



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-300

Appeal M-9200471

Port Hope 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 Port Hope Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of all files relating to all investigations, prosecutions and records pertaining to the requester.

The Police identified 835 pages of responsive records and provided full access to 220 pages. The Police withheld 367 pages in their entirety and 248 in part pursuant to sections 7(2)(a), 8(1)(e), 8(1)(g), 9(1)(d), 12, 13, and 14 of the Act, and indicated that one record was contained in the Crown Brief. The requester appealed the decision of the Police.

During mediation, the appellant clarified that he was only seeking access to records which contained his personal information. Further mediation was not successful and notice that an inquiry was being conducted to review the decision of the Police was sent to the Police and the appellant. Representations were received from the Police.

The records at issue in this appeal are the 615 pages to which the Police denied access in whole or in part. They comprise 39 documents of various lengths, which are listed in Appendix "A" to this order.

PERSONAL INFORMATION:

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

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

Having reviewed the records at issue in this appeal, I find that they all contain information which satisfies the definition of personal information in section 2(1) of the Act. Though not every record is **entirely** "about" the appellant, I find that each of the records at issue in this appeal contains, at least in part, personal information of the appellant. Additionally, I find that all of the records for which the Police claimed section 14 also contain the personal information of individuals other than the appellant.

RECORDS 1-6, 8, 10, 12-14, 19-32 and 34-39:

In the majority of these records, the Police have granted the appellant access to each part of the record which contains reference to or information about himself. In my view, where the Police have withheld information which is not about the appellant, that information is not the appellant's personal information and is not responsive to the request. These parts of the record are, therefore, outside of the scope of this appeal.

The Police have also withheld parts of these records which, in my view, contain personal information of the appellant and other identifiable individuals. 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, this right of access is not absolute. Section 38 of the Act provides a number of exemptions to this general right of access. One such exemption is found in section 38(b) of the Act, which reads:

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 or her personal information against the rights of other individuals to the protection of their personal privacy. If the Police determine that the disclosure of the information would constitute an unjustified invasion of the personal privacy of other individuals, then section 38(b) gives the Police the discretion to deny the requester access to the personal information.

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 personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy.

Section 14(3) of the Act lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(3)(b) states:

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;

In my view, all of the above-noted personal information was compiled and is identifiable as a part of an investigation into a possible violation of law, namely the Criminal Code of Canada, and I find that disclosure of this information would constitute an unjustified invasion of personal privacy under section 14(3)(b).

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. Accordingly, I find that the remaining portions of these records 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 its exercise of discretion to deny access to the records. I find nothing to indicate that the exercise of discretion was improper and I would not alter it on appeal.

RECORDS 7, 9, 11, 16, 18 and 33:

The Police submit that section 8(1)(g) of the Act applies to these records. This section reads:

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

interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

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 (Order M-202).

The Police submit that the information contained in these records was gathered by the Intelligence Branch of the Ontario Provincial Police in relation to matters which were and are still being investigated and/or monitored. The Police submit that it is essential that the extent of police knowledge about certain individuals and groups or illegal activities remains unknown to those individuals, so as not to interfere with police efforts in the prevention of crime.

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

RECORD 15:

The Police submit that section 12 of the Act applies to this record. This section reads:

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.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Record 15 is a letter to the Crown Attorney from a counsel within the Crown Law Office (Criminal) of the Ministry of the Attorney General, providing details and analysis of certain court rulings. In my view, this record was prepared for Crown counsel for use in litigation, and both criteria under Branch 2 have been met. Accordingly, I find that Record 15 qualifies for exemption under section 12 of the Act.

SECTION 38(a) EXERCISE OF DISCRETION:

I have found that all of the records contain the personal information of the appellant, and that Records 7, 9, 11, 15, 16, 18 and 33 qualify for exemption under section 8(1)(g) or 12 of the Act.

