



Information and Privacy  
Commissioner/Ontario

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

# **ORDER M-144**

## **Appeal M-9300015**

### **Metropolitan Toronto Board of Commissioners of 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 Metropolitan Toronto Board of Commissioners of Police (the Police) received a request for access under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for:

... all personnel records at the Personnel Office level and the unit level; all medical records from the unit and medical office level; all records and reports pertaining to complaint of harassment from the unit level and Labour Relations unit; and all records from the Employment Office of the Metropolitan Toronto Police Force with respect [to the requester].

The Police granted partial access to the information requested. Certain records were, however, not provided to the appellant pursuant to sections 8(1)(a) and (b), 8(2)(a), 10(1)(d), 14(1)(f), 14(3)(b) and (d), and 38(b) and (c) of the Act. The requester appealed the denial of access. During mediation, the records at issue were narrowed significantly such that only six pages now remain at issue. These records consist of Employer Reference forms where three of the appellant's former employers have provided information about the appellant's previous work experience.

Further mediation was not possible, and notice that an inquiry was being conducted to review the decision of the Police was sent to the Police, the appellant and to three individuals who provided the references (the affected persons). Representations were received from the Police and one affected person only.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the records contain personal information as defined by section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(c) of the Act applies to the records.

## SUBMISSIONS/CONCLUSIONS:

**ISSUE A:     Whether the records contain personal information as defined by section 2(1) of the Act.**

Section 2(1) of the Act states, in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

- (d)     the address, telephone number, fingerprints or blood type of the individual,
- (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;

In their representations, the Police acknowledge that the Employer Reference forms contain personal information about the appellant. That information relates to the appellant's employment history and to the views or opinions expressed by other individuals about the appellant. The Police also submit that the records contain the personal information of the individuals who supplied the employer references. That information would include the individual's name, his or her employment title, the name of the individual's organization and the individual's work address and telephone number.

From a review of the Employer Reference forms, it is clear that they contain the views and opinions of the references about the appellant, in the context of the appellant's previous work history and suitability for new employment. By virtue of sections 2(1)(e) and (g) of the Act, therefore, these views and opinions constitute the personal information of the appellant only.

The portions of the records which remain at issue consist of background information provided by the three references about their positions within their respective organizations. It has been established in a number of previous orders that information supplied by individuals in the execution of their employment responsibilities does not fall within the definition of personal information under the Act (Orders 113, 139, 157, P-257, P-326, and P-377). In the circumstances of this appeal, I find that the information in question relates to the employment sphere of the three individuals and was supplied to the Police for a work related purpose. Accordingly, the materials provided do not qualify as the personal information of the individuals involved.

**ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(c) of the Act applies to the records.**

I have found under Issue A that the information being sought qualifies as personal information under the Act and that this information pertains to the appellant only. I must now determine whether access to this information should be denied on the basis that it falls within the exemption provided by section 38(c) of the Act.

Section 36(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, the right of access under section 36(1) is not absolute; section 38 provides a number of exemptions to this general right of access to personal information by the individual to whom it relates.

Section 38(c) of the Act reads:

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

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

As I indicated in Order M-132, section 38(c) of the Act attempts to address two competing interests. These are: (1) the right of an individual to have access to his or her personal information and (2) the need to protect the flow of frank information to provincial or municipal institutions so that appropriate decisions can be made respecting the awarding of jobs, contracts or other benefits.

In Order M-132, I established what was, in effect, a four-part test for a record to qualify for exemption under section 38(c) of the Act. For the exemption to be successfully claimed, an institution and/or the affected person must establish that:

1. The personal information is evaluative or opinion material;

2. The personal information was compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits;
3. The information was supplied to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;
4. The disclosure of the record would reveal the identity of the source of the information.

Each element of the four-part test must be satisfied in order for the exemption to apply. The failure to meet any part of the test means that section 38(c) will not be available to exempt the personal information contained in the record from disclosure.

The records at issue in this appeal consist of six Employer Reference forms. These forms are used by employees of the Police to record information provided by references over the telephone about candidates who are being considered for jobs in the police force. In the present case, a total of three references were called. It appears that a draft form was completed for each reference and that each of these forms was then finalized when the phone calls were completed.

