

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3875

Appeal MA18-00697

Toronto Police Services Board

December 13, 2019

Summary: The Toronto Police Services Board (the police) received a request under the *Act* for access to a police occurrence report relating to an allegation of fraud the requester had made. The police located responsive records and granted partial access to them, withholding the personal information of an affected party under the discretionary personal privacy exemption in section 38(b). The appellant appealed the police's decision to withhold the name and address of the affected party, claiming that she was seeking access so that she could bring a claim for damages in small claims court. In this order, the adjudicator finds that the withheld information is personal information but orders the police to disclose it after weighing the factors and presumptions in sections 14(2) and (3) and balancing the interests of the parties.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), section 14(2)(d), 14(2)(e), 14(2)(f), 14(2)(i), 14(3)(b) and 38(b).

Orders Considered: Orders MO-2954 and MO-2980.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request for access to a police occurrence report, identified by occurrence report number, which documented an alleged incident of fraud. Specifically, the request was for:

Copy of the report in order for me to take the scammer to small claims court.

Case # [specified number].

[2] The police located a responsive record and issued a decision in which they granted partial access to the requester, but withheld information they determined was the personal information of an affected party. The police withheld this information pursuant to the mandatory personal privacy exemption at section 14(1), as well as the discretionary personal privacy exemption in section 38(b), read in conjunction with the presumption against disclosure in section 14(3)(b) (investigation into possible violation of law). The police did not withhold the affected party's first and middle names, which the appellant provided to them. However, they severed the affected party's surname and home address, among other information, from the records they disclosed.

[3] The requester, now the appellant, appealed the police's decision to this office and a mediator was appointed to explore the possibility of resolution.

[4] During mediation, the appellant informed the mediator that she only seeks access to the affected party's surname and his home address for the purposes of service of a claim in small claims court. As a result, access to other information severed from the record and withheld by the police is not at issue in this appeal.

[5] The mediator sought the affected party's consent to disclosure of his full name and address. He did not consent to disclosure of any of his personal information.

[6] A mediated resolution was not reached and the file was transferred to the adjudication stage of the appeal process, during which the parties participated in a written inquiry. I received representations from the police and the appellant, as well as from the affected party, who simply opposed the disclosure of any of his personal information to the appellant.¹

[7] In this order, in the particular circumstances of this appeal, I find that the presumption against disclosure in section 14(3)(b) is outweighed by the factor in section 14(2)(d) (fair determination of rights) together with an unlisted factor that favours disclosure. I therefore find that disclosure of the information at issue (i.e. the affected party's surname and address) would not constitute an unjustified invasion of personal privacy under section 38(b) and order the police to disclose this information to the appellant.

RECORDS:

[8] The record is a police general occurrence report. The information at issue consists of the surname and address of an affected party contained on page 2 of the record.

¹ Representations were shared in accordance with IPC Practice Direction 7.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and if so, to whom does it relate?
- B. Would disclosure of the information constitute an unjustified invasion of personal privacy under section 38(b)?

DISCUSSION:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[9] In order to determine which sections of the *Act* may apply, it is necessary to first decide whether the record contains "personal information" and, if so, whose. "Personal information" 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 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;

[10] Sections 2(2.1) and (2.2) distinguish personal information from information about an individual in a business or professional capacity. Section 2(2.1) states that:

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.

[11] Section 2(2.2) states:

For greater certainty, subsection (2.1) 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.

[12] 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.² To qualify as personal information, it must also be reasonable to expect that an individual may be identified if the information is disclosed.³

[13] The appellant does not dispute that the record contains her own and the affected party's personal information. She acknowledges that it is specifically the affected party's surname and address to which she seeks access so that she can bring a claim against him in small claims court.

[14] The police submit that the withheld portions of the record contain personal information of the affected party, including his name, address, driver's license number and other identifying information that falls into paragraphs (a), (b), (c), (d), and (h) of section 2(1) and that was collected as part of an investigation into a possible violation of law.

