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

ORDER M-199

Appeal M-9200264

Metropolitan Toronto Police Services Board

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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 access to "... all personal information about myself that has been collected by the Metropolitan Toronto Police in the course of their surveillance or investigation of me ..."

The Police granted partial access to the records. The records identified as responsive to the request consist of a total of 11 pages from the notebooks of three police officers, and relate to one particular incident. The appellant was provided with copies of pages 1, 6 and 9 of the records, as well as portions of pages 2-5, 7, 8, 10 and 11. The Police indicated that access was denied to the remaining portions of these records on the basis of sections 8(1)(l) and 14(1) of the Act.

The requester appealed the decision of the Police to deny access to parts of the records, and indicated that he believed that additional records responsive to his request exist. As well, the appellant appealed the form in which the records have been provided to him on the basis that he is unable to decipher the records.

Mediation was not successful, and notice that an inquiry was being conducted to review the decision of the Police was sent to the appellant, the Police and an individual named in the records (the affected person). Written representations were received from all parties.

PRELIMINARY MATTER:

I have reviewed the records and determined that the portions of the Records 2, 5, 10 and 11 which have been withheld from the appellant are not responsive to the request, as they deal with incidents other than the one involving the appellant. Additionally, in my view, all but one of the portions of the record which the Police have exempted under section 8(1)(l) are not responsive to the request, as they deal with communications related to the officer's availability and not to any incident involving the appellant. As a result, the records remaining in issue consist of one severance at the bottom of page 3, one severance at the top of page 4, and two severances at the bottom of page 7.

ISSUES:

The issues arising in this appeal are:

A. Whether the information contained in the records 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) of the Act applies.

C. If the answer to Issues A is yes, whether the discretionary exemption provided by section 38(a) of the Act applies.

D. Whether section 37(3) of the Act requires that the Police make typewritten transcriptions of handwritten records.

E. Whether the Police conducted a reasonable search for responsive records.

SUBMISSIONS/CONCLUSIONS:

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

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

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

Having reviewed the portions of the records which remain at issue in this appeal, I find that they all contain information that satisfies the definition of personal information in section 2(1) of the Act. I find that this information is the personal information of the appellant. As well, I find that the name, address, telephone number and statement on pages 3 and 4 of the records, and the name and telephone number on page 7, is the personal information of the affected person.

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

Under Issue A, I found that all portions of the records contain the personal information of the appellant, and that the name, address, telephone number and statements on pages 3 and 4 of the records, and the name and telephone number on page 7, is the personal information of the affected person.

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, this right of access is not absolute; section 38 provides a number of exceptions to this general right of access, including section 38(b), which 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;

The section introduces a balancing principle. The Police must look at the information and weigh the appellant's right of access to his personal information against the affected person's right to the protection of personal privacy. If the Police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the Police the discretion to deny the appellant access to his personal information.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of the personal information contained in the records would constitute an unjustified invasion of personal privacy.

The Police submit that section 14(3)(b) of the Act applies. This section 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 Police, however, have not indicated what possible violation of law was being investigated, and in my view the records do not refer to any such possible violation of law. It is therefore my view that the presumption contained in section 14(3)(b) of the Act does not apply.

The Police submit that a number of additional factors were considered in the decision not to disclose the personal information of the affected person to the appellant. These considerations included the fact that the personal information of the affected person was collected only incidentally as a result of the inquiries made by the Police; the expectation of privacy created in the collection of information for police purposes; and the identification by the Police that no factors favoured disclosure of the personal information of the affected person to the appellant.

The appellant submits that the personal information of the affected person should be disclosed to him. The appellant also speculates as to who the affected person is, and argues that the information should therefore be disclosed to him.

The affected person has provided submissions, and has requested that the personal information not be

disclosed.

After reviewing the records and the submissions and balancing all of the relevant factors, I am satisfied that the disclosure of the personal information of the affected person contained in the records would constitute an unjustified invasion of the personal information of the affected person, and section 38(b) applies to the records.

