

**Exercising Discretion  
under section 38(b) of the  
*Municipal Freedom of Information and  
Protection of Privacy Act***

**A Best Practice for Police Services**

**Produced by  
the Toronto Police Service  
and the  
Information and Privacy Commissioner/Ontario**



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## Background

The *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* provide members of the public with a right of access to personal information about them that is held by a public institution.

When an institution receives a request for access to that requester's personal information, it *must* disclose this information unless one or more discretionary exemptions apply. However, just because an exemption applies, that does not necessarily mean that the record cannot be disclosed; the institution must take the added step of deciding, in the particular circumstances, if the requester's personal information should be disclosed *despite the fact that it qualifies for exemption*. To make this determination, an institution must properly *exercise discretion*.

The exercise of discretion is a key component of the access process. This Best Practices paper provides institutions with an outline of what constitutes a valid exercise of discretion in the application of section 38(b), and some practical tips on how to properly exercise discretion when dealing with a specific category of records: those that contain personal information of both a requester and other individuals, and where disclosure of a requester's personal information would constitute an unjustified invasion of the other individual's privacy.

This paper has been prepared in collaboration with staff of the Toronto Police Service, and focusses on records and issues frequently dealt with by municipal police forces. All statutory references are to the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal Act), but the content of the paper is applicable to any municipal or provincial institution when dealing with a request for personal information under section 38(b) of the municipal Act or 49(b) of the *Freedom of Information and Protection of Privacy Act* (the provincial Act).



# Introduction

Under the municipal *Act*, institutions receive two broad categories of access requests:

- Category A requests for “general” records that do not contain a requester’s personal information, but may contain personal information of other individuals; and
- Category B requests for access to records containing personal information of the requester

Each category has its own process under the *Act* — Part I for Category A requests, and Part II for Category B requests.

## Category A — Part I of the *Act*

Section 4 of the municipal *Act* provides a general right of access to any record in the custody or under the control of an institution. A number of exemptions may apply, some of which are mandatory and others discretionary.

If a responsive record contains personal information of anyone other than the requester, section 14 of the municipal *Act* prohibits an institution from disclosing this information, unless one of the exceptions listed in that section apply. In other words, section 14 is a **mandatory** exemption claim, aimed at protecting privacy.

## Category B — Part II of the *Act*

This situation is quite different when a requester is seeking access to his or her own personal information. Section 36 of the municipal *Act* provides individuals with a right of access to their personal information in the custody or under the control of an institution. Again, a number of exemptions may apply, but in this instance, all of them are **discretionary**.

One of these discretionary exemptions is section 38(b) of the municipal *Act*, which reads:

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

Obviously, if the other individual consents to the disclosure of his or her personal information, then section 38(b) would not apply (see section 14(1)(a) of the *Act*). Wherever it is reasonable and appropriate to do so, efforts should be made to contact individuals to determine if they would consent in these circumstances.

If a responsive record contains a requester's personal information, and also the personal information of another individual or individuals (and consent has not been obtained), section 38(b) requires an institution to follow a 3-step process in deciding whether to disclose the record to the requester:

- Step 1     Can the record be severed in a way that would permit disclosure of the requester's personal information without disclosing personal information of any other individual? If the answer is "yes", the portions containing only the requester's personal information must be disclosed.
  
- Step 2     If severance is not possible (or if the undisclosed portions contain the requester's personal information), would providing the requester with access to his or her personal information at the same time constitute an unjustified invasion of any other person's privacy?
  
- Step 3     If the answer in Step 2 is "no", then the institution must disclose the requester's personal information, along with any other personal information that may be contained in the record.

If the answer is "yes", then the institution must go on to exercise discretion and decide whether the record should be disclosed even if this would constitute an unjustified invasion of another person's privacy.



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## What is a proper exercise of discretion?

Orders of the Commissioner's Office have established the proper approach to follow when exercising discretion. As a general statement:

An institution's exercise of discretion must be made in full appreciation of the facts of a particular case, and upon proper application of the applicable principles of law. (Order 58)

To properly exercise discretion, institutions must consider the individual circumstances of the request, including factors personal to the requester, and must ensure that decisions regarding access conform to the policies, objects and provisions of the *Act*.

