Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3020

Appeal MA12-161

Toronto Police Services Board

March 6, 2014

Summary: The appellant sought access to all records disclosed by the Toronto Police Services Board to an individual who was ordered by the Court to conduct a Custody and Access Assessment under section 30 of the *Children's Law Reform Act* in the course of a custody dispute in which the appellant was involved. The police refused to confirm or deny the existence of responsive records pursuant to section 14(5) (personal privacy) of the *Act*. The appellant appealed the police's decision. In this order, the adjudicator does not uphold the police's application of section 14(5) to refuse to confirm or deny the existence of records responsive to the request and orders the police to issue an access decision to the appellant regarding any responsive records that might exist.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of personal information), 14(3)(b), 14(5) and 38(b).

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a requester under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> All information related to [named individual] MSW RS Phone Number [#] Fax Number [#] between Nov. 16, 2010 and Nov. 4, 2011. The information was requested to complete Ontario Court of Justice Belleville Court File # 498/08 Section 30 – Custody and Access Assessment ordered on May 14, 2009, and June 23, 2009 be conducted by this assessor under the Children's Law Reform Act….

[2] In response, the police refused to confirm or deny the existence of any responsive records in accordance with section 14(5) (personal privacy) of the *Act*.

[3] As a mediated resolution could not be reached, the appellant advised that he wanted the appeal to proceed to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal to the police. The police provided me with representations which I shared with the appellant, who then provided me with representations in response. Following my review of the appellant's representations, which responded to Notices of Inquiry issued on two separate appeals, I determined that they do not directly address the issues relevant to this particular appeal. As a result, I determined that it was not necessary to provide them to the police and seek reply representations from them.

[4] During the course of my inquiry I also notified the individual named in the request, the court-appointed assessor, seeking their views and opinions regarding the police's decision to refuse to confirm or deny the existence of any responsive records in accordance with section 14(5) of the *Act*. They did not provide representations.

[5] In this order, I do not uphold the police's decision to refuse to confirm or deny the existence of responsive records pursuant to section 14(5) of the *Act* and order them to issue an access decision regarding any responsive records that might exist.

ISSUES:

A. If records exist, would they contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom would it relate?

B. Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) apply to the information requested by the appellant, if responsive records exist?

DISCUSSION:

A. If records exist, would they contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom would it relate?

[6] Under the *Act,* different exemptions may apply depending on whether or not a record contains the personal information of the requester.[1] Where records contain the requester's own information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records at issue contain the personal information of individuals other than the appellant but not that of the appellant, access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

[7] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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 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

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[1] Order M-352.

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;

[8] 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.[2]

[9] 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.[3]

[10] 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.[4]

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

Representations

[12] The police concede that if responsive records exist, they would contain the appellant's personal information as the request pertains to information that the police have about him. They also indicate that, because the request relates to information that the appellant believes was released to an affected party and used in a custody and access proceeding in which he is or was involved, any responsive records would also contain the personal information of the other parties involved in that dispute, including other identifiable individuals.

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Analysis

[13] Having reviewed the submissions made by the police and considered the type of information that would be responsive to the request, I accept the position taken by the police that the responsive records, if they exist, would contain the personal information of both the appellant and other identifiable individuals. In my view, it would be reasonable to assume that such records, if they exist, would contain information including that pertaining to the appellant's and other identified individuals' ages and sex [paragraph (a)], telephone numbers [paragraph (d)], their personal opinions or views [paragraph (e)], and their names, along with other personal information about them [paragraph (h)].

[14] Considering the wording of the request itself and the nature of the information requested, I find that if any responsive records exist, they would not contain the personal information of the individual named in the request, the court-appointed assessor. In my view, it is unlikely that the records would contain any information relating to this individual at all and, if in the unlikely chance that it did, that information would be information associated with that individual in a professional, rather than a personal, capacity.

[15] As any responsive records that might exist would contain both the personal information of the appellant and other identifiable individuals, Part II of the *Act* would apply. Therefore, my analysis under section 14(5) will be conducted using the discretionary exemption at section 38(b).

B. Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) apply to the information requested by the appellant, if responsive records exist?

[16] 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.

[17] 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.

[18] 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.

Refusal to confirm or deny the existence of a record: Have the police properly applied section 14(5) of the Act in the circumstances of this appeal?

[19] Section 14(5) reads:

> 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.

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

[21] 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.[6]

[22] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both 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.

[23] 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.[7]

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[6] Order P-339.

[7] 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.

Part one: disclosure of the record (if it exists)

Definition of personal information

[24] Under part one of the section 14(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information of identifiable individuals other than the appellant.

[25] I have found above that records responsive to the appellant's request, if they exist, would contain the personal information of the appellant, as well as the personal information of other identifiable individuals. However, I find that responsive records, if they exist, would not contain the personal information of the court-appointed assessor, the individual named in the request.

Unjustified invasion of personal privacy

[26] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of privacy" under section 14(5).

[27] The police indicate that the disclosure of any records that would be responsive to the appellant's request would amount to a presumed unjustified invasion of personal privacy as they would all be records related to and compiled as part of an investigation into a possible violation of law. Accordingly, it appears that the police are claiming that the presumption at section 14(3) would apply to any responsive records that might exist.

[28] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure is presumed to be an unjustified invasion of privacy. 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.[8] In the circumstances of this appeal none of the paragraphs at section 14(4) appear to apply, nor does it appear that the "public interest override" at section 16 is relevant.

[29] Section 14(3)(b) 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

[8] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

> disclosure is necessary to prosecute the violation or to continue the investigation;

[30] 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.[9] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[10]

[31] From my review of both the police and appellant's submissions as well as the wording of the request, in my view, it is clear that he is seeking information pertaining to law enforcement investigations. As a result, I accept that if records responsive to the request exist, section 14(3)(b) would apply to them and their disclosure would be presumed to amount to an unjustified invasion of personal privacy of identified individuals other than the appellant as contemplated by that section.

Part two: disclosure of the fact that the records exist (or do not exist)

[32] Under part two of the section 14(5) test, the police must demonstrate that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[33] The police submit:

> The particulars of this appeal involve an individual who (based on the information provided by his request) is in the custody process through Family Court. The information he believes was released to the affected party was to assist in completing a Court file as ordered by the Court. The institution contends that any information that may have been released would not only belong to the appellant but to any other involved parties to the custody process. It should be noted that the appellant had requested all records held by the [police] and it was released with only the personal information of third parties redacted. Any records released to a third party could only have been done with the authorization of the involved parties. If the affected party did receive any records, it would have been with the permission and written authorization of the appellant [or any of the individuals identified in the records if they exist]. It is not incumbent on the institution to release any records that may have been released to the affected party, in her professional capacity, particularly since personal information that may be contained would not be redacted….

[9] Orders P-242 and MO-2235.
[10] Orders MO-2213, PO-1849 and PO-2608.

…

While it may stand to reason that an access request *was* submitted by the affected party, the request was for all "information released" to the affected party. While not confirming or denying a request was submitted, the institution is also protecting the privacy of any potential third parties whose personal information would be contained in such records. The institution would only release to the affected party, records regarding persons whom have consented to its disclosure.

As the information the appellant believes was released would have formed part of the court case, the appellant has other avenues to obtain the records that are not governed by privacy legislation. The appellant did not provide the institution with an authorization of the affected party whom he believes submitted an access request and therefore is not entitled to the confirmation which would breach the affected party's privacy. As stated previously, the institution has previously received a request for the same documents he believes were released to the affected party. For him to have that information confirmed and released to him would constitute an unjustified invasion of the personal privacy of all involved parties. In the affected parties' capacity as a court appointed evaluator, the affected party would have provided authorizations of specific involved parties. Release would therefore be more fulsome than what may have been provided to the appellant who was unable to provide any additional authorizations. It is the institution's view that the appellant is motivated by his own personal interest in access other parties' personal information that he did not receive via his own request.

Release of records, similar to what may have been received from an authorized affected party, would not only grant the appellant access to third party personal information but breach the sanctity of the access process.

