



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

# **ORDER MO-2631**

**Appeal MA10-272**

**Niagara Regional Police Services Board**



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## **NATURE OF THE APPEAL:**

The Niagara Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any police files that exist involving the requester. The request was for the following information:

All information on file relating to myself (appellant's name) and regarding car accident October 8<sup>th</sup>, 2007. Personal Information. All records that exist about me.

In response, the Police located two responsive records and denied access in part to one record, the General Occurrence Report. Access to portions of the record was denied in accordance with section 38(b) (personal privacy) of the *Act*. In addition, the Police identified portions of the record as non-responsive information.

The requester, now the appellant, appealed that decision.

During the mediation, the appellant advised that she believes that additional records exist. The Police advised that a complete and thorough search was conducted and no further records exist.

The appellant asked that the file proceed to the inquiry stage of appeal and that she wished to add reasonable search to the issues on appeal.

Accordingly, the file was transferred to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Police and the persons whose personal information may be contained in the record (the affected persons) seeking their representations. I received representations from the Police only, which I sent to the appellant, along with a Notice of Inquiry. I received representations from the appellant. I also received unsolicited representations from the appellant prior to her receipt of the Notice of Inquiry.

## **RECORD:**

The record at issue consists of a Niagara Regional Police form, the *General Occurrence Hardcopy*.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

I will first determine whether the record contains "personal information" as defined in section 2(1) 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 if 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 where 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).

Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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).

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.)).

The Police submit that the personal information in the record relates to the appellant, the other party in the accident, and a witness. The personal information includes the name, date of birth, address, phone number, driver’s licence number, ethnicity, occupation, and a statement. The information is not about individuals in a professional capacity.

The Police state that they released the personal information of the other party as it was already known to the appellant. This information appeared on the motor vehicle collision (MVC) report involving the appellant. The personal information which was not known to the appellant was severed from the record.

The personal information of the witness was not available to the appellant on the MVC report and was severed from the record as the individual could be identified if the information was disclosed.

The appellant did not provided direct representations on whether the record contains personal information or whether the personal privacy exemption applies to the information severed from the record.

### **Analysis/Findings**

Based upon my review of the record, I agree with the Police that it contains the personal information of the appellant, the other person involved in the accident and the witness. Severed from the record are the witness’ name, sex, home telephone number and address, driver’s licence number, race and date of birth. I find that the severed information concerning the witness is information related to him in a personal capacity as set out in paragraphs (a), (c) and (d) of the definition of personal information in section 2(1).

Also severed from the record is the other driver’s race, personal vehicle’s serial number, one sentence from the statement he made to the Police about himself, the name of his employer and

his occupation. The other driver was involved in the accident in his personal capacity. I find that the severed information concerning this other driver is information related to him in a personal capacity as set out in paragraphs (a), (b) (c) and (e) of the definition of personal information in section 2(1).

## **PERSONAL PRIVACY**

I will now consider whether the discretionary exemption at section 38(b) applies to the personal information at issue in the record. 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.

The Police submit that the discretionary exemption at section 38(b) applies to the record as it contains the personal information of the appellant. They also submit that none of the paragraphs (a) to (e) of section 14(1) apply nor do any of the paragraphs (a) to (c) of section 14(4). They state that the presumption in 14(3)(b) does apply to this information.

### **Analysis/Findings**

As stated above, the personal information severed from the record consists of the personal information of the witness and the other driver. The Police have disclosed to the appellant her personal information in the record.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold 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 under sections 14 or 38(b). If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 14 or 38(b). Sections 14(1) and (4) do not apply in this appeal.

The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

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 38(b) 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). As stated above, section 14(4) does not apply. Furthermore, the appellant has not raised the application of section 16 to the records.

The Police have relied on the presumption at section 14(3)(b). This section 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;

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 (Orders P-242 and MO-2235). The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608). This presumed unjustified invasion of personal privacy under section 14(3) cannot be rebutted by one or more factors or circumstances under section 14(2) (*John Doe*, cited above).

