



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

# **INTERIM ORDER M-838**

**Appeal M\_9600193**

**Metropolitan Toronto Police Services Board**



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## **BACKGROUND:**

The appellant was mistakenly identified as a suspect by police responding to a 911 call about a possible criminal offence in progress. The appellant claims that he sustained personal injuries while being apprehended by police. The appellant has charged the constable who apprehended him with assault, and intends on pursuing a civil proceeding against those responsible for his injuries.

## **NATURE OF THE APPEAL:**

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Metropolitan Toronto Police Services Board (the Police). The request was for all records relating to the incident involving the appellant, including incident/occurrence reports, transcripts of radio calls (including Mobile Digital Terminal transmissions), 911 calls, notes of two identified police officers, investigation reports, reports of any disciplinary proceedings related to the incident, photographs taken by the Public Complaints Commission and the complete employment record of a named police constable.

The Police transferred the request for photographs to the Police Complaints Commissioner, therefore that part of the request is not at issue in this appeal. The Police denied access to the records responsive to the remaining parts of the request under the following sections of the Act:

- law enforcement - sections 8(1)(a) and (b)

The appellant appealed the decision to deny access to the records.

A Notice of Inquiry was sent to the appellant, the Police and one of the police officers named in the request. Because the record appeared to contain the appellant's personal information and the personal information of other identifiable individuals, the Appeals Officer invited the parties to comment on the application of sections 38(a) (discretion to refuse requester's own information) and (b) (invasion of privacy) of the Act in addition to the exemptions applied by the Police. Representations were received from the appellant and the Police.

In his representations, the appellant withdrew his request for the complete employment records of the named police constable and these records are no longer at issue in this appeal.

## **RECORDS:**

The records at issue in this appeal consist of the Record of Arrest/Occurrence Reports relating to the incident, computer generated print-outs of the Mobile Digital Terminal transmissions, the notes of the two identified officers, a tape recording of the 911 call, and the Police Complaints Investigation Bureau file.

## **PRELIMINARY MATTER:**

### **RECORDS DISCLOSED TO THE APPELLANT**

Records 12-16 consist of interim reports headed: "Public Complaint Form 4 \_Police Services Act, 1990". These records contain a number of indicators which suggest that the reports have already been released to the appellant, including a "Notice to Complainant" on Record 15. It would appear that these reports are the type of document that must be sent to a complainant by the Police under section 87 of the Police Services Act. However, the Police claim sections 8(1)(a) and (b) as the basis for exempting these pages. In the circumstances of this appeal, I find that Records 12-16 do not qualify for exemption and should be disclosed to the appellant in their entirety as he has already been given access to them.

Similarly, Record 18 is a copy of a letter sent by the Police to the appellant. Although the Police have claimed sections 8(1)(a) and (b) as the basis for exempting certain portions of these pages, for the reasons outlined above with respect to Records 12-16, I find that Record 18 does not qualify for exemption and this record should be disclosed to the appellant.

In addition, Records 9, 19, 20 and 22-24 are copies of the complaint form filled out by the appellant. The distribution notation at the bottom of the form indicates that the complainant was given a copy. For the reasons outlined above, I find that the Records 9, 19, 20 and 22-24 do not qualify for exemption and these records should also be disclosed to the appellant.

## **DISCUSSION:**

### **INVASION OF PRIVACY**

Personal information is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual".

Section 36(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 38 sets out exceptions to this right.

Where a record contains the personal information of both the appellant and other individuals, section 38(b) of the Act allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Where, however, the record only contains the personal information of other individuals, section 14(1) of the Act prohibits an institution from disclosing it except in the circumstances listed in sections 14(1)(a) through (f). Of these, only section 14(1)(f) could apply in this appeal. It permits disclosure if it "does not constitute an unjustified invasion of personal privacy."

Disclosing the types of personal information listed in section 14(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can

disclose the personal information only if it falls under section 14(4) or if section 16 applies to it. If none of the presumptions in section 14(3) apply, the institution must consider the factors listed in section 14(2) as well as all other relevant 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 the personal privacy of the individual to whom the information relates. 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 Ministry 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.