[15] Although the appellant states that the alleged fraud arises from the affected party's failure to do work for which she paid him a deposit, the police submit that the information is not information about the affected party in a professional or business capacity. They say that, while the affected party was advertising his services publicly, the information at issue leans more to his personal life, and, because it goes beyond what he willingly released in his advertisements, is his personal information.

² Orders P-257, P-427, P-1412, R-980015, MO-1550-F and PO-2225.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[16] I have reviewed the record and find that it contains the personal information of the appellant and another identifiable individual, namely, the affected party. The record contains biographical and other personal information relating to both. With respect to the appellant, I find that the record contains her name along with her address, telephone number, gender, age and date of birth, as well as her opinions and views on the incident described in the record. As a result, I find that the record contains information about the appellant that qualifies as her personal information within the meaning of paragraphs (a), (b), (d), (e) and (h) of the definition in section 2(1).

[17] With respect to the affected party to whose information the appellant seeks access, I find that the record likewise contains his full name along with his address and telephone number, age, date of birth, gender, and his opinions and views regarding the alleged incident leading to the police investigation. This is information that may also qualify as personal information within the meaning of paragraphs (a), (b), (c), and (d) of section 2(1).

[18] The police argue that the information of the affected party that remains at issue is not information about him in a professional capacity, such that the “business identity” exceptions to the personal information definition in section 2(12.1) and 2(2.2) do not apply to that information. This office has held that 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 In this appeal, the appellant argues that she hired the affected party to complete work at her home; however, it may be that the information to which the appellant seeks access, if disclosed, would reveal something of a personal nature about him, including that he is alleged to have taken money as part of a commercial exchange. I also have no information about whether the affected party conducted his business from his home address.

[19] However, given my findings below on the application of section 38(b), I do not have to make a determination on whether the withheld information at issue is about the affected party in a professional or business capacity. I will assume for the purposes of section 38(b) that it is personal information. And, because I have found that the record itself contains both the appellant’s personal information and that of the affected party, I must consider the application of the discretionary personal privacy exemption in section 38(b) to the personal information that the police have not disclosed.

Issue B: Would disclosure of the information at issue constitute an unjustified invasion of personal privacy under section 38(b)?

[20] Section 36(1) of the *Act* gives individuals a general right of access to their own

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

information held by an institution. Section 38 provides a number of exemptions from this right.

[21] Under section 38(b), where a record contains personal information of both the appellant and another individual, and disclosure of the information would be an unjustified invasion of the other individual's personal privacy, the institution may refuse to disclose that information to the appellant. Section 38(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[22] This involves weighing the appellant's right of access to her own personal information against the other individual's right to protection of his or her privacy.

[23] Under section 38(b), where a record contains personal information of both the requester and another individual, as is the case here, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Because the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[24] In the circumstances of this appeal, the record contains the personal information of both the requester (the appellant) and another individual (the affected party). Accordingly, the discretionary exemption at section 38(b), not the mandatory exemption at section 14(1), is at issue. Specifically, I must determine whether disclosing the information at issue to the appellant would constitute an unjustified invasion of his personal privacy under section 38(b).

[25] Sections 14 (1) to (4) give guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b):

- 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 section 38(b);
- section 14(2) provides a list of factors that must be considered;
- section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and,
- section 14(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 14(3).

[26] None of the circumstances listed in section 14(4) is present in this appeal.

Representations

The police's representations

[27] The police submit that the record was created as the result of the appellant attending her local police division to make a complaint about a matter she thought was criminal in nature. They say that she had hired the affected party to do repairs at her home. She paid a deposit but the affected party never showed up to start the work. The police completed an investigation in which they concluded that the complaint was not a criminal matter. They say the appellant informed them that she would pursue the affected party in small claims court.

[28] The police rely on section 38(b), together with the presumption against disclosure in section 14(3)(b), to withhold the affected party's personal information at issue. They submit that certain factors in section 14(2) apply to weigh against disclosure of this information. Because the appellant seeks the information to bring a civil claim against the affected party, they say that disclosure may cause the affected party pecuniary harm (section 14(2)(e)). They submit that release of his home address and name may cause the affected party personal distress and is highly sensitive because the allegations that he defrauded the appellant have not been proven or tested in a court (section 14(2)(f)), and may unfairly damage his reputation if disclosed (section 14(2)(i)).