In assessing the value of protecting the privacy interests of an individual other than the appellant, the institution has chosen to safeguard the privacy interests of all individuals, in keeping with the spirit of the *Act*."

…

It is not possible to confirm or deny the existence of an access request without violating the privacy of the affected party. It is reasonable in the circumstances and mandatory in accordance with the *Act*, to refuse to confirm or deny the appellant's request as such disclosure could lead to an unjustified invasion of the personal privacy of other individuals.

[34] The police's representations suggest that were they to confirm or deny the existence of records responsive to the appellant's request, it would result in an unjustified invasion of the personal information of the court-appointed assessor named in the request.

[35] I do not accept that this is the case in the circumstances of this appeal. In my view, the fact that the police might have or might not have disclosed records to an assessor assigned by the Court to conduct a Custody and Access Assessment pursuant to section 30 of the *Children's Law Reform Act* during a custody and access proceeding in which the appellant is or was involved, is not in and of itself information that would result in the unjustified invasion of any identifiable individual's personal privacy. In this type of situation, the appointed assessor would be acting in their professional and not in their personal capacity in gathering the requisite information to conduct an assessment. Therefore, disclosure of the fact that records may or may not have been disclosed to the assessor by the police cannot be said to result in an unjustified invasion of this individual's personal privacy. The assessor would clearly be acting in their professional capacity. It is clear from the wording of the request itself that the appellant is already aware that the Court appointed the individual named in the request, in their professional capacity, to conduct a Custody and Access Assessment during the course of a custody proceeding in which he is or was involved. Confirming that records responsive to the request exist or do not exist would only reveal whether or not there was contact between the police and the court-appointed assessor which relates only to the assessor in his or her professional capacity. I find that this would not disclose any personal information or amount to an unjustified invasion of the personal privacy of the court-appointed assessor, the individual named in the request.

[36] Additionally, I do not accept that the disclosure of the fact that information was or was not disclosed to the individual identified in the request would result in the unjustified invasion of the personal privacy of other individuals, including those that might be identified in any responsive records that might exist. The police's representations focus heavily on the unjustified invasion of the personal privacy of these individuals that might occur were the information contained in the records themselves disclosed. That is not what is at issue here. Instead, the information at issue is whether the mere confirmation or denial that records responsive to the request exist would result in the unjustified invasion of any identifiable individuals' personal privacy. In my view, in the circumstances of this appeal, simply disclosing the fact that records were or were not disclosed to a court-appointed assessor would not reveal personal information about any identifiable individual, including those individuals named in any records that might exist.

[37] I have found that the police have not established that the requirement under part two of the test for section 14(5) applies in the circumstances of this appeal. As a result, I do not uphold their refusal to confirm or deny the existence of any records responsive to the appellant's request. Accordingly, I will order the police to conduct a

search for records responsive to the appellant's request and issue an access decision to the appellant identifying whether any such records exist. I acknowledge, given the subject matter of any responsive records, they might contain sensitive personal information about identifiable individuals which might, if disclosed, result in an unjustified invasion of those individuals' personal privacy pursuant to the *Act*. Accordingly, I remind the police that their access decision should not only identify any records that might be responsive to the appellant's request, but should also set out any exemptions that might be applicable.

[38] Normally, when this office does not uphold an institution's refusal to confirm or deny the existence of records, the release of the order to the appellant is delayed. However, as this order does not reveal whether any records responsive to the request exist, I will provide the appellant with a copy of the order at this time.

ORDER:

1. I do not uphold the decision of the police to apply section 14(5) to refuse to confirm or deny the existence of responsive records in this appeal.

2. I order the police to issue an access decision to the appellant identifying any records responsive to the request, if they exist, as well as setting out any exemptions that may be applicable to any records that are located, treating the date of this order as the date of the request.

3. In order to verify compliance with this order, the police are ordered to provide me with a copy of the access decision issued to the appellant pursuant to order provision 2, above.

Original signed by: March 6, 2014
Catherine Corban
Adjudicator