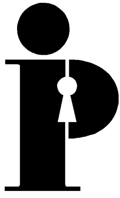

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-198

Appeal M-910454

Metropolitan Toronto Police Services Board

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

BACKGROUND:

The Metropolitan Toronto Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all information concerning an investigation of the requester's complaint of being assaulted by a named individual (the primary affected person).

The Police provided the requester with partial access to the records and denied access to the remainder of the records pursuant to sections 8(1)(d) and (1), 8(2)(a), 9(1)(d), 14(2)(h), 14(3)(b) and (d), and 38(b) of the Act. The requester appealed the decision.

The Police initially identified 124 pages of occurrence and supplementary police reports, copies from police officer's notebooks, Crown brief material, and correspondence as constituting the records responsive to the request.

Attempts to mediate this appeal were not successful. Accordingly, notice that an inquiry was being conducted to review the decision was sent to the appellant, the Police, the primary affected person and three other individuals (the affected persons). Representations were received from the Police, the appellant, the primary affected person and one other affected person. Both the primary affected person and the other affected person who responded to the Notice of Inquiry objected to the disclosure of their personal information.

On August 6, 1993, while these representation were being considered, Commissioner Tom Wright issued Order M-170 which interpreted several statutory provisions of the Act in a way which differed from the interpretation developed in previous orders. Since a new approach to the operation of the Act was being adopted and because the same statutory provisions are at issue in the present appeal, it was determined that copies of Order M-170 should be provided to all the parties. The parties were then afforded the opportunity to state whether the contents of Order M-170 would cause them to change or supplement the representations which they had previously made. None of the parties chose to do so.

PRELIMINARY ISSUE:

Canadian Charter of Rights and Freedoms

In his representations, the appellant contends that all of the exemptions claimed by the Police under the Act "are subordinated by the authority" of sections, 7, 12 and 15 of the Canadian Charter of Rights and Freedoms (the Charter), and refusal to disclose the records breaches the appellant's rights under the Charter.

In Order 106, former Commissioner Sidney B. Linden considered whether the use of section 14(3) of the provincial Freedom of Information and Protection of Privacy Act was in violation of a Charter right. He

stated the following:

> In my view, even if I were to conclude that I have the jurisdiction to hear and determine a Charter challenge to the validity of provisions of the Act, I would have to be convinced by a clear and compelling argument that the section the appellant seeks to impugn is, in fact, inconsistent with the Charter.
>
> The section that the appellant seeks to challenge is part of a comprehensive statutory scheme. Given the unique nature of the subject matter addressed by the Act, the role of an independent Commissioner is an integral part of this scheme. It is an important part of the role of the Commissioner to ensure that the potential abuses the appellant has referred to do not occur. To that end, the Commissioner has the statutory authority to make a binding Order in an appeal and has other significant powers with respect to the conduct of an inquiry under section 52 of the Act. These powers include the ability to require production and examination of any record in the custody or control of an institution and the right to enter the premises of an institution.

After considering the appellant's submission in that appeal, the former Commissioner was not convinced that section 14(3) of the provincial Act was in conflict with any Charter provision.

In Order P-254, Commissioner Tom Wright considered various decisions of the Supreme Court of Canada made after the issuance of Order 106 (i.e., Tetrault-Gadoury v. Canada (Canada Employment and Immigration Commission (1991), 122 N.R. 361, (S.C.C.), Cuddy Chicks Limited v. (Ontario) Labour Relations Board, (1991) 81 D.L.R. (4th) 358 (S.C.C.), and Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3.S.C.R.570), and concluded that he had the jurisdiction to determine Charter issues. Therefore, I have assumed that I have jurisdiction to determine a Charter challenge to provisions of the Act arising in matters properly before me.

I agree with former Commissioner Linden's view as expressed in Order 106 that I would have to be convinced by a clear and compelling argument that the sections which the appellant seeks to impugn are, in fact, inconsistent with the Charter.

I have considered the appellant's submissions with respect to the applicability of the Charter in the circumstances of this appeal. As I have stated, it is necessary for the party who raises such issues to provide sufficient support for them. Based on the submissions received from the appellant, I am not persuaded that the provisions of the exemptions used by the Police under the Act in this appeal offend the Charter in any way.