In considering whether to apply discretionary exemptions (including section 38(b) of the municipal *Act*), institutions must be governed by the principles that:

- information should be available to the public;
- individuals should have access to their own personal information; and
- exemptions to access should be limited and specific. (Order P-344)

Under section 38(b), an institution is given responsibility for balancing two competing interests—the requester's right of access to his or her personal information, and another individual's right to privacy. Some of the factors an institution should consider when dealing with each specific fact situation are:

- the particular privacy interests of the other individual;
- the way these privacy interests relate to the requester's access rights;
- the relationship between the requester and the other individual; and
- the type of record or records at issue.

If the balance weighs in favour of access, the records can be released to the requester, even if the institution has concluded that disclosure would represent an unjustified invasion of the other individual's privacy.

The same factors are not relevant in every circumstance, but *it is important to recognize that all factors that are relevant receive careful consideration.*

If an institution has properly exercised its discretion, the resulting decision will not be interfered with on appeal. However, if the institution has not exercised discretion properly, the appeal will be sent back to the institution for a proper re-exercise of discretion.

## **Improper exercise of discretion**

It is not possible to properly exercise discretion without taking into account the particular and specific circumstances of an individual request. An institution cannot adopt a fixed rule or policy and apply it in all situations. To do so would constitute a fettering of discretion and would represent non-compliance with an institution's statutory responsibility when responding to Part II requests.

When dealing with a section 38(b) request, an institution must turn its attention to the relevant circumstances of a particular case, and balance the competing access and privacy interests by considering whatever factors are relevant to that specific case.





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## Making a decision under section 38(b)

Section 38(b) of the municipal *Act* is one of the most difficult sections to apply, and also one of the most difficult for members of the public to understand. It is relatively easy for most people to understand that they have a right of access to their own personal information. However, it is much more difficult to accept that this right is not absolute, and that an institution can legitimately withhold an individual's personal information in certain circumstances. For this reason, it is important for institutions to carefully interpret section 38(b) in each case, and where an institution has exercised discretion to deny access, it is also important to ensure that requesters clearly understand why they are not being given access to their personal information.

Assuming that a Step 1 severance is not possible, institutions must then proceed to Step 2.

### Step 2

At Step 2, an institution must decide if providing a requester with access to his or her personal information would result in an unjustified invasion of another individual's privacy. To make this determination, an institution must look to section 14 of the municipal *Act* for guidance. Although this section is included in Part I of the *Act* and applies to situations involving a request for access to records that do not contain a requester's own personal information, it also provides the framework for a Step 2 decision under section 38(b). Three specific parts of section 14 are relevant in this context:

- 14(3) - identifies a specific set of circumstances where disclosure would be presumed to constitute an unjustified invasion of privacy
- 14(4) - lists specific exceptions to the section 14(3) presumptions
- 14(2) - includes a number of factors to consider in deciding whether disclosure would constitute an unjustified invasion of privacy, some of which favour disclosure and others which favour privacy protection

If the other individual's personal information falls within the scope of one of the section 14(3) presumptions, and none of the section 14(4) exceptions are present, the Courts have determined that a combination of factors under section 14(2) that favour disclosure cannot outweigh the presumption (in *John Doe v. Ontario (Information and Privacy Commissioner)*, [1993], 13 O.R. (3d) 767).

Given their mandates, Police Services frequently receive requests for records that fall within the scope of section 14(3), particularly section 14(3)(b), which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the information,  
  
was compiled and is identifiable as part of an investigation into a possible violation of law, ...

As a consequence, in circumstances where records include the personal information of both the requester and another individual, and severance is not possible, Police Services in making their Step 2 decisions under section 38(b) often conclude that disclosing the requester's personal information is a **presumed** unjustified invasion of another individual's privacy. This decision is made without ever considering any **factors** that might favour disclosure, because of the Court's decision that these factors are not relevant when a presumption applies.