Section 38(a) of the Act 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 38(a) provides the Police with the discretion to refuse to disclose to the appellant his own personal information in instances in which one of the enumerated exemptions would apply. The Police have provided representations regarding its exercise of discretion to deny access to the records. Having reviewed these representations, I find nothing to indicate that the exercise of discretion was improper and I would not alter it on appeal.

RECORD 17:

The Police submit that, in addition to the request it received, the appellant submitted similar requests for personal information to the Ministry of the Attorney General and the Ministry of the Solicitor General and Correctional Services. Because each of these institutions had been involved in the investigation and/or prosecution of the appellant, there was much duplication regarding the records in the custody or under the control of each institution. The Police submit that a meeting with representatives of the Ministry of the Attorney General and the Ministry of the Solicitor General and Correctional Services was convened to arrange a co-ordinated response to the requests.

The Police submit that Record 17 is found in the Crown Brief, and that, as the Crown Brief was originally prepared for the Ministry of the Attorney General, it was determined that the Ministry of the Attorney General has a greater interest in this record. The Police submit that, although the transfer of this part of the request was not formally communicated to the appellant, they were of the understanding that the Ministry of the Attorney General would be making a decision regarding access to this record.

Section 18(3) of the Act reads:

If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

According to this section, the Police were obligated to give written notice of the transfer of this part of the request to the appellant. However, given that in Order P-506 I upheld the Ministry of the Attorney General's application of section 19 to the Crown Brief (referred to in Order P-506 as "Files A1 and A2"), which included Record 17, in response to a similarly worded request from the appellant, in my view there is no remedial order for me to make in the circumstances.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ April 8, 1994

APPENDIX "A"

RECORD	PAGES	DESCRIPTION	EXEMPTIONS
1	1-64	Investigative Notes, Book 1	8(1)(d), 8(1)(e), 13, 14
2	65-196	Investigative Notes, Book 2	8(1)(e), 13, 14
3	197-329	Trial notebook of Named Inspector	14
4	395-402	A Statistics Canada Questionnaire	7, 14
5	403-404	A Report to a Chief from a Named Inspector	14
6	405-413	A Synopsis	8(1)(e), 13, 14
7	414-425	Intelligence Reports	8(1)(g), 9(1)(d)
8	426-434	Long Distance Telephone Toll Analysis	14
9	435-455	Intelligence Report	8(1)(g), 9(1)(d), 14
10	456-463	Statement of Co-accused	14
11	464-466	Intelligence Report	8(1)(g)
12	475	Arrest Record from Metro Toronto Police	14
13	476	Co-accused Arrest Record	14
14	477	Co-accused Arrest Record	14
15	479-481	Correspondence from counsel to Crown	12
16	482-500	Intelligence Report	8(1)(g)
17	508-512	Will-Say of Police Officer	18(4)(a)
18	513-515	Intelligence Correspondence	8(1)(g)
19	517-538	Subpoenas to Witnesses	14
20	582-583	Crown Correspondence	14
21	586-589	Affidavit	8(1)(e), 13, 14
22	590-597	Witness Statement	8(1)(e), 13, 14

RECORD	PAGES	DESCRIPTION	EXEMPTIONS
23	598-599	O.P.P. Correspondence	14(1)(a)
24	600-603	Affidavit	8(1)(e), 13, 14
25	604-605	Witness Warrant	14
26	606-607	Report from named Sergeant	7(2)(a), 14
27	641-673	Co-accused's Statement	14
28	674-680	Statement of Law on behalf of Co-accused	14
29	684-699	Memorandum of Law on behalf of Co-accused	14
30	700	Letter from Parole Board	14
31	701	Letter of Response to Parole Board	14
32	702	Crown Correspondence	14
33	704-706	Intelligence Report	8(1)(g), 9(1)(d)
34	707-708	Letter to R.C.M.P. Requesting Criminal Record	14
35	709-724	List of Visitors to Cobourg Jail	14
36	725-759	Phone Message Book	14
37	760-793	Subpoenas to Witnesses for Trial	14
38	794-800	Police Officer's notebook	8(1)(c), 8(2)(a), 14
39	801-835	Witness Statements	14