Having reviewed the records and the representations, I have made the following findings:

- (1) The part of the 911 tape which involves a conversation between the 911 caller and the 911 operator, Records 26, 28, 29 and 31-34 (Record of Arrest, Property Reports), and parts of Records 38 and 45 (the 911 caller's name, address and telephone number on the Mobile Digital Terminal transmissions) contain personal information of individuals other than the appellant which was compiled as part of an investigation into a possible violation of law. Accordingly, the presumption in section 14(3)(b) of the Act applies to them.
- (2) The remaining parts of Records 38 and 45 and all of Record 21 (handwritten notes), Records 39-44 (Mobile Digital Terminal transmissions) and the part of the 911 tape which involves a conversation between the 911 operator and the police officer do not contain information which qualifies as personal information under the Act, and sections 14 and 38(b) do not apply.
- (3) Records 10, 11, 27 and 30 (Record of Arrest), Record 25 (file folder) and Records 46-57 (police officer's notes) contain personal information of the appellant only, and sections 14 and 38(b) do not apply.
- (4) Record 1 (file cover sheet), Records 5 and 6 (Summons and Information) and Records 7, 8, 35 and 36 (Record of Summons Application) contain personal information of the appellant and the police constable charged with assault. The personal information of the police constable was compiled and is identifiable as part of an investigation into a possible violation of law, but was originally provided by the appellant. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result, and the presumption does not apply (Order M-444). In the absence of any factors favouring non\_disclosure, I find that the exemption in section 38(b) does not apply to Records 5-8, 35 and 36.
- (5) Records 2 and 3 (Investigation Log) contain the personal information of the appellant and the police constable. Of the eight entries in Records 2 and 3, three relate to telephone

inquiries from the appellant, and three are one-line administrative entries which contain no personal information. I am not satisfied that the disclosure of these six entries would constitute an unjustified invasion of privacy, and section 38(b) does not apply. The remaining two entries (dated 96/04/19 and 96/05/08) on Record 2 contain information which was compiled as part of an investigation into a possible violation of law. Accordingly, the presumption in section 14(3)(b) of the Act applies.

- (6) Record 4 (internal memorandum) and Record 17 (computer printout with handwritten notes) contain personal information of the appellant and the police constable which was compiled as part of an investigation into a possible violation of law. Accordingly, the presumption in section 14(3)(b) of the Act applies.
- (7) Section 14(4) has no application in the circumstances of this appeal, and the appellant has not argued that section 16 of the Act (public interest in disclosure) applies.

Accordingly, I find that the part of the 911 tape which involves a conversation between the 911 caller and the 911 operator, two entries (dated 96/04/19 and 96/05/08) on Record 2, all of Records 4, 17, 26, 28, 29, 31-34 and the 911 caller's name, address and telephone number on Records 38 and 45 are properly exempt from disclosure under sections 14 or 38(b) of the Act.

#### **DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT**

The records remaining at issue are:

- the part of the 911 tape involving a conversation between the 911 operator and the police officer (Record 37);
- one-line administrative entries and entries related to telephone conversations with the appellant in the Investigation Log (Records 2 and 3);
- two copies of the Record of Arrest pertaining to the appellant (Records 10, 11, 27 and 30);
- a copy of the summons issued to the police constable and the information sworn by the appellant on which the summons was based (Records 5 and 6);
- two copies of the Record of Summons Application pertaining to the police constable, the supplementary pages of which were signed by the appellant (Records 7, 8, 35 and 36);
- the Mobile Digital Terminal transmissions with the exception of the 911 caller's name, address and telephone number (Records 38-45);
- police officer's notes (Records 46-57);
- a copy of the front and back of the Public Complaints Investigation Bureau's file folder (Records 1 and 25); and

- one page of handwritten notes (Record 21).

Because I have found that Records 1-3, 6-8, 10, 11, 25, 27, 30, 35, 36 and 46-57 contain the personal information of the appellant, the application of sections 8(1)(a) and (b) must be considered under section 38(a) of the Act.

Under section 38(a) of the Act, the Police have the discretion to deny access to an individual's own personal information in instances where certain exemptions, including sections 8(1)(a) and (b), would otherwise apply to that information. Sections 8(1)(a) and (b) state:

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

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

Section 2(1) of the Act defines "law enforcement" as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings 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 am satisfied that both the criminal charge laid against the police constable and the complaint made by the appellant to the Police Complaints Commissioner fall within the meaning of the term "law enforcement" as it is used in the Act.

