



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

ORDER P-1422

Appeal P_9700024

Police Complaints Commissioner



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

The appellant filed a complaint against several members of the Metropolitan Toronto Police under Part VI of the Police Services Act (the PSA). The complaint arose from an incident in which the appellant had been involved. The appellant's complaint was initially investigated by the Public Complaints Bureau of the Metropolitan Toronto Police, which concluded that no action was required. The appellant requested a review of this decision by the Police Complaints Commissioner (the PCC), which concluded that no further action was warranted.

Subsequently, the appellant submitted a request to the PCC under the Freedom of Information and Protection of Privacy Act (the Act). The request was for information about the investigation of his complaint.

Under sections 25(2) and (3) of the Act, the PCC transferred part of the request to the Metropolitan Toronto Police Services Board (the Police) because the PCC concluded that the Police have a greater interest in some of the responsive records. The Police are an institution under the Municipal Freedom of Information and Protection of Privacy Act (the municipal Act). The Police issued a decision in response to the transferred parts of the request. The requester filed an appeal of that decision, which is the subject of Order M-962, issued concurrently with this order.

In addition, the PCC issued its own decision in relation to the part of the request which it did not transfer to the Police. The appellant filed an appeal of that decision as well, which is the subject of this order.

NATURE OF THE APPEAL:

In response to the portion of the appellant's request which was **not** transferred to the Police, the PCC decided to fully disclose some of the requested records, consisting of correspondence, notes, a number of interim reports, and administrative records. The PCC also denied access to 19 records, consisting of a total of 23 pages, in their entirety. The PCC indicated that it relies on the following exemptions in the Act as the basis for this denial of access:

- law enforcement - section 14(2)(a)
- discretion to refuse requester's own information - section 49(a)
- invasion of privacy - section 21.

The appellant appealed this denial of access. This office sent a Notice of Inquiry to the appellant and the PCC.

Because it appeared that the records might contain the appellant's personal information, as well as that of other individuals, the Notice of Inquiry invited the parties to make submissions on the possible application of section 49(b). The latter section provides a discretionary exemption which may be claimed where disclosure of a record containing the requester's personal

information would constitute an unjustified invasion of the personal privacy of another individual or individuals.

In addition, because the records appeared to relate to an employment-related matter, the Notice of Inquiry also invited the parties to comment on the possible application of sections 65(6) and (7). Section 65(6) excludes certain kinds of employment and labour relations records from the scope of the Act and section 65(7) lists types of records which are exceptions to section 65(6).

In response to the Notice of Inquiry, both the PCC and the appellant submitted representations.

As previously noted, the PCC's initial decision letter referred to section 21 and the Notice of Inquiry also invited the parties to make representations on the possible application of section 49(b). Both these sections relate to the "unjustified invasion of personal privacy" which may arise from the disclosure of personal information. The Index of Records submitted to this office in the early stages of this appeal indicated that section 21 was only claimed for Record 12, the "Administrative Fairness Interview" document. However, in its representations, the PCC "... takes the position that the records do not contain personal information". Consistent with this position, the PCC did not submit representations in relation to either section 21 or section 49(b).

Having reviewed the records, and bearing in mind the purpose of the Act mentioned in section 1(b) "to protect the privacy of individuals with respect to personal information about themselves held by institutions ...", I have decided to consider whether any information that is subject to the Act and not exempt under sections 14(2)(a) and 49(a) would constitute the personal information of individuals other than the appellant. This discussion appears under the heading, "Invasion of Privacy", below.

The records at issue consist of eight covering letters to various interested parties, enclosing the PCC's reporting letter (Records 4-11, using the PCC's numbering system), a document entitled "Administrative Fairness Interview" (Record 12), an internal memorandum (Record 14), six letters informing interested parties of the appellant's request for a review of the Police decision in relation to his complaint (Records 22-27), an internal memorandum (Record 34), two log pages (Record 41) and one piece of internal correspondence (Record 49). The PCC relies on section 14(2)(a) and 49(a) for all the records.

