b) of the *Act*.

In their decision the Police refer to the presumption in section 14(3)(b) which 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;

On my review of the records at issue, I am satisfied that the withheld personal information of affected parties A and D falls within the ambit of section 14(3)(b) of the *Act*. The Police were called to investigate the circumstances surrounding a motor vehicle accident which resulted in the creation of the records. The withheld personal information of affected parties A and D was compiled by the Police and is identifiable as part of an investigation into a possible violation of law. Consequently, I find that the presumption in section 14(3)(b) of the *Act* applies to the personal information withheld by the Police.

A presumed unjustified invasion of personal privacy under section 14(3) can be overcome if section 14(4) or the “public interest override” at section 16 of the *Act* applies [*John Doe*, cited above]; however, on my review of the records and in the absence of representations from the appellant, I find that sections 14(4) and 16 have no application in this appeal.

Lastly, 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.

I have carefully reviewed the portions of the records remaining at issue which relate to affected parties A and D. In the circumstances of this appeal, the Police exercised their discretion under section 38(b) by providing the appellant with partial access to the records, including all statements made by affected parties A and D, but chose to withhold the names and other identifiers of these individuals. In my view, the Police exercised their discretion under section 38(b) of the *Act* based on proper considerations. I make this finding in particular based on the fact that the Police provided the appellant with almost all of the information contained in the records, and carefully severed the information relating to affected parties A and D. In the circumstances, I am satisfied that the Police properly exercised their discretion.

Consequently, the withheld information relating to affected parties A and D qualifies for exemption under section 38(b).

ORDER:

1. I uphold the application of the exemption in section 38(b) to the portions of the records at issue relating to affected parties A and D.

2. I order the Police to disclose the portions of the records containing the names of affected parties B and C which I have found do not qualify for exemption, by sending him a copy of those records by **May 7, 2010** but not before **April 30, 2010**. For greater certainty, along with the copy of this Order sent to the Police I have included a highlighted copy of the pages of the records, which identify the portions of the records which are to be disclosed, and those portions which are to be withheld. To be clear, I have highlighted in yellow the portions of the pages of the records that are to be released, and blacked out the portions that are to be withheld.
3. I reserve the right to require the Police to provide me with a copy of the portions of the records which are disclosed to the appellant pursuant to Provision 2, upon request.

Frank DeVries
Adjudicator

March 30, 2010