Based upon my review of the record and the Police’s representations, I find that the personal information in the record was compiled and is identifiable as part of an investigation into possible violations of law under the *Criminal Code of Canada*. Accordingly, the presumption in section 14(3)(b) applies to this information and, subject to my review of the Police’s exercise of discretion, the information at issue in the record is exempt under section 38(b).

## **EXERCISE OF DISCRETION**

I will now determine whether the Police exercised their discretion under section 38(b), and if so, whether I should uphold the exercise of discretion.

### **General principles**

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)).

### **Relevant considerations**

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.

The Police submit that they exercised their discretion under section 38(b) and attempted to give the appellant access to her own personal information without breaching the privacy of other individuals. The Police are not aware of the appellant having any sympathetic or compelling need for the personal information denied to her.

As stated above, the appellant did not provide representations on the personal information at issue in the record.

### **Analysis/Findings**

Based upon my review of the records and the Police's representations, I find that they exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. The Police have withheld only the personal information of the individuals other than the appellant. This is sensitive personal information of these individuals gathered in the course of a law enforcement investigation. Accordingly, I uphold the Police's exercise of discretion and find that the information at issue in the record is exempt by reason of section 38(b).

Therefore, I find that the information at issue in the record, which is the personal information of the witness and the other driver, is exempt by reason of section 38(b).

### **SEARCH FOR RESPONSIVE RECORDS**

I will now determine whether the Police conducted a reasonable search for records.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 (Orders P-85, P-221 and PO-1954-I). If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records (Orders P-624 and PO-2559). To be responsive, a record must be "reasonably related" to the request (Order PO-2554).

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request (Orders M-909, PO-2469, PO-2592).

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control (Order MO-2185).

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist (Order MO-2246).

The Police were required to provide a written summary of all steps taken in response to the request. In particular, the Police were asked:



1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
  - (a) choose to respond literally to the request?
  - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The Police submit that:

The appellant had asked originally for all information on file relating to herself and regarding a car accident, October 8 2007. The appellant was contacted for clarification of her request. At that time she stated that she wanted all information about her. As her request included a motor vehicle collision (MVC) report, the appellant was advised to request the MVC report through the Insurance desk. The appellant advised she was also looking for "slander" reports and reports made by others in the last 6 years. The appellant called back and stated that she was requesting only information from the date of the motor vehicle collision (October 8, 2007) to the present time.

A search on our computer system of the appellant's name and date of birth yielded the two records which were released to the appellant. Any report in which a party is named as an entity would appear as a result of a "name search". The appellant's address was run in the event that a call to the police did not result in a report being taken. No responsive records were located as a result of the address search. No records have been purged from this system.

As the appellant had narrowed her request to records from 2007 to the present, a search of our older database was not conducted as only records prior to 2006 are located on that database. There is no other database to search for responsive records.

The appellant did not provide direct representations on the issue of whether the Police conducted a reasonable search for responsive records.

**Analysis/Findings**

The appellant's request was made on June 10, 2010. It was clarified by the appellant to include all records about her from 2007 to present, which would be up until the date of the request. The request was made to the Niagara Regional Police Services Board. I have carefully reviewed both sets of representations provided by the appellant. I cannot find any reference in there to additional responsive records about the appellant that may still exist. The appellant appears to be seeking additional information in her representations that goes beyond what was included in her clarified request to the Police.

With respect to the information that is within the scope of the appellant's request, I find that the Police have provided sufficient evidence to demonstrate that they made a reasonable effort to identify and locate all of the responsive records within their custody or control (Order MO-2185). The appellant has not provided a reasonable basis for concluding that additional responsive records exist (Order MO-2246). Therefore, I uphold the Police's search for responsive records.

**ORDER:**

I uphold the Police's decision and dismiss the appeal.

Original Signed By: \_\_\_\_\_ June 21, 2011  
Diane Smith  
Adjudicator