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

ORDER M-1053

Appeal M-9700218

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 dockets listing police officers charged under the Police Services Act (the PSA) from 1986 to 1996. These dockets, posted daily outside the Trials Office in Police Headquarters, contain the name, rank, badge number and alleged offences of officers scheduled to appear that day before the Police Discipline Tribunal. The request was made by two journalists.

The Police denied access to the responsive records, claiming that they fell under section 52(3), and were therefore excluded from the jurisdiction of the Act This decision was appealed and disposed of in Order M-936, where former Inquiry Officer Anita Fineberg found that section 52(3) did not apply, and ordered the Police to issue an access decision to the appellants.

Before issuing a decision, the Police notified 53 police officers (the affected persons) whose interests might be affected by disclosure of the records, pursuant to section 21 of the Act. One affected person consented to disclosure of information relating to him, and 52 objected to disclosure. After considering all submissions received from the affected persons, the Police granted access to the information relating to the consenting affected person, and denied access to the remaining responsive records, claiming the following exemption:

- invasion of privacy - section 14(1)

The Police also advised the appellants that dockets have only been prepared since late 1993 or early 1994, therefore no responsive records exist from 1986 to that point; and that any responsive records prior to January 1, 1997 have been destroyed. The Police agreed to extend the time period covered by the request to the date of their decision, and identified 42 Police Discipline Tribunal dockets covering the period January 8, 1997 to May 2, 1997. The affected persons notified by the Police are those officers listed on these 1997 records.

The appellants appealed the decision to deny access, and claimed that there was an overriding public interest in the disclosure of the records. The appellants later objected to the Police destroying responsive records, and claimed that more responsive records should exist. I have added these issues to the scope of this inquiry.

A Notice of Inquiry was sent to the appellants, the Police and the affected persons. Representations were received from the Police, the appellants and 46 affected persons.

PRELIMINARY MATTERS:

In Order M-936, Inquiry Officer Fineberg disposed of a number of issues in addition to her finding that section 52(3) of the Act did not apply.

She found that the decision letter issued by the Police was inadequate. I will not quote from her order, but I am in agreement with the reasoning she outlines on page 2. Despite the statements made by Inquiry Officer Fineberg, the Police have again issued an inadequate decision letter to the same appellants. Section 29(1)(b)(ii) of the Act clearly requires the Police to outline "the reasons the provision applies to the record". I would remind the Police that a re-statement of the language of the legislation is generally not sufficient to satisfy the requirements of the section. When the reasons why a request has been denied are clearly communicated, requesters are in the best position to decide whether to accept the decision or to appeal. It is in the interest of both requesters and institutions, as well as this office, to avoid the costs and delay associated with appeals arising from inadequate decision letters, and I strongly encourage the Police to adhere to its statutory responsibilities under section 29(1)(b)(ii) when responding to requests in which access is denied.

Inquiry Officer Fineberg's order also dealt with the implications of the dockets having already been publicly available through posting in a public space at the time of the hearing. This issue is raised again by the appellants in the present appeal. The appellants again attempt to rely on section 27 of the Act, and raise the possible application of section 15(a), an exemption not claimed by the Police. As I stated in Order M-96, and Inquiry Officer Fineberg found in Order M-936, the application of section 27 is not relevant to an access request under Part 1 of the Act. I will discuss the appellants other submissions regarding previous public availability later in my consideration of section 14(2).

The appellants also submit that, because natural justice requires that participants in an administrative process know the case against them, they should be provided with the representations of the Police so that they can be given the opportunity to challenge the evidence. They argue that to not do so is considered unfair and inappropriate. However, the appellants add that, given the long history of this proceeding, any request to make further submissions will simply delay the process further.

While I recognize that the appellants have chosen not to pursue a request for exchange of representations, they have raised concerns about this issue that I will take the opportunity to address.

Section 41 of the Act sets out the powers of the Commissioner with respect to conducting inquiries to review decisions of institutions that are appealed to the Commissioner. The statutory authority of the Commissioner includes the power to make a binding order, the ability to require production of any record in the custody or under the control of an institution, the right to enter the premises of an institution, and the right to conduct an inquiry in private.

Section 41(13) of the Act reads as follows:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

The appellants have been provided with a copy of the Notice of Inquiry which describes the records, explains the exemption which has been relied on, and the onus requirements under the Act. In my view, the appellants have been provided with sufficient information to enable them to address the issues in this appeal.

Inquiry Officer Marianne Miller considered a number of preliminary issues raised by the appellants, and disposed of them by letter to the appellants, dated August 28, 1997. I do not need to consider these issues further in this order.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

All parties agree, and I find, that the records contain personal information of the affected persons, and no one else.