The Records

The Police claim that many of the pages contain information which is not responsive to the request. I agree. I have examined the records and, in my opinion, the following 38 pages are either not responsive to the

request or have been released to the appellant with non-disclosure only of information which is not responsive: 1, 2, 3, 4, 5, 7, 12, 13, 14, 15, 16, 20, 21, 24, 28, 30, 31, 34, 35, 36, 37, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123 and 124. As these pages are not in issue, I need not consider the application of sections 8(1)(l) and 9(1)(d) of the Act claimed by the Police to apply to non-responsive pages.

A further nine pages contain some information which is not responsive, as well as additional information that is responsive to the request, but was severed pursuant to an exemption of the Act. They are pages 6, 8, 19, 22, 23, 27, 29, 33, and 53 parts of which are, therefore, still at issue. I should add that I agree with the Police, as stated in their representations, that the Police code on page 53 is not responsive to the request.

The Police released 19 pages in full to the appellant. They are pages 32, 54, 60, 61, 64, 65, 66, 70, 71, 78, 79, 80, 82, 83, 88, 89, 90, 103, 104, 105, and 107. These are therefore also not at issue here.

Many of the pages remaining at issue are duplicates. Pages 84 and 99 are duplicates of page 59; pages 86 and 101 are duplicates of page 64; and pages 87 and 102 are duplicates of page 65.

Page 95 is a duplicate of page 57; pages 96 and 97 are duplicates of page 58; page 100 is a duplicate of page 63. My decision on pages 57, 58, 59, 63, 64, and 65 will apply to their duplicates. Accordingly, I will not consider pages 84, 86, 87, 95, 96, 97, 99, 100, 101, and 102 in this order.

In summary, the following pages or parts of pages are still at issue in this appeal and will be considered in this order: 6, 8-11, 17-19, 22, 23, 25-27, 29, 33, 38-53, 55-59, 62-65, 67-69, 72-77, 81, 85, 91-94, 98, and 106.

ISSUES:

The issues arising in this appeal are as follows:

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

B. If the answer to Issue A is yes, and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies.

C. Whether the discretionary exemptions provided by sections 8(2)(a) and 38(a) of the Act apply.

D. Whether the discretionary exemption provided by section 8(1)(d) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

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

The introductory words of section 2(1) of the Act state:

> "personal information" means recorded information about an identifiable individual ...

I have examined the records at issue. In my opinion, the following pages contain the personal information of the appellant as well as other individuals: 6, 8-11, 17, 18, 19, 22, 23, 25-27, 29, 33, 38, 39, 40-51, 53, 55-59, 63, 64, 65, 67, 68, 77, 85, 91-94, and 98.

Page 62 contains the personal information of the appellant only. The Police have not claimed any discretionary exemptions to deny access to this page, nor do any mandatory exemptions apply. Accordingly, this page should be disclosed to the appellant.

On pages 52, 69, 72, 73, 74, 75, 76, 81, and 106, the names and, in places, the telephone numbers, of lawyers retained by the appellant have not been disclosed. This is not personal information, as the information concerns these individuals acting in their professional capacity (Orders 157 and P-369). As this was the only information withheld from disclosure on these pages, and no other exemptions were claimed or apply, these pages should be released in full.

The third severance on page 29, the first severance on page 33, the second severance on page 53, the first severance on page 67, and the second severance on page 68 also consist of information about the appellant's lawyer and his telephone number. Based on the reasoning above, this information does not constitute personal information. The information contained in these severances on pages 29, 67, and 68 should be disclosed to the appellant as no other exemptions were claimed or apply.

As the Police have claimed that section 8(2)(a) applies to exempt the information on pages 33 and 53 from disclosure, I will consider the first severance on page 33 and the second severance on page 53 in my discussion under Issue C.

ISSUE B: If the answer to Issue A is yes, and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies.

Having made the determination that many of the records contain the personal information of the appellant and other individuals, I wish to make some preliminary observations concerning some of those records.

