



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

# **ORDER M-202**

**Appeal M-910230**

**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/Télééc: 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 access to all information relating to "any and all" investigations conducted by the Police relating to the requester. Specifically, the requester sought access to all investigation files, witness statements, forensic information, surveillance reports, intelligence reports, applications to wiretap and/or insert listening devices, (plus transcripts of all intercepted communications or copies of tapes) and any information received from other agencies in Canada, the United States or elsewhere.

The Police compiled in excess of 9000 pages and a number of video and audio tapes as being responsive to the request. The requester was granted access to over 3000 pages, in whole or in part, and one videotape in whole. Access was denied to the remainder of the record pursuant to sections 8(1)(c), (d), (e), (g), (h) and (l), and 8(2)(a), (b), (d), 9(1)(d), 10(1)(b), 12, 14 and 38(b) of the Act. The requester appealed this decision.

During mediation, the Police reconsidered their position and granted access to additional pages of the record, in whole or in part, and withdrew their reliance on section 12 of the Act. They also claimed that certain parts of the record that they had initially compiled are not responsive to the appellant's request.

Further mediation was not possible. Accordingly, notice that an inquiry was being conducted to review the decision of the Police was sent to the appellant and the Police. Representations were received from both parties.

In their representations, the Police withdrew the application of section 10(1)(b) and disclosed the pages of the record for which this exemption had been claimed. The Police also indicated that in denying access to the remaining records, they exercised discretion under section 38(a) and (b) of the Act.

On August 6, 1993, while these representations 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 similar statutory provisions are at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the appellant and the Police. 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. No further representations were received from either party.

## PRELIMINARY MATTERS:

### Wiretap Application Records

In Order P-344, former Assistant Commissioner Tom Mitchinson found that the doctrine of federal legislative paramouncy operates so as to exclude requests for wiretap application records from the scope of the Act. Further, in Order M-58 he stated:

In my view, this finding applies equally to the municipal Act, and I similarly find that the doctrine of federal legislative paramouncy operates so as to exclude requests for wiretap application records from the scope of the municipal Act.

I agree.

Therefore, I find that this part of the appellant's request falls outside the scope of the Act.

### **Records not responsive to the request**

In their representations, the Police indicate that a number of pages or parts of pages of the record which have been withheld from the appellant do not contain information responsive to the request. I have reviewed these pages and, with the exception of five pages (3533 - 3537) which, in my view, contain responsive information, I agree that the pages or parts of pages identified by the Police do not contain any information that is responsive to the request. In addition, I find that other parts of the record not referred to by the Police also contain similar non-responsive information. In my view, the information contained in 230 pages of the record either does not relate to the investigation of the appellant or was inadvertently copied when compiling the record relating to the appellant and has no relevance to the request. Therefore it falls outside the scope of this appeal.

### **Records at issue**

The parts of the record which remain at issue, in whole or in part, consist of 6248 pages including 32 audio cassette tapes and 4 videotapes which have been assigned page numbers. They include witness statements; occurrence and investigation "reports"; financial and medical documents; "intelligence" information; material obtained from other police services and agencies; administrative forms; investigative notes, letters, and internal memoranda; crime scene "mock-ups" and re-enactments; photographs; forensic information; victim of crime information; and other information relating to the investigation of the appellant.

### **ISSUES:**

The issues in this appeal are as follows.

- A. Whether any of the information contained in the record 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 identifiable individuals, whether any parts of the record qualify for exemption pursuant to the discretionary exemption provided by section 38(b) of the Act.
- C. Whether any parts of the record qualify for exemption pursuant to any of the discretionary exemptions provided by sections 8(1)(c), (d), (e), (g), (h) and (l), and 8(2)(a), (b) and (d) of the Act.
- D. Whether any parts of the record qualify for exemption pursuant to the exemption provided by section 9(1)(d) of the Act.
- E. If the answer to Issue A, and Issues C and/or D is yes, whether any parts of the record qualify for exemption pursuant to the discretionary exemption provided by section 38(a) of the Act.

## **SUBMISSIONS/CONCLUSIONS:**

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

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

"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,
- ...
- (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;

Having reviewed the record, it is my view that 4312 pages of the record contain information which satisfies the definition of "personal information" under one or more of the subparagraphs noted above. I find that this personal information relates both to the appellant and other identifiable individuals.