[29] The police say that information they located in their database using the limited information provided by the appellant is not eligible for release to the general public and that this database is not to be used as a dial-up phonebook to assist with moving a personal agenda forward. Despite their conclusion that the matter was not criminal, the police do submit that they attempted to speak to the affected party to "encourage him to return the deposit." The police say that the loss of money "by apparent fraudulent means"⁵ does not, however, negate the personal privacy rights of an individual, including a suspect, especially in the case of a civil matter outside their mandate.

The appellant's representations

[30] The appellant says that, in order to be able to bring a claim against the affected party for return of her money, she needs his "real name" and contact information. In other words, she seeks access to his name and address to assist with a fair

⁵ As I have noted, the police did not charge the affected party with a criminal offence.

determination of her rights (the factor at section 14(2)(d)).⁶

[31] As noted above, the appellant only seeks access to the affected party's name and address, and not to any other personal information that the police have withheld.

Affected party's representations

[32] The affected party made no representations on the issues except to say that he does not consent to the disclosure of any of his personal information to the appellant.

Analysis and findings

Section 14(3)(b): investigation into possible violation of law

[33] Under section 14(3)(b), 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.

[34] 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.⁷

[35] I have reviewed the record and find that the personal information in it was compiled and is identifiable as part of an investigation into a possible violation of law. Based on information the appellant provided, the police began an investigation into allegations of fraud that could have resulted in criminal charges. It is immaterial that no charges were laid, since the presumption only requires that there be an investigation into a possible violation of law. As a result, I find that the presumption against disclosure in section 14(3)(b) applies.

[36] Although I find that this presumption should be given considerable weight in determining whether disclosing the affected party's personal information would constitute an unjustified invasion of the affected party's personal privacy under section 38(b), I find that it is outweighed in the circumstances of this appeal by the factor in section 14(2)(d), discussed below.

⁶ The appellant gave the police a partial name that the affected party gave to her, together with his telephone number. I have interpreted the appellant's reference to the affected party's "real name" as his full name, which the police partially withheld by severing his surname from the record.

⁷ Orders P-242 and MO-2235.

Section 14(2)

[37] 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.⁸ Section 14(2) states that:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[38] The factors in paragraphs (a), (b), (c) and (d) of section 14(2) generally weigh in favour of disclosure, while the factors in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection.⁹

[39] 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

⁸ Order P-239.

⁹ Order PO-2265.

14(2).¹⁰

Section 14(2)(d): fair determination of rights

[40] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(d) requires the police to consider whether the personal information is relevant to a fair determination of rights affecting the person who made the request. If found to apply, this factor weighs in favour of disclosing the personal information.

[41] The appellant submits that the affected party's name and address are relevant to a fair determination of her rights. She submits that the information at issue would allow her to access civil remedies to seek damages for her losses. Without this information, the appellant argues that she cannot serve the appellant or obtain redress against him.

[42] The police submit that, although section 14(2)(d) applies, it is outweighed by the affected party's right to protection of his personal privacy and that other factors in section 14(2) apply in favour of privacy protection. I disagree.

[43] This office has found that for section 14(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information to which the appellant seeks access has some bearing on or is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹¹

[44] There is no dispute that the appellant seeks the affected party's name and address to sue for damages in small claims court. I am satisfied that she has met the four-part test in section 14(2)(d) because:

1. her right to sue is drawn from common law;

¹⁰ Order P-99.

¹¹ Order PO-1764; see also Order P-312, upheld on judicial record in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

2. the right is related to a contemplated civil claim for damages;
3. the personal information to which she seeks access (i.e. the appellant's name and address for service) has a direct bearing on her right to sue because she needs to identify the appellant in order to bring a successful claim; and
4. she needs the affected party's name to prepare for the proceeding by serving him with her claim.

[45] I therefore find that disclosing the affected party's name and address in the circumstances of this particular case is relevant to a fair determination of the appellant's rights under section 14(2)(d) and that this factor weighs in favour of disclosing this information to her.