Once it has been determined that a record contains personal information, section 14(1) of the Act **prohibits** the disclosure of personal information to any person other than the individual to whom the information relates, except in certain circumstances listed under the section.

Section 14(1)(a) permits disclosure on consent. This exception applies to information concerning the one affected person who consented to the release of his information, but I do not need to consider this further since this information has already been disclosed to the appellants.

The Police also identify section 14(1)(f), and claim that it is not applicable in the circumstances of this appeal. I agree that it is the only exception to the section 14(1) mandatory exemption which has potential application. This section reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The only way in which a section 14(3) presumption can be overcome is if the personal information falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the mandatory personal information exemption.

Section 14(3) presumptions

The Police and the affected persons submit that the presumptions in sections 14(3)(b) and (d) apply in the circumstances of this appeal. These sections state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (b) 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;
>
> (d) relates to employment or educational history;

14(3)(b)

The Police and affected persons submit that the personal information relates to information that was compiled during an investigation under the PSA. The Police acknowledge that the record itself was not created during an investigation, but maintain that the information obtained during the investigation was later used to create the record, and that this is sufficient to bring the information within the parameters of section 14(3)(b).

The appellants disagree. They point out that:

> [t]he docket was compiled not as part of an investigation, but as part of a legal proceeding which *followed* an investigation. The fact that the Police disclosed these dockets publicly outside the hearing rooms confirms that the dockets relate to the prosecution of the matter, not its investigation, and the posting of the docket is a *necessary* part of the public hearing process.

I agree with the appellants. The records are documents which are generated upon the completion of an investigation and after charges are laid. They are not compiled as part of the investigation, but rather relate to the proceedings which follow the investigation. Therefore, I find that section 14(3)(b) does not apply.

14(3)(d)

The Police submit that the affected persons attended disciplinary hearings as a function of their employment and that the charges have become part of their employment history. Several affected persons support this position.

The appellants do not comment specifically on section 14(3)(d).

I disagree with the position of the Police.

In Order P-1117, former Inquiry Officer John Higgins dealt with request for records relating to an investigation of a complaint made to the Ontario Coroners' Council against four coroners. The complaint arose in the context of an investigation and inquest into the death of the requester's mother. Inquiry Officer Higgins found that investigations of alleged improper work-related behaviour are not part of the employment history because they fall outside the normal scope of employment duties.

I agree with this finding, and feel it is equally applicable in this appeal. The affected persons attended disciplinary hearings as the result of investigations of alleged improper work-related behaviour. This was not a normal part of their employment duties and, in my view, the information does not relate to the employment history of the affected persons within the meaning of section 14(3)(d).

14(2) considerations

The Police rely on sections 14(2)(e), (f) and (i) as factors favouring non-disclosure.

The appellants raise section 14(2)(a) in support of their position that the records should be released. They also point out that the records were posted publicly and relate to information about hearings that are open to the public. This is not a factor which appears in section 14(2), but may be a relevant consideration favouring disclosure.

These sections read as follows:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

14(2)(e)

The Police and the affected persons submit that disclosure of the records would perpetuate the publicity of the disciplinary matters, and that they are entitled to closure. They add that, because the appellants are journalists, there is no certainty about how or when the information would be used, and that the ongoing and potentially never-ending wait would be stressful and unfair. Finally, they argue that disclosure of their identities would interfere with their ability to transfer to a specialized unit or undercover work.

The appellants argue that there is no evidence that the police officers identified on the dockets will be exposed to pecuniary or other harm, let alone unfairly exposed. They point out that any harm which may result to these officers "would be due to decisions of the Tribunal, and not by disclosure to a member of the public".

In Order P-1167, former Inquiry Officer Fineberg considered the relevance of section 14(2)(e) in the context of a sexual harassment complaint to the Ontario Human Rights Commission which had been settled. One of the respondents to the complaint was seeking personal information relating to the complainants. Inquiry Office Fineberg made the following comments:

> I am of the view that once the parties have followed the appropriate procedures to file a complaint with the Commission and have reached a satisfactory settlement, they are entitled to consider the matter as 'closed'. ... I accept that disclosure of the records at this time could expose the complainants unfairly to harm in the form of a continuing, and potentially public, reminder of these unpleasant events.

I agree with the approach followed by Inquiry Officer Fineberg, and find it applicable in this case, even though, in contrast to Order P-1167, it is the respondents' personal information which is being sought. In my view, once the affected parties have been through the appropriate proceedings in responding to a complaint under the PSA, they are entitled to consider the matter as closed. For the same reasons stated in Order P-1167, I find that section 14(2)(e) is a relevant consideration in the circumstances of this appeal, and is a factor favouring privacy protection.