If faced with a similar request for another individual's personal information under Part I of the municipal *Act*, the decision-making process would end there. But the situation is different under Part II. When dealing with a request for access to a requester's own personal information, an institution must proceed to Step 3 before making a final decision under section 38(b).

### Step 3

After concluding that providing a requester with access to his or her own personal information would constitute an unjustified invasion of another individual's privacy, an institution must then make a Step 3 decision — should the institution exercise discretion in favour of disclosing the record, despite the fact that doing so would represent an invasion of privacy? If the answer to this question is “yes”, that is acceptable. It recognizes what has been described as a “higher right of access” when dealing with an individual's own personal information, and a need to carefully balance the competing interests under section 38(b) — the right of a requester for access to his or her personal information on the one hand; and the right of other individuals to the protection of their privacy. Neither interest prevails in all situations. Each situation must be considered based on its own set of specific facts and circumstances.



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In exercising discretion at Step 3, an institution may want to consider the various factors listed in section 14(2), even though these factors could not be taken into account at Step 2 because one of the section 14(3) presumptions applies. Many records compiled by Police Services in the context of criminal investigations contain personal information of more than one individual, and some of the various factors set out in section 14(2) are often present, depending on the individual circumstances. For example:

- in some cases the personal information of other individuals is highly sensitive (14(2)(f)) or supplied to the Police in confidence (14(2)(h)), while in other cases the personal information may not be sensitive or may already be known by the requester;
- the individuals involved may be very different — e.g., victim of a crime, as compared to the accused in a crime; or
- the requester may want the information for the purpose of a proceeding that could affect his or her rights (14(2)(d)), or feel that the records were important in subjecting the activities of the institution to public scrutiny (14(2)(a)).

These are just some examples of the variability of individual circumstances.

There may also be factors or circumstances not listed in section 14(2) that should be taken into account when exercising discretion. For example:

- the requester may be a parent and/or guardian asking for records compiled by the Police Service in the context of a sudden death investigation that did not result in any criminal charges; or
- the other individual whose personal information is contained in the records may have been dead for a considerable length of time.

Again, these are just two examples.

The point to remember is that in properly exercising discretion under section 38(b) of the municipal *Act*, an institution must turn its attention to all relevant factors present in the particular circumstances of a specific request. Depending on an assessment of the relative importance of these various factors, the institution may decide to disclose records or not, but it is important that this decision be made on an individual basis.

Although it may not be necessary for a Police Service to consult with the individuals whose personal information is contained in the records in order to make a Step 2 decision, notification to these individuals under section 21 of the municipal *Act* prior to exercising discretion under section 38(b) would generally be appropriate. If notification is given, any responses provided by any of the notified individuals should be taken into account in order to ensure that all of the various relevant factors are considered.

## Special Circumstances

In certain specified circumstances, the right of access to personal information under Part II of the municipal *Act* is extended to other individuals. In these circumstances, institutions must comply with the access process under Part II, including the proper exercise of discretion in deciding whether to provide access to personal information.

### Section 54

Section 54 of the municipal *Act* identifies three specific situations where someone is given the same right of access to personal information as the individual to whom this personal information relates. These situations are:

- where the personal information relates to a child who is under the age of 16, and the requester has lawful custody of this child;
- where the requester is a legal guardian or has a valid power of attorney to deal with the individual's care or property; and
- where the individual has died, and the requester is the deceased's personal representative and the request relates to the administration of the individual's estate.

If any of these three situations are present, the institution should treat the request as if it were being made under Part II of the municipal *Act* by the individual whose personal information is at issue. Orders of the Commissioner's Office have given direction to institutions on how to properly interpret each of these three situations.

### Lawyers or agents

Where a lawyer or agent makes a request on behalf of an individual, and the institution is satisfied that valid authorizations are in place, the request should be processed as a Part II request, as if the individual had made the request personally. If the institution is uncertain as to whether the proper authorizations have been given, this should be clarified through discussions with the requester before deciding whether to process the request under Part II or Part I of the municipal *Act*.