The purpose of the exemptions contained in sections 8(1)(a) and (b) of the Act is to provide the Police with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter or investigation. The Police bear the onus of providing evidence to substantiate that, first, a law enforcement matter or investigation is ongoing and second, that disclosure of the records could reasonably be expected to interfere with the matter or the investigation.

The Police submit:

Disclosure of records to a party with an interest in an investigation must be viewed as disclosure to the public generally. Premature and unlimited access by

the public to information about an ongoing police investigation - both criminal and conduct related - could interfere with the investigation.

...

All of the information requested in this case constitute various segments of related criminal and officer conduct investigations. Release of one piece could jeopardize fair hearings and court proceedings and, ultimately, the outcome of the entire investigation.

The representations provided by the Police are simply not sufficient to establish a section 8(1)(a) or (b) exemption claim in circumstances where records contain information that is already known to the appellant, as is the case with Records 1-3, 5-8, 10, 11, 25, 27, 30, 35 and 36. In my view, in the circumstances of this appeal, the Police have not substantiated that disclosure of these records could reasonably be expected to interfere with a law enforcement matter or investigation, and they do not qualify for exemption under section 8(1)(a) or (b).

The contents of remaining part of the 911 tape and Records 21 and 38-57 are not known to the appellant. The Police have not explained why non-disclosure of these particular records is necessary in the specific circumstances of this appeal. In my view, the disclosure of Records 38\_45 could not reasonably be expected to interfere with an ongoing law enforcement matter or investigation. However, based on my own assessment of the records, I find that there is a possibility that disclosure of the remaining part of the 911 tape and Records 21 and 46-57 could reasonably be expected to interfere with a law enforcement matter or investigation. Accordingly, I find that the remaining part of the 911 tape and Records 21 and 46-57 qualify for exemption under section 8(1)(a) or (b).

Sections 8(1)(a) and (b) and section 38(a) are discretionary exemptions. As I have found that certain records fall within the scope of these exemptions, the Police are obliged to consider whether it would be appropriate to release all or parts of the records, regardless of the fact that they qualify for exemption.

The appellant submits that the reliance by the Police on discretionary exemptions to exempt all of the records requested from disclosure, without even considering granting partial access to some records, constitutes strong evidence of an abuse of that discretion.

It is my responsibility to ensure that the head has properly exercised his discretion under the Act. In reviewing the circumstances of this appeal, I am concerned by the fact that the Police applied these discretionary exemptions to information which was within the knowledge of the appellant or had previously been disclosed to the appellant, and I am not satisfied that the Police considered the option of disclosure prior to deciding to deny the appellant access to the records. Accordingly, I find that the Police have not properly exercised discretion under sections 38(a) and 8(1)(a) and (b). Accordingly, I have decided to defer my final determination regarding the application of these exemptions to the remaining part of the 911 tape and Records 21 and 46-57 until I have received submissions from the Police regarding the exercise of discretion.

If, after reviewing the additional representations provided by the Police, I am satisfied that discretion has been exercised in accordance with established legal principles, I will uphold the

application of the exemptions. However, if discretion has not been exercised properly, the Police will not have satisfied the requirements of the exemptions and they will not apply.

**ORDER:**

1. I order the Police to reconsider the exercise of discretion under section 38(a) and sections 8(1)(a) and (b) with respect to the remaining part of the 911 tape and Records 21 and 46\_57 and to provide me with representations as to the factors considered in doing so by **October 9, 1996**. I remain seized of this matter.
2. I uphold the decision of the Police not to disclose the part of the 911 tape which involves a conversation between the 911 caller and the 911 operator, two entries (dated 96/04/19 and 96/05/08) on Record 2, all of Records 4, 17, 26, 28, 29, 31-34 and the 911 caller's name, address and telephone number on Records 38 and 45.
3. I order the Police to disclose the remaining records or parts of records to the appellant by sending him a copy by **October 24, 1996** but not earlier than **October 18, 1996**.
4. In order to verify compliance with the provisions of this interim order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ September 19, 1996