DISCUSSION:

JURISDICTION

I must now determine whether the records fall within the scope of section 65(6) of the Act. If so, they would be excluded from the scope of the Act unless they are records described in section 65(7), which lists exceptions to the exclusions established in section 65(6).

These sections state:

- (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
- (7) This Act applies to the following records:
1. An agreement between an institution and a trade union.
 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

These provisions were added to the Act by the Labour Relations and Employment Statute Law Amendment Act, 1995 (Bill 7), which came into force on November 10, 1995. The appellant, in his letter of appeal, argues that because "... this has been an on-going investigation by myself since 1992 I believe that I should have the right to their files as I should qualify for grandfathering". I also note that all of the records at issue were created prior to November 10, 1995. However, the appellant's request was dated November 19, 1996.

In Order P-1258, former Assistant Commissioner Tom Mitchinson considered the timing criteria for the application of 65(6) and (7) of the Act. In this discussion, he found that the relevant factor was the date upon which the request was submitted. The former Assistant Commissioner stated:

... if the appellant made her requests prior to November 10, 1995, they would be subject to the law in effect prior to the enactment of Bill 7. On the other hand, if

the requests were not made until after this date, they would be subject to the new provisions creating sections 65(6) and (7).

I agree with this interpretation, which is consistent with the law in relation to the retroactive application of statutes. Therefore, when the appellant began investigating this matter, and when the records were created, are not relevant to the determination of whether these sections apply to his request. Rather, the question is, was the request submitted before or after the amendments came into force?

In this case, the request was submitted more than a year after Bill 7 became law, and therefore, I find that sections 65(6) and (7) have potential application in the circumstances of this appeal.

Turning to the question of whether section 65(6) applies, I note that the PCC submits that it does not. In this regard, the PCC states:

... [i]t is our view that there is nothing in the excluded records with respect to proceedings or anticipated proceedings before a court, tribunal or other entity which is related to labour relations or to the employment of a person by the PCC. It is therefore our submission that subsection 65(6) ... does not apply.

Notwithstanding that the PCC takes this view, since section 65(6) is a jurisdiction-limiting provision, I must determine whether it applies.

The submission I have just quoted implies that if the individual in question is not an employee of the institution which receives the request (in this case, the PCC), then section 65(6) cannot apply. However, in Order P_1345, Inquiry Officer Donald Hale dealt with a request to an adjudicative body (the Ontario Labour Relations Board) for records relating to a Board hearing involving an individual who was not an employee of the Board. In that case, the employer of the individual was Ontario Hydro, which was a party to the proceeding. Hydro is also an institution under the Act. Inquiry Officer Hale held that records submitted to the Board by Hydro, or sent by the Board to Hydro, were excluded from the scope of the Act under section 65(6)1. In this regard, the wording of the preamble of section 65(6) is important; it refers to records collected, prepared, maintained or used by or on behalf of **an** institution (i.e. Hydro), rather than making specific reference to the institution which received the request (i.e. the Board).

In the present case, the Police were the addressees of several of the records at issue. However, while the Police are an institution under the municipal Act, they are not an institution for the purposes of section 65(6) of the Act, and therefore, the fact that the Police may have received (and hence “collected”, “used”, etc.) some of the records is irrelevant for the purpose of deciding whether section 65(6) applies.

Based on the evidence before me, I am not satisfied that the records were created, prepared, used or maintained in relation to proceedings or anticipated proceedings, nor to negotiations or anticipated negotiations. Therefore, I find that sections 65(6)1 and 2 do not apply.

In addition, the PCC’s function, in the circumstances of this appeal, was to conduct a review of the Police’s decision in relation to the complaint, under section 91 of the PSA. In my view, it is

clear that the PCC's role of independent and impartial investigator would be inconsistent with having "an interest" in the employment-related matter of the appellant's complaint, in the sense intended by section 65(6)3. Therefore, I also find that section 65(6)3 does not apply.