The first part of the form includes spaces for the name of the company for which the job applicant worked, the name of the reference, a description of applicant's previous job responsibilities and the time that the individual spent in that position.

The second part of the form contains a checklist for rating the applicant based on a number of factors such as motivation, job performance and dependability.

The third part of the form contains space for further comments. The form then asks whether or not the reference would recommend the applicant for the position for which the applicant has applied.

Finally, the bottom of the form provides spaces for the signature of the reference, his or her position and the date that the form was completed. Because the information in the present case was taken over the phone, the form would be signed by an employee of the Police on behalf of the reference.

With the nature of the record now understood, the next step is to determine whether the four-part test established for the section 38(c) exemption applies to the information contained in the reference form.

## **Part 1**

It is clear that the records at issue contain the opinions of the references with respect to the appellant in the context of her suitability for new employment. In my view, therefore, the record contains personal information which is evaluative or opinion material with the result that the first part of the test is satisfied.

## **Part 2**

It is also clear that the records at issue were compiled solely for the purpose of determining suitability, eligibility or qualifications for employment and, accordingly, the second part of the test has also been satisfied.

## **Part 3**

In Order M-132, I stated that the following factors are relevant in determining whether the materials were supplied to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence:

1. The expectations of the provider of the opinion or evaluative material and the institution regarding the confidentiality of the provider's identity at the time that the information was supplied to the institution.
2. The ordinary practice and/or experience of the individual who provided the information and of the institution which sought the information with respect to maintaining the confidentiality of the source of the information.
3. The knowledge of the individual about whom the information relates as to the identity of the provider of the specific opinion or evaluative material and the individual's expectation as to whether the identity of the provider would be held in confidence.
4. The nature of the opinion or evaluative material, itself, insofar as it would identify the provider of the information.

With respect to the question of whether there existed a reasonable assumption that the identity of the source of the reference would be held in confidence, the Police state as follows:

... the portion of the application form where the applicant is to list educational institutions and also previous employment information is relayed to the applicant in pre-printed form [and states that ... all] information will be treated in a confidential manner [and that all] information supplied is subject to verification by investigation.

In my view, this statement relates to the expectations of confidentiality between the Police and the appellant with respect to information provided to and obtained by the Police in assessing the applicant's suitability for employment.

The Police then make the following statement with respect to the expectations of confidentiality of the references whom the Police would periodically contact:

The need for all employers to be able to contact both personal and employment references and obtain from such references their candid views or assessments of an applicant requires that the employer provide a reasonable assurance of confidentiality of the information. To do otherwise reduces an employment investigation to a level in which only the information available would be factual information from a file ...

The Police have not indicated, however, the extent to which expectations of confidentiality are ordinarily communicated between the Police and references who are contacted during the recruitment process. Nor has any evidence been provided on whether assurances of confidentiality were either requested or actually provided to the three affected persons who provided references in this case. Finally, I would observe that the Employer Reference form does not contain any statement that either the identity of the reference or the information that the reference supplies will be held in confidence.

Only one of the three affected persons chose to provide representations in this appeal. This individual states that:

The information I provided to the Metropolitan Toronto Police was confidential in nature. At the time it was given, it was my understanding that such information would not be disclosed.

These representations are also very general in nature. The affected person has not indicated with any degree of specificity the basis for her understanding, nor does she indicate whether she was given assurances that she would not be identified as the source of the information.

I have carefully reviewed the records at issue in this appeal as well as the representations provided to me by the parties. I find that the Police and the affected person have failed to provide me with sufficient evidence to indicate that, at the time the references were provided, it could reasonably have been assumed that the source of the reference would be held in confidence. Thus, the third part of the test has not been met.

#### **Part 4**

Since I have found that the third part of the test has not been satisfied, it is not necessary for me to consider the application of Part 4 of the test.

Because all elements of the four-part test have not been met, the Police cannot rely on the exemption set out in section 38(c) of the Act to withhold the Employer Reference forms from the appellant.

**ORDER:**

1. I order the Police to disclose to the appellant the six individual Employer Reference forms within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
2. In order to verify compliance with this order, I order the Police to provide me with a copy of the record which was disclosed to the appellant pursuant to provision 1, **only** upon request.

Original signed by: \_\_\_\_\_  
Irwin Glasberg  
Assistant Commissioner

\_\_\_\_\_ June 11, 1993