[46] The police argue that factor at section 14(2)(d) should be given less weight because the appellant has discovery mechanisms available to her as part of the litigation process and which would give her access to the requested information to ensure a fair determination of her rights.

[47] Adjudicator Colin Bhattacharjee dealt with a similar question in Order MO-2980. In that case, the appellant sought access to the name of the owner of a dog that bit her so that she could bring a civil claim for damages. With respect to discovery mechanisms available within the litigation process, Adjudicator Bhattacharjee wrote:

In my view, the existence of other possible methods of access does not preclude the appellant from exercising her access rights under the *Act* to seek the dog owner's name before she files a civil claim. As the victim of a dog attack, she has a right to seek the information in the most efficient, cost-effective manner that she sees fit and should not have to jump through numerous hoops in different forums to seek basic information that would enable her to exercise her legal right to seek redress.

[48] I agree and adopt this reasoning. The mere existence of a discovery mechanism within litigation may reduce the weight given to the factor in section 14(2)(d), but I find that it should still be given considerable weight in the circumstances of this appeal.

Section 14(2) factors that weigh against disclosure

[49] The police argue that the factors at paragraphs (e), (f), and (i) of section 14(2) apply to weigh against disclosure of the affected party's name and address.

[50] For the reasons that follow, I find that these factors do not apply in the circumstances.

14(2)(e): pecuniary or other harm

[51] Section 14(2)(e) weighs against disclosure if it will expose the affected party

unfairly to pecuniary or other harm. The police submit that "all indicators point to the records being used in part for a civil litigation against the affected party" and it may expose him "to pre-judgement interest if released to the appellant."

[52] As evidence of possible harm, the police submit only that the affected party may be exposed to "pre-judgement interest." The affected party made no submissions on this (or any other) factor. I note that any damages against the affected party, including "pre-judgment interest" would only be awarded against him in the event of a successful claim by the appellant, after a hearing of the case before a court of competent jurisdiction. In this context, I do not view any potential pecuniary or other harm to be unfair for the purpose of section 14(2)(e).¹²

Section 14(2)(f): highly sensitive

[53] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(f) requires the police to consider whether the personal information is highly sensitive.

[54] In relying on the factor at section 14(2)(f), the police submit only that disclosure of his name and address could cause the affected party personal distress, particularly since the case against him for defrauding the appellant has not been tested in court.

[55] To be considered highly sensitive, however, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹³

[56] I again adopt the reasoning of Adjudicator Bhattacharjee in Order MO-2980, where he found that whether an individual's name and address is highly sensitive depends on the context, and should be assessed on a case-by-case basis. Specifically, Adjudicator Bhattacharjee wrote:

An individual's name and address is not always sensitive information. For example, the names and addresses of most individuals appear in publically accessible telephone or online 411 directories and are clearly not highly sensitive in that context.

However, the names and addresses of individuals have greater sensitivity when this information is collected by the state or agencies of the state such as the police. For example, if the police interview a witness who saw a murder and can identify the suspect, the witness's name and address would clearly be highly sensitive. In other cases, however, a witness' name and address may be sensitive, but not necessarily highly sensitive.

¹² See Order PO-1912.

¹³ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[57] In the circumstances of this appeal, the police concluded that the appellant's allegations did not rise to a level warranting a criminal charge. The police concluded the appellant's allegations were a matter that should be addressed in the context of a civil proceeding, not a criminal one.

[58] The police also submit that disclosure could result in unwanted attention from the appellant. Their representations acknowledge that the appellant seeks the information at issue for a civil litigation. Neither the police's representations nor the record give any suggestion that the appellant would or has initiated other contact with the affected party. For example, the appellant has the affected party's telephone number, which she gave to the police. Neither the police nor the affected party submit that she has used it to give the affected party unwanted attention and I have no basis on which to conclude that the appellant would use the information at issue for any purpose other than to attempt to prove her case in court. I recognize that the fact of litigation may itself be attention that is unwanted or unwelcome, but I do not find that it rises to the level of significant personal distress.