Accordingly, the records at issue do not fall within the scope of section 65(6), and they are subject to the Act.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records at issue. These records all pertain to the investigation of the appellant's complaint, which related to incidents involving the appellant. Records 4-11 (the covering letters forwarding the PCC's report to interested parties) do not mention the appellant by name, but informed individuals would be able to identify him and link the information in the records to him. All of the other records at issue contain direct references to the appellant and his complaint. Therefore, I find that all the records at issue contain the appellant's personal information.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, the institution has the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions, including section 14 of the Act, would otherwise apply to that information.

Section 49(a) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information. (emphasis added)

I have held that all of the records at issue contain the appellant's own personal information. Therefore, I will consider whether the records qualify for exemption under section 14(2)(a) as a preliminary step in determining whether section 49(a) applies.

LAW ENFORCEMENT

Section 14(2)(a) of the Act states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

In Order 200, former Commissioner Tom Wright determined that in order to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information and that, generally speaking, results would not include mere observations or recordings of fact. I agree with this view.

Records 4-11 (the covering letters sending the PCC's reporting letter to various interested parties) include a cursory statement of the results of the PCC investigation, but in my view, this is not sufficient to bring these documents within the definition of "report" which I have just quoted. Similarly, Records 22-27 (the letters informing interested parties of the appellant's request for a review) and Record 49 (internal correspondence) do not provide a statement of account of the results of the collation and consideration of information. Nor, in my view, do any of Records 4-11, 22-27 or 49 in any way resemble what would normally be considered a "report".

This same analysis also applies to the two internal memoranda (Records 14 and 34) and the two log pages (Record 41), and in addition, these documents could aptly be described as "mere observations or recordings of fact".

I find that Records 4-11, 14, 22-27, 34, 41 and 49 do not qualify for exemption under section 14(2)(a), and therefore, section 49(a) does not apply to them.

I will now consider Record 12, the "Administrative Fairness Interview" document. This document provides a permanent record of the investigator's conclusions about the evidence, and brings together the views of a number of witnesses, which had been separately collected, about particular incidents. I find that it sets out "a formal statement or account of the results of the collation and consideration of information" and therefore qualifies as a "report" within the meaning of section 14(2)(a). In my view, this conclusion is not altered, in the circumstances of this case, by the fact that this information was shared verbally with the appellant.

I also find that, given the circumstances of this appeal and the PCC's mandate as set out in the PSA, Record 12 was prepared in the course of an investigation by an agency (i.e. the PCC) which "has the function of enforcing and regulating compliance with a law". In this regard, I note that in Order P-659, Inquiry Officer Donald Hale reached this same conclusion about a similar record prepared in the course of a PCC investigation under the PSA.

Accordingly, I find that Record 12 has met the requirements for exemption under section 14(2)(a) and is exempt under section 49(a).

INVASION OF PRIVACY

I have found that Records 4-11, 14, 22_27, 34, 41 and 49 are not exempt under section 49(a), and therefore, I will consider whether these records contain the personal information of individuals other than the appellant. If they do, I will then consider what, if any, remedial order to make in the circumstances of this appeal.

Personal Information

As noted previously, under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual.

Records 6-11 are letters addressed to the officers who were the subject of the complaint, and set out the conclusions of the PCC in relation to the complaint. Records 22-27 are again addressed to the officers who were the subject of the complaint, and contain information about the complaint and the PCC investigation. Record 49 also identifies the subject officers, and another individual.

In a long line of cases beginning with Order 157, issued by former Commissioner Sidney B. Linden, this office has taken the approach that information which identifies individuals in their professional capacity, opinions expressed as part of a person’s professional responsibilities, and information about other normal activities undertaken in that context, are not personal information.

In Order P-1180, former Inquiry Officer Anita Fineberg discussed an important limitation on this view that information relating to an individual’s employment or professional capacity is not personal information:

Information about an employee does not constitute personal information where the information relates to the individual’s employment responsibilities or position. Where, however, the information involves an examination of the employee’s performance or an investigation into his or her conduct, these references are considered to be the individual’s personal information.