Section 38(b) is a discretionary exemption, giving the Police the discretion to refuse to disclose personal information to the appellant where disclosure would constitute an unjustified invasion of another person's privacy. I have reviewed the Police's representations regarding their decision to exercise discretion in favour of claiming section 38(b), and find nothing improper in the circumstances of this appeal.

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

Under Issue A, I found that portions of the records contain the personal information of the appellant. Leaving out the information which constituted the personal information of the affected person as identified in Issue B, the remaining portion of the records responsive to the request consist of one severance at the bottom of page 7, which is a code used by Police and two words following the code. The Police submit that this portion of the records qualifies for exemption under section 8(1)(l) of the Act.

Section 38(a) provides an exception to the general right of access to personal information by the person to whom the information relates. It reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information; [emphasis added]

Section 8(1)(l) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

The Police submit that they maintain codes for certain information for a reason, and that the Police utilize codes to ensure both that information is passed efficiently from one police source to another, and that anyone intercepting the message would be unable to determine the content or import of the message. They

also submit that codes of this nature may relate to the status of an individual, or officer and/or police vehicle availability.

Section 8(1) of the Act requires that there exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the Police must establish a clear and direct linkage between disclosure of the information and the harm alleged.

On the basis of the submissions made by the Police, I am not satisfied that the particular code for which the Police have claimed an exemption qualifies for exemption under section 8(1)(l) of the Act. In my view, the Police have not demonstrated a clear and direct linkage between disclosure of the specific information exempted and the harm described in section 8(1)(l) and, in my view, the information does not qualify for exemption under section 8(1)(l).

ISSUE D: Whether section 37(3) of the Act requires that the Police make typewritten transcriptions of handwritten records.

The appellant indicates that he cannot decipher the handwriting of the authors of the records, and has asked the Police to provide him with typewritten clarification of the entire content of the records. The Police responded by informing the appellant that they would not create new typewritten records. However, they provided some clarification for the appellant by identifying and explaining the various abbreviations used by the authors of the records. The appellant maintained that he was entitled to the records in a comprehensible form, and that the Police were obligated to provide a type-written copy of the records.

Both the Police and the appellant addressed this issue in their submissions.

The appellant refers to section 37(3) of the Act to support his position. Section 37(3) reads as follows:

> If access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner which indicates the general conditions under which the personal information is stored and used.

The appellant submits that the term "comprehensible" used in section 37(3) should be interpreted to mean "capable of being understood by the person to whom the information relates", and that the records in this appeal (notebook entries of police officers) are only decipherable by the authors. The appellant therefore argues that the records provided do not meet the test of "comprehensibility". To the appellant the records are illegible and, therefore, incomprehensible.

The Police refer to both section 37(3) and section 23(1) to support their position. Section 23(1) reads as follows:

> Subject to subsection (2), a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.

The Police submit that they have provided access to the records by reproducing a true photocopy of the parts of the responsive pages, in accordance with section 23(1). The Police also submit that they have given access to the documents in a comprehensible form, namely, handwritten copies of the documents. As well, the Police indicate that they have responded further to the request by providing the appellant with a clarification of the abbreviations used in the records.

Section 23(1) falls under Part II of the Act which governs how requests for general records are to be processed. This section describes the manner in which requesters may examine records which are disclosed under this Part of the legislation.

The present appeal, however, involves a request by an individual for access to his own personal information. Requests of this nature fall under Part III, rather than Part II, of the Act. The result is that section 37(3) of the Act, and not section 23(1), defines how the information is to be provided to this requester. Thus, the contents of section 23(1) of the Act are not applicable to the facts of this appeal.

The Police submit that the meaning of section 37(3) does not apply to whether or not a record is handwritten, but rather applies to ensure that a record is not given to a requester in a "coded" form. The Police submit that section 37(3) requires institutions to provide copies of records that are comprehensible, and not, for example, records which are "machine readable" only, or actual "miniature sized" microfiche film. Because a record is defined in the Act as any record of information however recorded, including a machine readable record, the Police submit that section 37(3) applies to only those types of records.