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## Summary of steps to take in dealing with a section 38(b) request

1. Talk to the requester to make sure you know the scope of the request.
2. Assess the request and satisfy yourself that it is a valid request for personal information under Part II of the municipal *Act* — if it isn't, then process it as a request for general records under Part I. This may include reviewing appropriate legal documentation to determine if a requester qualifies under section 54 of the *Act*.
3. If a responsive record contains the personal information of both the requester and another individual, consider whether the record can be severed in a way that would permit disclosure of the requester's personal information without disclosing personal information of the other individual (Step 1).
4. If severance is not possible (or if the undisclosed portions contain the requester's personal information), consider whether providing the requester with access to his or her personal information would at the same time constitute an unjustified invasion of the other individual's privacy (Step 2).
5. If the Step 2 decision is “no”, then you must disclose the record to the requester.
6. If the Step 2 decision is “yes”, then proceed to exercise discretion and decide whether the record should be disclosed, even if doing so would constitute an unjustified invasion of privacy (Step 3).
7. In exercising discretion, consider all of the facts and circumstances of the particular case, including facts personal to the requester, and balance the requester's right of access against the other individual's right to privacy protection. You may want to consider notification to other individuals before making this decision.
8. Issue a decision letter to the requester explaining the process followed in reaching your decision (see Appendix A).

## Appendix A — Sample Letter to Requester

[Date]

[Requester's Name]

[Requester's Street Address]

[Requester's City/Province/Postal Code]

Dear [Mr./Ms. Requester's Surname]:

**Re: Your Access Request to the [named] Police Service**

On [date] the [named] Police Service received your access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). You have requested access to all records [description of request]. [If the requester was contacted for the purposes of clarifying the scope of the request, this would be described here.]

Because your request involves records that contain your own personal information, I have processed it under Part II of the *Act*.

Part II includes section 36, which gives you a general right of access to any of your personal information held by the [named] Police Service. However, it is important to state that this is not an absolute right. Section 38 lists certain situations where access may be denied, and I have decided that your request falls within scope of one of these exceptions.

Having carefully considered your request, I have decided to deny access to your personal information on the basis that providing this information to you would constitute an unjustified invasion of another individual's privacy. I am permitted to make this decision under section 38(b) of the *Act*, which reads:

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.



First, I considered whether or not the records could be severed in a way that would allow me to disclose your personal information without also disclosing other individuals' personal information. Unfortunately, this was not possible. Your personal information was intertwined with the personal information of the other individuals to such an extent that severance was not an option.

Second, I looked to the provisions of section 14 of the *Act* for guidance in deciding whether disclosing the personal information of the other individuals would constitute an unjustified invasion of their privacy. The Information and Privacy Commissioner's Office has issued a number of orders that assist me in making this determination. I concluded in your case that section 14(3)(b) was relevant in the circumstances of your request. This provision 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.

The Commissioner's Office and the Courts have determined that if a record falls within the scope of any of the presumptions contained in section 14(3) (including section 14(3)(b)), that even if factors which favour disclosure are present, they cannot be considered.

As a final step before making my decision under section 38(b), the *Act* requires that I exercise discretion and determine whether you should be provided with access even if doing so would constitute an unjustified invasion of other individuals' privacy. In exercising discretion, I must consider the individual circumstances of your request, and balance two competing interests:

- your right of access to your personal information; and
- any other person's right to privacy.

In reaching my decision to exercise discretion in favour of privacy protection, I carefully considered the following factors as they apply to the particular circumstances of your request:

[insert description of section 14(2) factors and any other factors particular to the request and to the requester]

You may request that this decision be reviewed by the Information and Privacy Commissioner. The Commissioner can be reached at:

2 Bloor Street East, Suite 1400  
Toronto, Ontario  
M4W 1A8  
416-326-3333  
Toll free: 1-800-387-0073

If you decide to appeal a decision to the Commissioner, please provide the Commissioner's office with:

1. The request number assigned to the request,
2. A copy of this decision letter,
3. A copy of the original request you sent to this institution, and
4. A fee of \$10 made payable to the Minister of Finance.

Yours sincerely,

Freedom of Information and Privacy Co-ordinator  
[named] Police Service