Among the records which the Police stated are responsive to the request is a four-page letter addressed to

them written by the appellant. Although that letter contains personal information of the appellant and others, because the information in it was supplied by the appellant to the Police, in my view, there can be no unjustified invasion of personal privacy in releasing it to the appellant. On this basis, the following five pages, which include portions of the letter which have not yet been disclosed to the appellant, should be released: 59, 63, 64, 65, and 85. The Police have not claimed that any other discretionary exemptions apply to this information and no mandatory exemptions apply.

I shall now consider the applicability to the remaining pages of the discretionary exemption provided by section 38(b) of the Act. The pages to be considered under this section are: the responsive portions of pages 6, 8, 19, 22, 23, 27, 29, 33, 53, 67 and 68 that remain at issue, as well as pages 9-11, 17-18, 25-26, 38-51, 55-58, 77, 91-94 and 98.

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).

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 14(2), (3), and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. In Order M-170, Commissioner Wright addressed the interrelationship between sections 14(2), (3), and (4) of the Act in the following way:

> ... [W]here personal information falls within one of the presumptions found in section 14(3) of the Act, a combination of circumstances set out in section 14(2) of the Act which weigh in favour of disclosure, cannot collectively operate to rebut the presumption.
>
> The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a compelling public interest exists in disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

I adopt this approach for the purposes of this order.

Specifically, the Police have relied on section 14(3)(b) of the Act, which states the following:

> 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 Police have stated that the personal information was compiled during an investigation into a possible violation of law, that of the Criminal Code. Although the Police found after investigation that the allegation was without merit, a charge was subsequently laid by the appellant through a private information. It was dealt with in court, resulting in the acquittal of the primary affected person.

The fact that no criminal proceedings were commenced by the Police does not negate the applicability of section 14(3)(b) (Order P-237). As section 14(3)(b) only requires that there be an **investigation** into a possible violation of law, I am satisfied that the requirements for a presumed unjustified invasion of personal privacy under section 14(3)(b) have been established.

I have considered section 14(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 16 of the Act applies to the facts of this case.

Accordingly, I find that the presumption of an unjustified invasion of personal privacy has not been rebutted with respect to the personal information of the individuals other than the appellant contained in the records at issue. Therefore these records qualify for exemption under section 38(b) of the Act.

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

ISSUE C: Whether the discretionary exemptions provided by sections 8(2)(a) and 38(a) of the Act apply.

The only remaining pages for which the Police submit that the exemption provided by section 8(2)(a) of the Act applies are 33 and 53.

Section 8(2)(a) reads:

> A head may refuse to disclose a record,
>
> > 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, the 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).

Both pages 33 and 53 reflect information that was recorded by the police officer who investigated the alleged assault. They contain only observations and recordings of fact. Page 53 records a conversation a police officer had with the appellant.

In my view, neither page constitutes a report for the purpose of section 8(2)(a) of the Act. They do not consist of a formal statement or account of the **results** of the collation and consideration of information. They are recordings of the information itself.

Because these pages do not satisfy the first part of the section 8(2)(a) test, they do not qualify for exemption pursuant to this section. Accordingly, I need not consider the application of section 38(a) to these records.

Because of the manner in which I have dealt with Issues A, B, and C, I need not consider Issue D.

ORDER:

1. I uphold the decision of the Police not to disclose all or part of the following records: 6, 8, 9, 10, 11, 17, 18, 19, 22, 23, 25, 26, 27, 29 (the first two severances), 33 (the second and third severances), 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53 (the first and third severances), 55, 56, 57, 58, 67 (the second severance), 68 (the first severance), 77, 91, 92, 93, 94, and 98.

2. I order the Police to disclose the following records in full: 52, 59, 62, 63, 64, 65, 69, 72, 73, 74, 75, 76, 81, 85, and 106. I also order the Police to disclose the third severance of page 29, the first severance on page 33, the second severance of page 53, the first severance of page 67 and the second severance of page 68.

3. I order the Police to disclose the pages noted in Provision 2 within 35 days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.

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

Original signed by: October 12, 1993
Anita Fineberg
Inquiry Officer