The Police have claimed that an additional 46 pages (5195, 5201, 5214, 5218, 5222, 7724, 7765, 7791 and 7846-7883 inclusive) contain personal information that relates solely to individuals other than the appellant and have cited section 14 as their authority for withholding these pages. The information which has been severed from these pages relates to the identities of individuals who were acting in their professional capacity at the time the documents were created. In my view, section 14 is not available to exempt such information. It has been established in a number of previous orders that information provided by an individual in a professional capacity in the course of the execution of employment responsibilities is not "personal information" (e.g. Orders M-71, M-74, P-326, P-328, P-329, P-333 and P-377).

With the exception of pages 7724, 7765 and 7791, the Police have not claimed any other exemptions for these pages. Accordingly, pages 5195, 5201, 5214, 5218, 5222 and 7846-7883 inclusive, should be disclosed to the appellant.

**ISSUE B: If the answer to Issue A is yes, and the personal information relates to the appellant and other identifiable individuals, whether any parts of the record qualify for exemption pursuant to the discretionary exemption provided by section 38(b) of the Act.**

Under Issue A, I found that 4312 pages of the record contain personal information that relates both to the appellant and other identifiable individuals.

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 municipal institutions covered by the Act. However, this right

of access is not absolute. Section 38 provides a number of exemptions to this general right of access, including section 38(b), which reads as follows:

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) introduces a balancing principle. The Police must look at the information and weigh the requester's right of access to his own personal information against other individuals' right to the protection of their personal privacy. If the Police determine that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the Police the discretion to deny the requester access to his personal information (Order 37).

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 the 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 finding is made under section 16 of the Act that a compelling public interest exists in the 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.

In their representations, the Police rely on section 14(3)(b) which reads as follows:

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;

As stated earlier, the record at issue relates to investigations conducted by the Police under the Criminal Code of Canada (the Criminal Code) into the actions of the appellant. In my view, the personal information

in the record was compiled and is identifiable as part of an investigation into a possible violation of law. Accordingly, the requirements of section 14(3)(b) have been satisfied, and I find that disclosure of the parts of the record containing personal information would result in a presumed unjustified invasion of the personal privacy of individuals other than the appellant.

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 unjustified invasion of personal privacy has not been rebutted in the circumstances of this appeal.

Section 38(b) is a discretionary exemption giving the Police the discretion to grant access to personal information to the person to whom it relates even if doing so would constitute an unjustified invasion of another individual's privacy. I have reviewed the representations submitted by the Police regarding their decision to exercise discretion in favour of withholding the information, and I find nothing improper in the circumstances.

Accordingly, I find that 4312 pages of the record are exempt under section 38(b) of the Act.

Other exemptions were claimed for a number of these pages. However, since I have found all of them to be exempt under section 38(b), I will not discuss them further in this order.

**ISSUE C: Whether any parts of the record qualify for exemption pursuant to any of the discretionary exemptions provided by sections 8(1)(c), (d), (e), (g), (h) and (l), and 8(2)(a), (b) and (d) of the Act.**

Sections 8(1)(c), (d), (e), (g), (h) and (l) of the Act state:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;

- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

Sections 8(2)(a), (b) and (d) state:

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;
- (b) that is a law enforcement record if the disclosure would constitute an offence under an Act of Parliament;
- (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

The Police have claimed one or more of these exemptions for various parts of the record. As previously stated, the investigations to which the record relates were conducted under the Criminal Code, and I am satisfied that the "law enforcement" component of sections 8(1)(c), (d), (e), (g), 8(2)(a) and (b) has been met.

Section 8(1) of the Act provides that an institution may refuse to disclose a record where disclosure could reasonably be expected to produce the types of harms outlined in subparagraphs (a) through (l) of the section. In my view, the exceptions to access set out in section 8(1) of the Act require 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 the disclosure of the specific information and the harm which is alleged.



**Section 8(1)(c)**

The Police claim this exemption for 116 pages of the record remaining at issue.

In Order 170, former Inquiry Officer John McCamus considered the interpretation of section 14(1)(c) of the provincial Freedom of Information and Protection of Privacy Act, which is equivalent to section 8(1)(c) of the Act. He stated:

In order to constitute an "investigative technique or procedure" in the requisite sense, it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that the particular technique or procedure is generally known to the public would normally lead to the conclusion that such compromise would not be effected by disclosure and accordingly that the technique or procedure in question is not within the scope of the protection afforded by section 14(1)(c).

I concur with Inquiry Officer McCamus' interpretation and adopt it for the purposes of this appeal.

In their representations, the Police submit that the portions of the record to which this section has been applied would reveal investigative techniques which would be "undermined should they become generally known."

