



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

ORDER M-52

Appeal M-910083

Sudbury Regional Police



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Sudbury Regional Police (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The requester sought access to the reports and statements concerning a charge of first degree murder including police reports, etc. sent to Correctional Service of Canada.

Upon receipt of the request, the Freedom of Information and Privacy Co-ordinator for the Police wrote to the witnesses whose statements are contained in the record, inquiring whether they would consent to disclosure of their statements. Eleven witnesses did not reply. Of the nine witnesses who did respond, only one consented to the release of her statement. However, the Police did not disclose this statement to the requester.

The Police identified the record which responded to the request as consisting of three groups of information. Group A, pages 1-85, consists of a "Crown Brief" and a covering letter; Group B, pages 86-147, consists of pages from two police officers' notebooks; Group C, pages 148-186, consists of information sent by the appellant to the Ministry of the Solicitor General as well as a covering letter forwarding a copy to the Sudbury Regional Police.

The Police granted partial access to Group B of the record. Access to the remainder of the record was denied, either in whole or in part, pursuant to sections 8(2)(a), 9(1)(b), 15(a), 12 and 38(a) and 38(b) of the Act. Some information was severed from the record on the basis that it was not responsive to the appellant's request.

The requester appealed the decision of the Police.

The Appeals Officer obtained and reviewed a copy of the record. During mediation, the Police withdrew their claim for exemption pursuant to sections 15(a) and 9(1)(b) of the Act and released pages 148-186, Group C, to the appellant.

Further attempts at mediation proved unsuccessful. Accordingly, notice that an inquiry was being conducted to review the decision of the Police was sent to the appellant and the Police. Enclosed with each notice was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. Representations were received from the Police only.

PRELIMINARY ISSUE:

Pages 74 and 76 of the record are identical to pages 168 and 169. As pages 168 and 169 have already

been released to the appellant, pages 74 and 76 are not at issue in this appeal. In addition, the Police have identified all or parts of pages 87, 88, 101, 103, 105 to 128, 130 and 147 as containing information which is not responsive to the appellant's request. I have reviewed these pages of the record and I agree that all or parts of them contain information which is not responsive to the appellant's request and, accordingly, this information falls outside the scope of this appeal.

The record at issue in this appeal is: Group A, pages 1-85. Pages 1, 2 and 63-66 were exempted in their entirety pursuant to sections 8(2)(a) and 12; pages 3-62, 67-73, 75 and 77-85 were exempted in their entirety pursuant to sections 8(2)(a), 12, 14(2)(e), 14(3)(a) and (b) and 38(a) and (b); Group B, Pages 89-92, 102-106, 108-110, 114-116, 118-120, 130, 133, 139, 140 and 141-147 were all exempted pursuant to sections 8(2)(a), 14(3)(b), 14(2)(e) and 14(2)(h), 38(a) and (b). Page 104 was also exempted pursuant to section 14(3)(a).

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the requested record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) applies.
- C. Whether the record qualifies for exemption under section 8(2)(a) of the Act.
- D. Whether the record qualifies for exemption under section 12 of the Act.
- E. If the answer to Issue C and/or Issue D is yes, whether the discretionary exemption provided by section 38(a) applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the requested record qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act reads as follows:

In this Act,

"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
- [IPC Order M-52/October 14,1992]**

information about the individual;

In my view, all of the information contained in the record qualifies as personal information. Pages 1, 2, 63 - 66 and 75 of Group A of the record contain the personal information of the appellant only. All of Group B and the remaining pages of Group A contain the personal information of the appellant and other individuals.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) applies.

I have found under Issue A that all of Group B and Group A, with the exception of pages 1, 2, 63-66 and 75, of the record contain the "personal information" of the appellant and other individuals. This information consists of the names, addresses and statements of individuals other than the appellant.

Section 36(1) of the Act gives the appellant a general right of access to personal information about him/her which is in the custody or under the control of the Police. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access. Specifically, section 38(b) of the Act 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;

Section 38(b) of the Act introduces a balancing principle. The Police must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her privacy. If the Police determine that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the Police the discretion to deny the requester access to his/her own personal information (Orders M-3, M-22).

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the requester. Section 14(3) of the Act lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy (Orders M-3, M-22).

The Police have relied on sections 14(3)(a) and (b) of the Act which provide:

A disclosure of personal information is presumed to constitute an unjustified invasion of
[IPC Order M-52/October 14,1992]

personal privacy if the personal information

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) 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;

In their representations, the Police state:

When the officers made the notes in question, they were conducting an investigation into the murder of [the victim]. Personal information was collected about individuals other than the appellant. It is our contention that this information was compiled and is identifiable as part of an investigation into a possible violation of law and that release of this information would constitute an unjustified invasion of personal privacy.