I agree with the views of former Commissioner Linden and former Inquiry Officer Fineberg which I have just quoted. On this basis, I find that the references to the subject officers in Records 6-11, 22-27 and 49 constitute the personal information of individuals other than the appellant. I also find that the reference to another individual in Record 49 is that individual’s personal information. These references, which comprise the information I have found to be personal information of individuals other than the appellant, are highlighted on the copies of these records which are being sent to the PCC’s Freedom of Information and Privacy Co_ordinator with this order.

Record 41 also contains information that appears to be the personal information of an individual or individuals other than the appellant. I have also highlighted this information on the copy of this record which is being sent to the PCC’s Freedom of Information and Privacy Co-ordinator with this order.

In addition, I find that Records 4, 5, 14 and 34 do not contain any information which could reasonably be construed as “personal information” of individuals other than the appellant.

Because Records 4, 5, 14 and 34, and the non-highlighted parts of Records 6-11, 22-27, 41 and 49 are not exempt under section 49(a), no other discretionary exemptions have been claimed and no mandatory exemptions apply, I will order that they be disclosed.

Invasion of Privacy

The exemptions in the Act which can apply to avoid an unjustified invasion of personal privacy are the mandatory exemption in section 21 and the discretionary exemption in section 49(b).

Although the PCC has not made representations in relation to section 21, in some situations I could find that it applies and order the non-disclosure of personal information on that basis, because it is a mandatory exemption. However, section 21 cannot apply to records containing a requester's own personal information; in that case, the only exemption which can apply to avoid an invasion of another individual's personal privacy is section 49(b) (Order M-352). Since I have found that all the records contain the appellant's personal information, the only exemption which could be applied to the personal information of other individuals in Records 6-11, 22-27, 41 and 49 is section 49(b).

Section 49(b) is a discretionary exemption which the PCC did not claim, and on which it submitted no representations despite being invited to do so in the Notice of Inquiry.

However, given the PCC's view that the records do not contain personal information, and my contrary finding to the effect that Records 6-11, 22-27 and 49 contain the personal information of individuals other than the appellant, and that Record 41 may also contain such information, I am not satisfied that the PCC took all relevant factors into account in exercising its discretion not to claim section 49(b) in relation to this information. I will therefore order the PCC to re-exercise its discretion in this regard. If the PCC decides to apply the exemption, the appellant will be entitled to appeal that decision.

ORDER:

1. I uphold the PCC's decision to deny access to Record 12 in its entirety.
2. I order the PCC to disclose Records 4, 5, 14 and 34 in their entirety, and the parts of Records 6-11, 22-27, 41 and 49 which are **not** highlighted on the copies of these records which are being sent to the PCC's Freedom of Information and Privacy Co-ordinator with this order, by sending a copy of the records to the appellant by **July 31, 1997**.
3. I further order the PCC to re-exercise its discretion in relation to section 49(b) and the information in Records 6-11, 22-27, 41 and 49 which I have highlighted on the copies of these records which are being sent to the PCC's Freedom of Information and Privacy Co-ordinator with this order. In the event that the PCC decides not to claim section 49(b) for any of this information, I order the PCC to notify the individual(s) to whom the information relates, following the procedures and time frames specified in section 28 of the Act and treating the date of this order as the date of the request. In the event that the PCC decides to claim section 49(b) for this information, I order it to notify the appellant of this fact by sending him written notice on or before **July 31, 1997**.

4. I further order the PCC to provide me with copies of any correspondence it sends out pursuant to Provision 3, by sending a copy to me at the same time the correspondence is sent to the appellant or other individuals.
5. In the event that the PCC requires clarification of Provision 3 for any reason, it may contact me.
6. To verify compliance with the provisions of this order, I reserve the right to require the PCC to provide me with a copy of the records which are disclosed pursuant to Provision 2.

Original signed by: _____

John Higgins
Inquiry Officer

July 10, 1997