Having reviewed the representations of the Police and the contents of the record, I find that 85 pages contain information which, in my view, could reasonably be expected to reveal investigative techniques and procedures currently in use in law enforcement. I find that disclosure of the information in these pages would hinder or compromise their effective utilization. Accordingly, these pages qualify for exemption under this section. However, in my opinion, the remaining 31 pages (7700, 7724, 7909-7915 inclusive, 7917-7934 inclusive, and 7937-7940 inclusive) do not contain any information which satisfies the requirements of the exemption. The Police have claimed section 8(2)(a) for page 7700, and section (8)(1)(l) for the remaining 30 pages. Therefore, I will discuss these pages in the relevant exemptions.

**Section 8(1)(d)**

The Police claim this exemption for 73 pages of the record still remaining at issue.

To qualify for exemption under this subsection, the record must disclose the identity of a confidential source or disclose information furnished only by that confidential source in a law enforcement matter.

In order to establish that section 8(1)(d) applies to the parts of the record at issue, the Police must provide evidence of the circumstances in which the information was given in confidence (Orders 139, P-304 and M-147).

In their representations, the Police provide a description of their practices and policies when conducting law enforcement investigations. They describe the circumstances under which the information contained in these pages of the record was obtained and/or provided.

Having considered the nature of the information and the submissions by the Police, I am satisfied that disclosure of 71 pages of the record, in whole or in part, could reasonably be expected to reveal the identity of a confidential source of information in a law enforcement matter and/or information furnished only by the confidential source. Therefore, these pages qualify for exemption under section 8(1)(d) of the Act.

I find the remaining two pages (7765 and 7791) do not contain information which satisfies the requirements of the exemption. No other exemption has been claimed for page 7765 and therefore, it should be disclosed to the appellant. The Police have claimed that section 8(1)(e) applies to page 7791 which I will discuss next.

### **Section 8(1)(e)**

The Police claim that page 7791 qualifies for exemption under this section.

In order for a record to qualify under this exemption, the Police must establish that the disclosure of the record could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person.

Having reviewed the contents of page 7791, and the representations of the Police, I am not satisfied that disclosure of the information on this page can reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Therefore, I find that this page does not satisfy the requirements of the exemption. Since this page does not satisfy any of the exemptions which the Police have claimed, it should be disclosed to the appellant.

### **Section 8(1)(g)**

The Police claim this exemption for 235 pages of the record still remaining at issue.

In my view, in order for a record to qualify for exemption under section 8(1)(g) of the Act, the Police must establish that disclosure of the record could reasonably be expected to:

- (a) interfere with the gathering of law enforcement intelligence information respecting organizations or persons, **or**
- (b) reveal law enforcement intelligence information respecting organizations or persons.

The term "intelligence" is not defined in the Act. The Concise Oxford Dictionary, eighth edition, defines "intelligence" as "the collection of information, [especially] of military or political value", and "intelligence department" as "a [usually] government department engaged in collecting [especially] secret information".

The Williams Commission in its report entitled Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980, Volume II at pages 298-99, states:

Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offenses. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.

In my view, for the purposes of section 8(1)(g) of the Act, "intelligence" information may be described as information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.

The Police state that the pages of the record for which this exemption is claimed, reveal information that was gathered "in the course of investigations initiated upon the request of law enforcement officials consequent to suspected criminal activity".

The Police state:

Contained within these documents is an abundance of material concerned with persons other than the target of the investigation. As such these reports are the essence of intelligence, in that they contain information and names of institutions and individuals, which must be sifted through by experienced intelligence personnel as they try to make a whole picture out of the small 'informational puzzle' pieces".

Having reviewed the parts of the record at issue, I am satisfied that the disclosure of 235 pages of the record could reasonably be expected to reveal law enforcement intelligence information respecting organizations or persons. Accordingly, these pages qualify for exemption under section 8(1)(g).

### **Section 8(1)(l)**

The Police claim this exemption for 64 pages of the record still remaining at issue.

They state that these pages contain various instances of crime control and investigation methods, the general knowledge of which might reasonably be expected to hamper the control of crime. They also identify certain information in these pages, the disclosure of which they claim could reasonably be expected to facilitate the commission of crime.

I have reviewed these pages and I find that 34 pages contain information relating to a chemical formula for manufacturing a well known narcotic and the construction of explosive devices. In my view, disclosure of this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

Accordingly, I find that these 34 pages qualify for exemption under section 8(1)(l) of the Act. I do not find the remaining 30 pages (7724, 7909-7915 inclusive, 7917-7934 inclusive and 7937-7940 inclusive) contain information which satisfies the requirements of the exemption. Therefore, they are not exempt under section 8(1)(l). I have also found earlier that these pages do not qualify for exemption under section 8(1)(c), and as there are no other exemptions claimed by the Police for these records, they should be disclosed to the appellant.