[59] Although I accept that a name and address are sensitive in the context of police records, I do not find that they are highly sensitive in this case. The affected party was given the opportunity to submit why this information is highly sensitive and might cause him significant personal distress if disclosed but chose not to do so. While I agree with the police that disclosure of his name and address may cause the affected party some personal distress, at least in the form of an unwelcome claim, I have insufficient basis on which to find that doing so in this case would cause him significant personal distress as the factor in section 14(2)(f) requires. As a result, I find that this factor does not weigh against disclosure of the personal information at issue in this appeal.

Section 14(2)(i): unfair damage to reputation

[60] The police submit that, if disclosed, the information at issue could cause irreparable harm to the reputation of the affected party and his business. They say that the contract the appellant provided specified no date when the work should start or end, so that it was not evident that the affected party was, in fact, in breach of any agreement. The affected party made no representations on how disclosure could reasonably be expected to cause unfair damage to his reputation or that of his business.

[61] I find that this factor does not apply in the circumstances. Previous orders of this office have found that section 14(2)(i) is not established simply on the basis that the damage or harm envisioned by this section is present or foreseeable: it must also be demonstrated that this damage or harm would be unfair to the individual involved.¹⁴ I

¹⁴ Orders M-347 and P-256.

am not persuaded that damage will necessarily flow from disclosure of the information where the portions of the record disclose only the appellant's allegations on which the police took no action. Nor am I persuaded that, where allegations are to be tested in court, such as the terms of an agreement and any alleged breach, any damage to the affected party's reputation or that of his business would be unfair.

Unlisted factors

[62] The police submit that unwanted attention from the appellant is an unlisted factor that weighs against disclosure. I have addressed this factor, above, under the factor in section 14(2)(f) and found that it does not apply in this case.

[63] However, in Order MO-2954, Adjudicator Laurel Cropley wrote that the *Act* should not be used in a way that prevents individuals from exercising their legal rights. She found that this is an unlisted factor favouring disclosure.

[64] Although the facts in this appeal are different than those before Adjudicator Cropley in Order MO-2954, I find that the same general principle nevertheless applies. I agree that the *Act* should not be used in a way that prevents individuals from exercising their legal rights, and find in this appeal that the non-disclosure of the information at issue unduly impairs the appellant's ability to pursue her right to seek damages. Therefore, I find that this unlisted factor, together with the factor at section 14(2)(d), tilts the balance in favour of disclosure.

[65] In closing, in determining whether disclosure of the personal information of the affected party that is at issue (i.e. his name and address) would constitute an unjustified invasion of his personal privacy under section 38(b), I have considered and weighed the factors and presumptions in sections 14(2) and (3) and balanced the interests of the parties to find that:

- the withheld information at issue falls within the section 14(3)(b) presumption so that its disclosure is presumed to constitute an unjustified invasion of the affected party's personal privacy;
- disclosing the affected party's name and address in this particular case is relevant to a fair determination of the appellant's rights under section 14(2)(d); and,
- the unlisted section 14(2) factor supports disclosure of the personal information at issue to permit the appellant to exercise her legal rights.

[66] Although I have given the presumption in section 14(3)(b) considerable weight, I find that it is outweighed in the circumstances of this particular appeal by the factor at section 14(2)(d) and the unlisted factor discussed above, both of which strongly weigh in favour of disclosure of the affected party's name and address.

[67] After considering and weighing the factors and presumptions in sections 14(2) and (3), and balancing the interests of the parties, I find that disclosing the affected party's name and address would not constitute an unjustified invasion of his personal privacy under section 38(b) in this particular case.

[68] For the reasons described above, I order the police to disclose to the appellant the name and address of the affected party on page 2 of the record only.

ORDER:

1. I order the police to disclose the surname and address of the individual severed from page 2 of the record only.
2. I order the police to disclose a severed version of the record to the appellant by January 20, 2020 but not before January 15, 2020. I have enclosed a copy of the record with this order and have highlighted in yellow the parts that must be disclosed to the appellant. To be clear, only the highlighted parts of the record must be disclosed.

Original Signed by: _____
Jessica Kowalski
Adjudicator

December 13, 2019 _____