



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

INTERIM ORDER M-769

Appeal M_9500723

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 for copies of records pertaining to any investigation of the appellant's activities conducted between 1980 and 1982. In particular, the appellant sought information concerning investigations into street gang and/or organized crime involvement.

The Police responded to the appellant and advised him that no records exist regarding investigations into his involvement in street gangs or organized crime. However, the Police located two occurrence reports concerning other investigations of the appellant during this time period. The Police granted full access to three pages and partial access to the remaining records, and rely on the following provisions of the Act to exempt the withheld portions:

- law enforcement - section 8(1)(c)
- invasion of privacy - sections 14(1) and 38(b).

In addition, the Police claim that portions of the remaining records are not responsive to the request.

The appellant appealed the decision of the Police.

At the same time, in a separate letter addressed to the Police, the appellant referred to the above-noted decision letter and indicated that he continues to seek access to all of the records located by the Police, including those which the Police claim are not responsive. With respect to the part of the decision dealing with the non-existence of records, the appellant reiterated his belief that more records should exist, and suggested that the Police extend the time frame from 1980 - 1982 to 1978 - 1982. In addition, he provided the name of a street gang and set out his reason for believing that records should exist. The appellant also requested further information regarding the two investigation files which were identified by the Police, and concluded by requesting all other information the Police have on file regarding himself.

The Police acknowledged this second letter and indicated that they were opening a new request file to respond to it. The Police issued a new decision letter to the appellant regarding his request for further information in which they indicated, among other things, that no records exist with respect to investigations regarding the appellant's involvement in street gangs and/or organized crime.

A Notice of Inquiry was sent to the appellant and the Police. Because the records appeared to contain the personal information of the appellant, the Notice of Inquiry raised the possible application of section 38(a) of the Act. This section provides an exemption which may apply to records containing an individual's own personal information. Representations were received from both parties.

The Notice of Inquiry did not raise the reasonableness of search as an issue as it appeared that this issue was resolved by the second decision letter issued by the Police. In his representations, however, the appellant indicated that he was of the view that this issue was very much alive in the current appeal.

In reviewing the background regarding this appeal, I was of the opinion that this issue had not been disposed of, and that it must be dealt with in this order. Therefore, a supplemental Notice of Inquiry was sent to the parties asking them to address the issues relating to the existence of records concerning investigations of the appellant with respect to street gang and/or organized crime involvement. The appellant submitted additional representations. The Police wrote to this office and indicated that, in their view, the reasonableness of search was not at issue in this appeal.

In my view, the issues in this appeal have become somewhat blurred as a result of on-going communications between the parties. I will, therefore, deal with the scope of this appeal below under the heading "Preliminary Matters".

PRELIMINARY MATTERS:

SCOPE OF THE APPEAL

In his initial access request, the appellant indicated that he was seeking information about himself concerning investigations into street gang and/or organized crime involvement. In his second letter to the Police, the appellant has attempted to clarify his previous request, by providing the name of a street gang as well as indicating the nature of the contact he had with the Police. He has also attempted to extend the scope of the initial request to include a larger time frame in which records might be located. Finally, he has requested new categories of information regarding the two investigations identified by the Police in response to the initial request, and for essentially "anything else" the Police might have on him.

In my view, the appellant's request for additional information to that which he identified in his original request does not fall within the scope of this appeal. Accordingly, that part of the second decision letter will not be considered further in this order. Similarly, the extended time frame suggested by the appellant does not fall within the scope of the original request. If this were the only part of the reasonableness of search issue to be determined, I would conclude that it fell outside the scope of this appeal.

However, in my view, the issue raised by the appellant on appeal regarding the existence of further records responsive to the initial request was not disposed of by the second decision letter. Moreover, to the extent that the appellant is clarifying the original request, it is not a new request. In this regard, the appellant has attempted to provide the Police with sufficient information which would allow them to search for and possibly locate records responsive to the original request. Accordingly, I find that the reasonableness of the search conducted by the Police for records relating to investigations conducted between 1980 and 1982 is still at issue in this appeal.

REASONABLENESS OF SEARCH

When a requester provides sufficient details about the records which he or she is seeking and the Police indicate that no additional records 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 records do not exist. However, in my view, in order to properly discharge their obligations under the Act, the Police must provide me with sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records.

In their initial decision letter, the Police state only that no records exist regarding street gang and/or organized crime involvement. In their second decision letter to the appellant, the Police indicate that many record types are not retained permanently by the Police, but are purged in accordance with the retention schedule applicable to police records. The Police state that, other than the ones previously located, any records which might have been in their custody and/or control regarding the appellant appear to have been expunged. As I indicated above, however, the Police did not submit representations on this issue.