### **Section 8(2)(a)**

The Police claim this exemption for 451 pages of the record still remaining at issue.

For the record to qualify for exemption under section 8(2)(a), the Police 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 200]

I have considered the parts of the record for which section 8(2)(a) was claimed. In my view, 448 pages satisfy each part of the three-part test outlined above. These pages qualify as reports because they provide summaries of the various steps of the investigation of the alleged offence, findings of fact by the investigators, conclusions about the findings and recommended courses of action. Further, the reports were prepared in

the course of investigations conducted pursuant to the Criminal Code, and finally, the reports were prepared by members of the Police, who have the function of enforcing the Criminal Code.

Accordingly, I find that 448 pages of the record qualify for exemption under section 8(2)(a) of the Act. The remaining three pages, (3054, 3064 and 7700) which I have also found not to be exempt under section 8(1)(c), do not satisfy the requirements of the exemption. Since no other exemptions are claimed for these pages, they should be disclosed to the appellant.

**Sections 8(1)(h), 8(2)(b) and 8(2)(d)**

All of the pages of the record for which the Police have claimed these exemptions are included in the pages which I have found qualify for exemption under one or more of the exemptions discussed above. Therefore, it is not necessary for me to consider the application of the additional exemptions claimed for these pages.

**ISSUE D: Whether any parts of the record qualify for exemption pursuant to the exemption provided by section 9(1)(d) of the Act.**

Section 9 of the Act states:

A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

- (a) the Government of Canada;
- (b) the Government of Ontario or the government of a province or territory in Canada;
- (c) the government of a foreign country or state;
- (d) an agency of a government referred to in clause (a), (b) or (c); or
- (e) an international organization of states or a body of such an organization.

The Police claim that section 9(1)(d) applies to 950 pages of the record still remaining at issue.

In Order M-128, I found that in order to deny access to a record under section 9(1), the Police must demonstrate that disclosure of the record could reasonably be expected to reveal information which the

Police received from one of the governments, agencies or organizations listed in the section, **and** that this information was received by the Police in confidence.

In my view, all of the pages of the record for which this exemption was claimed contain information originating from various agencies of the Government of Canada, the Government of Ontario and the Government of the United States. In particular, these agencies are the Royal Canadian Mounted Police, the Federal Department of External Affairs and the Department of Justice, the Ministries of the Solicitor General and the Attorney General in Ontario and United States police agencies.

In their representations, the Police confirm that the information in the record was received from the aforementioned agencies and state that it was received in confidence.

Having reviewed the record and the submissions of the Police, I find that the disclosure of 950 pages of the record could reasonably be expected to reveal information received by the Police in confidence from another government or its agencies, and therefore, qualify for exemption under section 9(1)(d) of the Act.

**ISSUE E: If the answer to Issue A, and Issues C and/or D is yes, whether any parts of the record qualify for exemption pursuant to the discretionary exemption provided by section 38(a) of the Act.**

As I stated in my discussion of Issue B, section 36(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, section 38(a) provides an exception to this general right of access 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]

Under Issue A, I found that the record at issue contains the personal information of the appellant, and under Issues C and D, that various parts of the record qualified for exemption under sections 8(1)(c), (d), (g) and (l), 8(2)(a) and 9(1)(d) of the Act.

I have reviewed the representations made by the Police in deciding to exercise discretion in favour of claiming section 38(a) to withhold these pages and find nothing improper in their decision to deny access.

In summary, I find that a total of 6135 pages are exempt under one or more of the exemptions claimed by the Police. Specifically, I find that 4312 pages are exempt under section 38(b), 873 pages under sections

8(1)(c), (d), (g) (l) or 8(2)(a), and 950 pages under section 9(1)(d). I find the remaining 78 pages do not qualify for exemption under any of the sections claimed by the Police and should therefore be disclosed to the appellant.

**ORDER:**

1. I order the Police to disclose to the appellant pages 3054, 3064, 5195, 5201, 5214, 5218, 5222, 7700, 7724, 7765, 7791, 7846-7883 inclusive, 7909-7915 inclusive, 7917-7934 inclusive and 7937-7940 inclusive, within 15 days of the date of this order.
2. I uphold the decision of the Police to deny access to the record at issue with the exception of those pages I have identified in Provision 1.
3. In order to verify compliance with this order, I order the Police to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: \_\_\_\_\_

Asfaw Seife  
Inquiry Officer

October 15, 1993