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

ORDER M-655

Appeal M_9500354

Metropolitan Toronto Police Services Board

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NATURE OF THE APPEAL:

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 the requester. In particular, the requester sought access to the notes and reports of four named police officers.

Partial access was granted. The Police denied access to the remaining records on the basis of certain exemptions in the Act and indicated that certain portions of the records were not responsive to the request. The requester appealed the decision to deny access.

During mediation, the appellant indicated that he was not interested in pursuing access to certain records, including those portions of the records which the Police had determined were not responsive to the request. In addition, the appellant stated that he was not satisfied that the Police had searched for all the records responsive to his request. In this regard, he described specific records that he believed had not been identified by the Police.

The records that remain at issue, in whole or in part, are pages 4-6, 11, 13-15, 29, 30, 34 and 35 (police officers' notes) and pages 40, 41, 43-47, 49-52, 56-60 and 63-65 (occurrence reports, supplementary reports, records of arrest and supplementary records).

The Police rely on the following exemptions to deny access to the records listed above:

- law enforcement - sections 8(1)(b) and (c)
- facilitate commission of unlawful act - section 8(1)(l)
- relations with other governments - section 9(1)(c)
- invasion of privacy - sections 14(1)(f) and 38(b)

A Notice of Inquiry was provided to the appellant and the Police. Since the records appeared to contain the personal information of the appellant, the possible application of section 38(a) as it pertains to sections 8(1) and 9(1) of the Act was included in the Notice of Inquiry. Representations were received from both parties.

The two issues in this appeal are access to the records withheld by the Police and the reasonableness of the search for responsive records.

DISCUSSION:

PERSONAL INFORMATION

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 named would reveal other personal information about the individual.

I have reviewed the information in all the records. I find that it satisfies the definition of "personal information" in section 2(1) of the Act and that this information relates to both the appellant and other identifiable individuals, including the complainants.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a), the Police have the discretion to deny access to an individual's own personal information where certain exemptions would otherwise apply to that information. The exemptions listed in section 38(a) include the law enforcement exemption claimed for page 11. I will therefore first consider the application of section 8(1)(c) to page 11.

LAW ENFORCEMENT

The Police claim that section 8(1)(c) applies to the information withheld from page 11. This section reads as follows:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement.

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of "law enforcement". This term is defined in section 2(1) of the Act as follows:

> (a) policing;
>
> (b) investigations or inspections that lead or could lead to proceeding in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b).

I find that the matter to which the record relates satisfies the definition of "law enforcement" as it concerns a police investigation into a possible violation of the Criminal Code.

Section 8(1) also requires that disclosure of the record could reasonably be expected to result in one of the harms described in that section. The Police submit that disclosure of the portion of the record to which section 8(1)(c) has been applied could reasonably be expected to reveal an investigative technique and procedure being used in the current law enforcement investigation.

In order to constitute an "investigative technique" or "procedure" for the purposes of section 8(1)(c), it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective use. The fact that the particular technique or procedure is

generally known to the public would normally lead to the conclusion that disclosure would not compromise its effective use and accordingly, that section 8(1)(c) would not apply (Order 170).

I have reviewed the record and I am satisfied that, in the particular circumstances of this case, disclosure of the information could reasonably be expected to reveal an investigative technique and procedure for the purposes of section 8(1)(c). I find that page 11 qualifies for exemption under section 8(1)(c) and it is exempt from disclosure under section 38(a) of the Act.

The Police have claimed that the remaining pages or portions thereof are exempt from disclosure under section 38(b) (invasion of privacy).

INVASION OF PRIVACY

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

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. Where one of the presumptions found 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 where 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 contained in section 14(3) apply, the Police must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant to the case.

The Police claim that section 14(3)(b) applies to the personal information in the records in that the records were compiled and are identifiable as part of an investigation into a possible violation of law.

The appellant submits that disclosure of the personal information in the records would not constitute an unjustified invasion of personal privacy as he already knows the identities of the individuals together with other personal information about them. The appellant also states that disclosure of the records is necessary to help him prepare for the upcoming court proceedings. In this regard, the appellant is indirectly raising section 14(2)(d) of the Act which requires a consideration of whether disclosure of the personal information is relevant to a fair determination of rights affecting the person who made the request.

I have carefully reviewed the information in the records together with the representations of the parties and I make the following findings:

(1) The personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law (the Criminal Code). Accordingly, the presumed unjustified invasion of personal privacy under section 14(3)(b) applies.

(2) Section 14(4) does not apply and the appellant has not raised the possible application of section 16 of the Act. With respect to the application of section 14(2)(d), a finding of a presumption under section 14(3) cannot be rebutted by a factor or a combination of factors under section 14(2) (Order M-170).

(3) Accordingly, disclosure of the personal information which has been withheld would constitute an unjustified invasion of personal privacy of individuals other than the appellant and is properly exempt under section 38(b) of the Act.

I have found that page 11 is exempt under section 38(a) and that the remaining pages are exempt under section 38(b) of the Act. Therefore, I need not consider the application of the other exemptions claimed by the Police.

REASONABLENESS OF SEARCH

The appellant has claimed that additional records should exist. Where a requester provides sufficient details about the records which he or she is seeking and the Police indicate that such a record does not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly discharge its obligations under the Act, the Police must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

The Police submit that they have conducted a thorough search for records responsive to the request and point out that while the appellant received access to numerous records, access was denied to those records where certain exemptions applied.

In approaching reasonableness of search issues in appeals, the Commissioner's office has recognized that an appellant is rarely in a position to **know** that records do, in fact, exist. In many cases, the reasonableness of the search conducted by an institution becomes an issue because of this particular situation in which the appellant is placed. In my view, an index of records containing a brief description of the responsive records can advise the requester of the records which the institution has identified as responsive to the request even though access has been denied under an exemption(s). In this way, an appropriate index can serve to provide certainty to the requester and it also speaks to the reasonableness of the search conducted by the institution.

In the particular circumstances of this case, I note that the Police have not provided the appellant with an index of the records that they found to be responsive to the request. In my view, had the Police provided a proper index of records with their decision letter, the reasonableness of the conduct of their search would likely not have been an issue in this appeal.

I have reviewed the records together with the representations of the parties. I note that the specific records identified by the appellant are among those to which access has been denied. In

my view, the search conducted by the Police for responsive records was reasonable in the circumstances.

ORDER:

I uphold the decision of the Police.

Original signed by: November 21, 1995
Mumtaz Jiwan
Inquiry Officer