



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-381

Appeal M-9400122

Ottawa Police Services Board



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Ottawa Police Services Board (the Board) received a request under the Act for a copy of the Ottawa Police Professional Standards Section (PSS) investigation report of an incident involving a named Ottawa City councillor (the councillor) who was also a member of the Board. The request stipulated that it was to include "police officers' report notes" used to prepare the report. The request was made by a newspaper reporter (the appellant) who was represented by counsel throughout these proceedings.

The following records and parts of records are at issue in this appeal (page numbers are those assigned by the Board):

- Record 1: Investigation Report prepared by the PSS (pages 1 to 164, 167 to 169, 179 to 265, 267, and 271 to 297);
- Record 2: Summary prepared for review by Crown Attorney (pages 365 to 371);
- Record 3: Handwritten note signed by Crown Attorney (page 377);
- Record 4: Transcript of an excerpt from proceedings of the Board meeting of November 8, 1993 (pages 378 to 381);
- Record 5: Handwritten notes made by the officers who conducted the PSS investigation (pages 664 to 675).

The Board relies on the following exemptions in denying access to the records at issue:

- law enforcement - section 8(2)(a)
- solicitor-client privilege - section 12
- invasion of privacy - section 14.

A Notice of Inquiry was provided to the appellant's solicitor, the Board and the councillor. Representations were received from the appellant's solicitor and the Board.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The appellant submits that the entirety of the records (or, in the alternative, the great majority of their contents) do not contain personal information because they relate to the councillor in his professional capacity.

I cannot agree with this assertion. The investigation to which all of the records relate was undertaken to determine whether any offence under the Criminal Code had been committed, whether any action was warranted under the Police Services Act (the PSA), and what action the Board ought to take regarding the incident. The Board's publicly stated conclusion after reviewing the report was that the councillor's actions were "inappropriate".

In these circumstances, the information in the records has a personal component which removes it from the sphere of information which relates solely to the councillor's "professional capacity". I find that all of the records contain the councillor's personal information.

In addition, parts of the records contain information concerning a number of individuals other than the councillor, specifically persons who happened to witness the incident and were subsequently interviewed by the officers who conducted the PSS investigation. In my view, some of this information qualifies as the personal information of those individuals.

In summary, the records at issue, in their entirety, consist of the personal information of the councillor and/or other individuals.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances.

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 personal privacy. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2), as well as all other circumstances that are relevant in the circumstances of the case.

The Board maintains that the presumption against disclosure found in section 14(3)(b) of the Act applies to the records at issue in this appeal. This provision states that:

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;

I have carefully reviewed the representations of the parties and the records at issue, and I find that all of the records at issue were compiled, and are identifiable, as part of an investigation by the PSS into a possible

violation of the Criminal Code and the PSA. On this basis, I find that the disclosure of the records at issue would constitute a presumed unjustified invasion of the personal privacy of individuals other than the appellant, under section 14(3)(b) of the Act.

The appellant's solicitor submits that section 14(2)(a) is relevant in the circumstances of this appeal. That section weighs in favour of disclosure in circumstances where "disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny".

As I have indicated above, once a presumption under section 14(3) has been established, it may only be rebutted by the considerations outlined in section 14(4) or the public interest override found in section 16. This interpretation was established by the Ontario Court (General Division) Divisional Court in Re JohnDoe et al. and Information and Privacy Commissioner et al. (1993) 13 O.R. (3d) 767, and adopted by Commissioner Tom Wright in Order M-170.

In the John Doe case, the Court rejected the view that a presumption under section 21(3) of the Freedom of Information and Protection of Privacy Act (which is the provincial equivalent of section 14(3) of the Act) could be rebutted by a factor, or combination of factors, under the provincial equivalent of section 14(2).

Accordingly, even if I were of the view that the appellant had established the applicability of section 14(2)(a), this would not overturn the presumed unjustified invasion of personal privacy under section 14(3)(b).

I have considered section 14(4) of the Act and find that the personal information in the records does not come within the scope of this provision.

The appellant's solicitor submits that there exists a compelling public interest under section 16 of the Act which favours disclosure of the record. He states that the public's right to be informed of the actions of its elected officials outweighs the councillor's interests in the protection of his privacy.

In my view, a significant factor to be considered in determining the relevance of section 16 is the degree of public disclosure which has already taken place concerning this matter. The Board met to consider Record 1 (the Investigation Report) in an in camera session on December 20, 1993. Shortly thereafter, the Board issued a four-page public statement which provided a detailed summary of the incident in question, an explanation of the purpose of the meeting and the conclusions reached by the Board. The statement also included a description of the PSS investigation of the incident, the Board's directions to the councillor and the Board's finding that the councillor could continue as a Board member.

As a result, the public has been provided with a considerable amount of information regarding the councillor, the incident in question and the Board's handling of the matter. For that reason, I find that, in the circumstances of this appeal, the appellant has not established that there is a compelling public interest in disclosure which outweighs the purpose of the exemption.

In connection with his argument concerning section 16 of the Act, the appellant's representations indicate that the "right to know" is buttressed by the provisions of section 2(b) of the Canadian Charter of Rights and Freedoms. The appellant has made no further arguments or representations in support of this view and I find that his submission in this regard has not been substantiated.

Accordingly, the presumption under section 14(3)(b) of the Act has not been rebutted. Since disclosure of the records at issue, or any part of them, would constitute an unjustified invasion of the personal privacy of individuals other than the appellant, the exemption in section 14(1) applies to these records in their entirety.

Because of the way I have determined this issue it is not necessary for me to consider the application of sections 8(2)(a) and 12 of the Act.

ORDER:

I uphold the decision of the Board.

Original signed by: _____
John Higgins
Inquiry Officer

_____ August 26, 1994