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

ORDER M-603

Appeal M_9500245

Metropolitan Toronto 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 Metropolitan Toronto Police Services Board (the Police) received a request from a named insurance company (the Company) for "copies of any documents, notes, statements, etc." respecting a specific fire. The Company and one of its employees are defendants in a civil action brought by an officer (the affected person) of the business at which the fired occurred. The action, brought following the Company's decision to deny coverage to the affected person's business, is for coverage under two policies of insurance and various damages, including damages for alleged malicious prosecution by the Company's employee.

The Police identified 15 pages of records as being responsive to the request. Following notification of the affected person, who objected to disclosure, the Police denied access to the records in their entirety, based on the exemption in section 14 of the Act (invasion of privacy). The Police also denied access to portions of three of the 15 pages on the basis that they are not responsive to the request.

The Company appealed the decision of the Police with respect to both the application of section 14 to the records and to the claim that records are not responsive. A Notice of Inquiry was provided to the Police and the Company. Representations were received from both parties.

RECORDS

The records consist of the following:

- record of arrest (page 1)
- supplementary record of arrest (pages 2 - 3)
- property report (page 4)
- supplementary property report (page 5)
- police officer's notes (pages 5a - 14)

PRELIMINARY MATTER:

RESPONSIVE RECORDS

In their representations, the Police indicate that portions of pages 5(a) and 14 have been removed as not responsive to the request. My review of the records indicates that a portion of page 6 has also been removed as non-responsive. These three pages were taken from a police officer's memorandum book, which is essentially a diary maintained by individual police officers to record and describe the noteworthy events which take place during a tour of duty. The Police state that the portions which have been removed relate to the police officer or are "Ten-Codes" which are used in police communication systems, and that they do not apply to the Company's request.

In its representations, the Company states that the request was broadly worded in order to include any and all relevant information in respect of the fire.
I have reviewed these three pages and I agree that the information which has been removed does not relate to the request as worded. That is, the information which has been removed does not relate in any way to the fire or the investigation of the fire. Accordingly, I find that these portions are not responsive, and I will not address them further in this order.

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, including any identifying number assigned to the individual and the individual's name where 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.

In its representations, the Company argues that the records at issue do not contain personal information, but rather, relate to a fire which occurred at a specific property. In reviewing the records, I cannot agree. The information contained in the records pertains directly to the affected person, albeit in the context of the investigation of the fire, and I find that the records all contain his personal information. Some of the records also contain the personal information of other individuals. None of the information in the records pertains to the Company's employee.

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) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

The Police submit that the information was compiled and is identifiable as part of an investigation into a possible violation of law, which ultimately resulted in the arrest of an individual for offenses under the Criminal Code, and that disclosure of this information would constitute a presumed unjustified invasion of privacy under section 14(3)(b) of the Act.

The Company submits that disclosure of the personal information in the records would not constitute an unjustified invasion of privacy because it pertains to the affected person and certain information, such as the affected person's name and address, has already been disclosed to the Company in the civil action.

The Company also submits that the personal information contained in the records is relevant to a fair determination of its rights (section 14(2)(d)), and is required in order to properly defend the claims brought against it by the affected person.

In reviewing the records I find that all of the information in the records was compiled and is identifiable as part of an investigation into a possible violation of law, and accordingly, the presumed unjustified invasion of personal privacy in section 14(3)(b) applies.

The Company states that the affected person has made substantial claims against it and has also made allegations of malicious prosecution against its employee. The Company argues that the affected person's allegations against its employee, in particular, relate directly to the records at issue, and, in bringing this action, the affected person has opened himself up to full discovery and has waived his privacy rights under the Act. Therefore, the Company submits, even if the information was compiled and is identifiable as part of an investigation into a possible violation of law, it is information relating to the affected person, and its disclosure should not be presumed to constitute an unjustified invasion of privacy.

With respect to the Company's arguments that the affected person has waived his rights to privacy protection under the Act, I dealt with similar arguments in Order P-919 regarding section 21 of the provincial Freedom of Information and Protection of Privacy Act (the provincial Act), which is identical to section 14 of the Act. In that case, the appellants argued that the plaintiffs in an action against them had raised the proceedings before the Criminal Injuries Compensation Board as relevant to the lawsuit, and had, thereby, waived any claim to privacy under the Act. In that order, I stated that:

> I am unable to accept the appellants' position that by making the Board proceedings relevant to the lawsuit, the family has waived any claim to privacy. One of the primary purposes of the Act is to protect the privacy of individuals with respect to personal information about themselves held by institutions (section 1(b)). In my view, the principles of the Act are not compatible with the concept of waiver with respect to its privacy protection provisions. Rather, the Act states, in section 21(1)(a) that:
>
> > A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
> >
> > > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

In that case, as in the current appeal, the plaintiffs expressly objected to the disclosure of their personal information in the context of the access request, and could not be said to have consented to disclosure under section 21(1)(a) of the provincial Act (or section 14(1)(a) of the Act).

In my view, the reasoning in Order P-919 is directly applicable to the Company's arguments in the current appeal. Moreover, disclosure through the discovery process and disclosure under the

Act, function within entirely different schemes. This is expressly recognized in section 51(1) of the Act, which states:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

I cannot accept the Company's arguments, therefore, that by bringing a civil action against them, and thus opening himself up to full discovery, the affected person has, in any way, waived his rights to privacy under the Act.

In Order P-919, I went on to consider the appellants' arguments as an unlisted factor favouring disclosure under section 21(2) of the provincial Act, which I identified as a diminished expectation of privacy. I intend to approach the Company's arguments in the current appeal in a similar fashion.

In reviewing the records and the representations, I do not accept that by bringing an action, the affected person's expectations of privacy are necessarily lessened or unreasonably held. In my view, the Company has not established that, in the circumstances of this appeal, the affected person had or should have had a diminished expectation of personal privacy. Accordingly, I find that this unlisted factor has no application.

Even if I were to find that this factor applied in the circumstances of this appeal, the Ontario Court's (General Division) decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767 held that the factors in section 14(2) cannot be used to rebut the presumption in section 14(3).

Similarly, with respect to the factor favouring disclosure in section 14(2)(d), even if I were to find that it applied in the circumstances of this case, it cannot be used to rebut the presumption in section 14(3)(b). As I indicated above, the only way 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.

The Company does not argue that section 14(4) applies in the circumstances of this appeal, and, in reviewing the records, I find that it does not apply.

As a result, I find that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of the individuals referred to in the records and that this information is properly exempt from disclosure under section 14(1) of the Act.

The Company submits, however, that the public interest override in section 16 should apply to rebut the presumption in section 14(3)(b) because there is a public interest in having access to all relevant information for the purposes of defending civil actions so that these actions may be fairly and justly decided by the courts.

In my view, this argument is insufficient to bring the information within section 16. As I indicated above, section 51(1) of the Act provides that this Act does not impose any limitation on the information otherwise available by law to a party to litigation. Moreover, I find that the

Company's arguments relate to its **private** interest in the records as they pertain to the litigation in which it is involved, rather than a **public** interest. Accordingly, I find that section 16 does not apply in the circumstances of this appeal.

ORDER:

I uphold the decision of the Police.

Original signed by: September 27, 1995
Laurel Cropley
Inquiry Officer