As I indicated above, the appellant attempted to provide further direction to the Police in his second letter to them. In his representations, the appellant indicates further that a particular officer might be of assistance in locating responsive records because of this officer's specific knowledge of the street gang in question.

In my view, this information should ideally have been provided to the Police at the time of the appellant's original request (or, at least, in his letter of clarification insofar as it pertains to the named officer). The Police do not indicate whether or not they contacted the appellant for clarification, or whether they felt clarification was necessary.

Ordinarily, I would not have allowed the appellant to specify new areas to be searched for responsive records at this late stage in the appeal. However, in my view, the information provided by the Police in their decision letters is insufficient to enable me to dispose of this issue. Accordingly, I will order the Police to conduct a further search for records responsive to this part of the appellant's request, and to provide representations on the steps taken. In the circumstances, it is reasonable for the Police to take into account the information provided by the appellant in attempting to clarify his request. In responding to this office, the Police should include representations on their records retention schedules, and include a copy of any retention schedules they rely on.

NON-RESPONSIVE RECORDS

The Police indicate that pages 33 and 34 contain police 10-codes. They submit that the 10-codes relate to the officer's availability during his tour of duty rather than to any incident involving the appellant and accordingly, are not responsive to this request. The appellant indicates that the records relate to him and any information contained in them is, therefore, responsive to his request.

Pages 33 and 34 outline in chronological time order the activities of the investigating officer. I am satisfied that the 10-code in this case does not relate to the investigation of the appellant, but is rather an internal means for the investigating officer to document his status at a particular point in time. Accordingly, I find that this part of the records is not responsive to the request and will not be considered further in this order.

The Police also claim that the information on page 50 is not responsive to this request. This page contains a list of property associated with a particular occurrence. The occurrence number assigned to one of the investigations concerning the appellant is noted at the top of this page, however, the occurrence number is not included in the list. I am satisfied that the information contained in page 50 is not related to the investigation of the appellant in any way, and it is, therefore, not responsive to this request. Accordingly, I will not consider page 50 further in this order.

RECORDS AT ISSUE:

The records at issue total 50 pages, and consist of the withheld portions of general occurrence and supplementary reports concerning two separate investigations as well as two supplementary records of arrest, property notification forms and property receipts.

DISCUSSION:

INVASION OF PRIVACY

Section 2(1) of the Act defines personal information, in part, as “recorded information about an identifiable individual ...”. I have reviewed the portions of the records at issue to determine whether they contain personal information and, if so, to whom the personal information relates.

The information which has been withheld from the records at issue consists of the name and other personal identifiers of the victims of two occurrences, details of the occurrences, information provided to the Police by other individuals during their investigation, and possible suspects. This information qualifies as the personal information of the victims and other individuals referred to in the records.

The appellant was subsequently arrested for both occurrences. Although he was not identified by name in many of the records at issue, his ultimate arrest links him to the information. Accordingly, I find that all of the records at issue also contain the appellant’s personal information.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Police determine that the disclosure of the information would constitute an unjustified invasion of another individual’s personal privacy, the Police have 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 in the circumstances of the case.

The Police submit that the presumed unjustified invasion of privacy in section 14(3)(b) applies. This section 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.

I am satisfied that the information at issue was “compiled and is identifiable as part of an investigation into a possible violation of law”, and therefore it meets the requirements of section 14(3)(b). Accordingly, I find that this presumption applies.

As noted above, the only way such a presumption can be rebutted is if section 14(4) or 16 applies. This interpretation is based on the decision of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767.

The information in the records is not information of the type described in section 14(4), and the appellant has not claimed the possible application of section 16. Accordingly, I find that these two sections have no application in this appeal, and I find that disclosure of the withheld portions of the records at issue would constitute an unjustified invasion of personal privacy. The withheld portions of the records are, therefore, properly exempt from disclosure pursuant to section 38(b).

Because of the findings I have made, it is not necessary for me to consider the exemption in section 8(1)(c) of the Act.

ORDER:

1. I uphold the decision of the Police to withhold the undisclosed portions of the records at issue.
2. I order the Police to conduct a further search and provide representations regarding the steps taken to search for records responsive to the part of the request pertaining to investigations of the appellant in connection with the named street gang and/or organized crime by **June 6, 1996**. In conducting their search, the Police should contact the appellant regarding the identity of the police officer identified by him. The

representations should address specific retention schedules as they pertain to the types of records requested and contain any retention schedules relied on by the Police.

3. If, as a result of the further search, the Police identify any records responsive to the request, I order the Police to provide a decision letter to the appellant regarding access to these records in accordance with sections 19 and 22 of the Act, considering the date of this interim order as the date of the request and without recourse to a time extension.
4. The representations referred to in Provision 2 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ May 7, 1996