



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

ORDER MO-2579

Appeal MA10-252

Toronto Police Services Board



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NATURE OF THE APPEAL:

The appellant submitted a request to the Toronto Police Service (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

I would like to ask the Police Service on which date did my daughter...contacted [a named officer] from 13 division and spoke to him or [named officer] phoned my daughter...

The Police issued a decision in which they refused to confirm or deny the existence of a record, citing section 14(5) of the *Act*.

The appellant appealed this decision.

During mediation, the Police clarified that if records exist, they would be exempt under section 14(1) in conjunction with the factor at section 14(2)(f) (highly sensitive) and the presumption at section 14(3)(b) (compiled and identifiable as part of an investigation into a possible violation of law) of the *Act*. Further mediation was not possible and the file was forwarded to the adjudication stage of the appeal process.

I decided to seek representations from the Police, initially. In addition to the exemptions referred to above, the Police were also asked to turn their mind to the possible application of section 38(b) in the circumstances of this appeal.

The Police submitted representations in response, and requested that large portions of them not be shared with the appellant due to confidentiality concerns. After reviewing these submissions, I agreed to this request. I then sought representations from the appellant, and provided her with a copy of the non-confidential portions of the Police's representations.

The appellant submitted a package of documents in response, none of which address the issues in this appeal. I also note that from the time this appeal was moved to the adjudication stage and prior to being asked to submit representations, the appellant has twice sent letters to this office that relate to her request for information regarding her daughters, but do not address the issues on appeal. Rather, the documents reflect her desire to communicate with her estranged daughters.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

Section 14(5) of the *Act* states:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

Section 14(5) gives an institution the discretion to refuse to confirm or deny the existence of a record in certain circumstances.

A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339].

Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and
2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.

[Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802]

Would the disclosure of the existence of the records reveal personal information?

Under part one of the section 14(5) test, the Police must demonstrate that disclosure of records, if they exist, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual [paragraph (h)].

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, 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].

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.)].

The Police take the position that if records existed, they would contain the personal information of the appellant and other identifiable individuals.

Having reviewed the submissions of the Police and the letters that the appellant sent to this office through the mediation and adjudication stages of this appeal, I am satisfied that, if a record exists, it would contain the personal information of the appellant and other identifiable individuals.

Would disclosure of the record constitute an unjustified invasion of personal privacy?

I must now determine whether disclosure of such records, if they exist, would constitute an unjustified invasion of privacy of individuals other than the appellant. Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Section 38(b) provides that where a record contains the personal information of both the appellant and other individuals, and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual’s personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the *Act* applies to the personal information.

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

The Police submit that if a record exists, the personal information in it would fall within the presumption in section 14(3)(b), which reads:

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

Due to confidentiality concerns I am not able to further discuss the submissions made by the Police on this issue. However, based on their submissions and the information contained in the letters that the appellant has sent to this office, I am satisfied that if a record exists, the presumption at section 14(3)(b) would apply to the personal information in it. After considering the submissions of the Police further, I am satisfied that they have properly considered all relevant factors in exercising their discretion and in arriving at their decision that access to a record that is responsive to the request, if it exists, should be denied under section 38(b) of the *Act*.

Would disclosure of the fact that the record exists (or does not exist) in itself convey information to the requester in such a way that disclosure would constitute an unjustified invasion of personal privacy?

Section 38 contains no parallel provision to section 14(5). Since I have found that if a record exists it would contain the appellant's personal information, the question arises whether the Police can rely on section 14(5) in this case. In Order M-615, senior adjudicator John Higgins stated:

Section 37(2) provides that certain sections from Part I of the *Act* (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information.

However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.

Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

I agree with the senior adjudicator's analysis and findings. Accordingly, I will consider whether section 14(5) may be invoked in the circumstances of this appeal.

As I indicated above, the majority of the submissions made by the Police have been withheld as confidential. A final comment made by the Police in their submissions, however, is indicative of their concerns about disclosure of the fact of the existence or non-existence of a record in response to the appellant's request:

The term privacy is not defined in the [Act]. It could mean the right to be let or left alone. Justice Cory of the Supreme Court of Canada used these words to define "privacy":

The state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right; freedom from interference or intrusion ... an important aspect of privacy is the ability to exclude others from the premises. The right to be free from intrusion or interference is a key element of privacy.

The information provided by the appellant throughout her appeal is extremely personal and reflects a desperate mother attempting to re-establish communications with her three adult daughters who had been in the custody of their father from a young age.

Based on all of the information before me, I am satisfied that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant. Further, I find that the nature of the information conveyed is such that its disclosure would constitute an unjustified invasion of privacy.

Finally, I find that neither section 14(4) nor 16 apply in the circumstances of this appeal.

Accordingly, I find that the Police may refuse to confirm or deny the existence of records that might be responsive to the appellant's request.

ORDER:

I uphold the decision of the Police to refuse to confirm or deny the existence of records.

Original signed by: _____
Laurel Cropley
Adjudicator

December 10, 2010 _____