In my view, the names, addresses and statements of individuals other than the appellant contained in Group B and Group A, contain personal information which was compiled as part of an investigation into a possible violation of law, namely the Criminal Code. Accordingly, the requirements for a presumed unjustified invasion of personal privacy under section 14(3)(b) have been satisfied.

I will now consider whether any other provisions of the Act come into play to rebut this presumption. Section 14(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 14(3). In my view, the record does not contain any information that pertains to section 14(4).

It could be that in an unusual case, a combination of the circumstances set out in section 14(2) might be so compelling as to outweigh a presumption under section 14(3). However, such a case would be extremely unusual (Orders M-5, M-6).

Although the appellant did not make representations on this issue, I have reviewed the various factors contained in section 14(2) and the record, and, in my view, with the exception of page 15, the presumption in section 14(3)(b) of the Act has not been rebutted.

Since the individual whose personal information is contained in page 15 of the record has consented to the disclosure of the information, the presumption found in section 14(3)(b) does not apply to it.

In the circumstances of this appeal, I am of the opinion that disclosure of all of Group B and all of Group A with the exception of pages 1, 2, 15, 63-66 and 75, would constitute an unjustified invasion of the personal privacy of individuals other than the appellant, and, therefore, these pages qualify for exemption under section 38(b) of the Act.

Section 38(b) is a discretionary exemption. I have reviewed the representations of the Police regarding the exercise of the discretion to refuse to disclose the information at issue and I find nothing to indicate that the exercise of discretion was improper.

Section 38(a) provides another exception to the general right of access to personal information by the person to whom the information relates. Section 38(a) provides that:

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

- (a) if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information; (emphasis added)

I will now consider whether sections 8(2)(a) and 12 of the Act apply to pages 1, 2, 15, 63-66 and 75 of the record.

ISSUE C: Whether the record qualifies for exemption under section 8(2)(a) of the Act.

Section 8(2)(a) reads as follows:

A head may refuse to disclose a record,

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order to qualify for exemption under section 8(2)(a) of the Act, a record must satisfy each part of the following three part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function

of enforcing and regulating compliance with a law.

(Order M-12)

The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order M-12).

In my view, neither the Crown Brief as a whole, or pages 1, 2, 15 and 75 meet the definition of report. The brief as a whole and these individual pages contain observations or recordings of fact. Therefore, section 8(2)(a) does not apply.

The "Alcohol Influence Test Report", pages 63-66, is a report prepared in the course of law enforcement by an agency which has the function of enforcing and regulating compliance with a law. In my view, it meets all three parts of the test and, therefore, section 8(2)(a) applies.

ISSUE D: Whether the record qualifies for exemption under section 12 of the Act.

The pages to which the section 8(2)(a) exemption did not apply are:

- cover sheet to the "Crown Brief" (page 1);
- covering letter to the Crown Brief dated February 11, 1985 (page 2);
- "will say" statement (page 15); and
- consent form (page 75).

Section 12 of the Act reads as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

In Order M-2, dated August 15, 1991, I stated that section 12 provides an institution with the discretion to refuse to disclose:

1. A record that is subject to the common law solicitor-client privilege; or
[IPC Order M-52/October 14,1992]

2. A record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

In their representations, the Police state, "the entire Crown Brief is subject to solicitor-client privilege. It was prepared for crown counsel in contemplation of or for use in litigation".

I have reviewed pages 1, 2, 15 and 75 of the record and the representations of the Police. In my view, these pages cannot qualify for exemption under section 12 as the relationship between the Police and a Crown Attorney is not that of solicitor and client. The Police are not the clients of the Crown Attorney, and the Crown Attorney, who is an employee of the provincial government, is not "employed or retained" by the Police. Therefore, section 12 does not apply to pages 1, 2, 15 and 75 of the record.

ISSUE E: If the answer to Issue C and/or Issue D is yes, whether the discretionary exemption provided by section 38(a) applies.

Having found that section 8(2)(a) and section 12 do not apply to pages 1, 2, 15 and 75 of the record, I need not consider Issue E in relation to those pages.

Pages 63-66 contain the personal information of the appellant only and under Issue C, I have determined that section 8(2)(a) applies to these pages. Therefore, the exemption provided by section 38(a) applies and gives the Police the discretion to refuse disclosure.

In all cases where discretion is exercised under section 38(a), I will look very carefully at the manner in which the discretion has been exercised. Having reviewed the representations of the Police, I find nothing improper in the exercise of discretion and would not alter it on appeal.

ORDER:

1. I uphold the decision of the Police not to disclose all of Group B and all of Group A, with the exception of pages 1, 2, 15 and 75.
2. I order the Police to disclose pages 1, 2, 15 and 75 to the appellant within fifteen days of the date of this order.
3. The Police are further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and

Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

4. In order to verify compliance with this order, I order the head to provide me with a copy of the pages disclosed to the appellant pursuant to provision 2, **only** upon request.

Original signed by: _____
Tom Wright
Commissioner

_____ October 14, 1992