The Police also refer to the manner in which officer's notebooks are kept. They also identify that in the case of the records at issue, the officers can decipher their own notes. The supervisor has read and acknowledged the notes with his/her own signature, and both the Freedom of Information Co-ordinator and the Analyst were able to read the records.

Both parties also address the issue of the cost of providing typewritten copies of the records. The appellant submits that the records in this appeal are fairly short, and would not require much effort to provide in typewritten form. The Police identify that it would create a substantial hardship on an institution to prepare all records in a typed form.

A previous order addressed the issue of the applicability of section 48(4) of the Freedom of Information and Protection of Privacy Act, which corresponds with section 37(3) of the Act referred to in this appeal. In Order 19, Former Commissioner Sidney B. Linden stated the following:

> I agree that subsection 48(4) of the Act does place a duty on the head to "ensure that the personal information is provided to the individual in a comprehensible form". Clearly, the subsection creates a duty to ensure that the average person can comprehend the record. For example, a computer-coded record would be incomprehensible to the average person if provided without the key which will "unlock" it.
>
> But, does subsection 48(4) create a further duty on the head to assess a specific requester's ability to comprehend a particular record? With respect, I do not think that it does ...

Although the issues raised in that order were different from the ones raised in this appeal, in my view the statement that this section creates a duty to ensure that the average person can comprehend the record applies in this appeal. The Police have identified that a number of individuals involved with the records could decipher the records in all instances where an individual had to do so. The Police have also provided an explanation of the abbreviations used in the records. I have reviewed the records, and I am of the view that the average person is able to comprehend the records. It is my view that in the circumstances of this appeal there is no obligation on the Police to create a typewritten copy of the records.

In Issue C, I found that the code used by the Police in one severance at the bottom of page 7 did not qualify for exemption under section 8(1)(l). It is my view that this information, in its coded form, is not comprehensible to the average person, and section 37(3) requires that this information be provided to the appellant in a form comprehensible to the average individual.

ISSUE E: Whether the Police conducted a reasonable search for responsive records.

The appellant provided additional information in his submissions, and identified by name an additional police officer who was involved in the incident. As a result of this information, the Police did identify additional records responsive to the request. The Police provided the appellant with a copy of the additional records in full.

The appellant confirmed that he continued to appeal the decision that no additional responsive records existed.

The appellant refers to the records provided to him to support his view that other records responsive to the request exist. In that regard, the appellant has referred to portions of the records which suggest that the police officers had prior knowledge of the appellant. As well, the appellant indicates that five police officers were involved with the events giving rise to the incident, and that he was provided with the records of only three officers (with records of the fourth officer provided subsequently). The appellant submits that if the head were to ask the authors of the records, the authors would be able to direct the head to additional records which, the appellant submits, should exist.

The Police submit that the officers' notebooks, which constitute the records in this appeal, are not "personal information banks" as defined in the Act, and that, unless a subsequent report is considered warranted by the Police officers, no information is recorded in "information banks". In these situations, computer searches carried out by the Police (which the Police identify were carried out in this appeal) would not reveal any additional information. The Police also submit the following:

> In the case at issue, a search of the computerized information bank sources failed to produce any record or report of surveillance in existence. Additionally, the search of the information bank sources failed to produce any other information responsive to the request.
>
> ... The only way to retrieve personal information contained in a police officer's memorandum book is for the officer to have submitted a report of the event or, as the case at issue, for the requester to identify the date and the officer who recorded the personal information. The memorandum books of the involved officers were checked for recorded entries responsive to the request in the days preceding their contact with the requester. There were no additional recorded entries responsive to the request.

Having carefully reviewed the representations, I am satisfied that the search conducted by the Police was reasonable in the circumstances of this appeal.

ORDER:

1. I order the Police to disclose a decoded version of the coded information severed from the bottom of page 7 of the record in a form comprehensible to the average individual, within 15 days of the date of this order.

2. I uphold the Police's decision to deny access to the remaining severed portions of the records.

3. In order to verify compliance with the provisions of this order, I order the Police to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1, only upon request.

Original signed by: October 14, 1993
Holly Big Canoe
Inquiry Officer