14(2)(f)

The Police and the affected persons submit that information relating to allegations of professional misconduct is highly sensitive. They support this position by pointing to the high stress levels

experienced by many affected persons stemming from past prosecutions. The Police also refer to previous orders of this office where information relating to criminal history and allegations of improper professional conduct were found to be "highly sensitive". The Police also refer to Order P-1055 in which Inquiry Officer Mumtaz Jiwan found that information relating to allegations of improper professional conduct were "highly sensitive".

The appellants argue that if the information was highly sensitive, the Police would not have posted the information publicly outside the hearing rooms.

In order to qualify as "highly sensitive", the Police must establish that release of the information would cause excessive personal distress to the affected persons (Order P-434). It is clear that the records contain information relating to allegations of improper professional conduct against the affected parties. While I accept the appellant's position that the records were displayed publicly at a specific point in time, this does not mean that the information contained in the records is not highly sensitive. I accept that disclosure of allegations of professional misconduct would cause excessive personal stress to the officers involved, and that this information is properly characterized as highly sensitive (Orders P-658, P-1055, P-1117, P-1278 and P-1427).

Therefore, I find that section 14(2)(f) is a relevant consideration in the circumstances of this appeal, and is another factor favouring privacy protection.

14(2)(i)

The Police and affected persons submit that disclosure of the records would impact on the professional and personal reputations of the affected persons, in particular those who were eventually found not guilty of misconduct. They further argue that the records do not contain sufficient details and could be misleading as to the circumstances surrounding each matter, potentially resulting in unfair damage to the reputation of the affected persons.

The appellants again submit that public disclosure of the records at the time of the hearing obviates any concerns about damage to the affected persons' reputations.

In my view, given the limited information contained in the records, it is reasonable to expect that the disclosure of information which identifies these individuals by name may unfairly damage their reputations, particularly those who were ultimately acquitted. Therefore, I find that section 14(2)(i) is a relevant consideration in the circumstances of this appeal.

14(2)(a)/previously publicly available

The Police submit that section 14(2)(a) is not relevant. In their view, there is an adequate level of public scrutiny of the activities of the Police through a number of avenues, including the media's attendance at Police Discipline Tribunal hearings. The public is aware through the media that the Police have a

disciplinary hearings process and, in the opinion of the Police, the release of the docket sheets "do[es] not subject the activities of the institution to scrutiny, but only the activities of the individual police officers". The Police also point out that there is nothing to indicate that the public has demanded scrutiny in the form of the docket sheets, and although the appellants are journalists, it does not automatically follow that the request is made on behalf of the public. The Police submit that the fact that the appellants have requested access to the records in bulk is an indication that there is no public demand for scrutiny of these records, "but that the public will have access to this information only when the requester chooses to release it".

The appellants submissions on section 14(2)(a) focus on the fact that the records are readily accessible to the public on the date of the scheduled hearing, through posting outside the room in which the hearings take place. In support of their position, the appellants refer to submissions made in the context of Order P-936, which focus on the public nature of proceedings under the PSA, and refer to court decisions which establish the principle of openness in hearings before courts and tribunals. In the appellants' view, the information contained in the records has already been made public and, therefore, disclosure will not result in an unjustified invasion of personal privacy.

In my view, section 14(2)(a) is not a relevant consideration in the circumstances of this appeal. In Order P-347, I made the following statements regarding the application of this section, which are equally applicable in this appeal:

> In my view, in order for [section 14(2)(a)] to be a relevant consideration, there must be a public demand for scrutiny of the Government or its agencies, not one person's subjective opinion that scrutiny is necessary. No such public demand has been established in this case and, accordingly, I find that [section 14(2)(a)] is not a relevant consideration in the circumstances of this appeal.

In my view, the public hearings process under the PSA is established for the very purpose of subjecting police services to public scrutiny. The appellants have provided insufficient evidence to establish that additional public scrutiny is desirable in the circumstances. I am also not satisfied that disclosure of this information would contribute in any meaningful way to the public's understanding of the activities of government.

I accept the position of the appellants that the prior public posting of the records outside the hearing room is a valid factor favouring disclosure, and should be taken into account in balancing the various considerations under section 14(2). However, as was pointed out to the parties in the Notice of Inquiry, a number of orders issued by this office have found that, although particular personal information may have been disclosed at one time as part of a public process, it does not necessarily follow that this information should be freely and routinely available to anyone who asks (Orders 180, 181, M-68, M-800 and M-849).

Balancing the considerations of the one factor favouring the disclosure of the records against the three factors favouring the protection of the privacy of the affected persons, I find the factors weighing in favour of privacy protection are more compelling. Accordingly, I find that the disclosure of the records would result in an unjustified invasion of the personal privacy of the affected persons, and that the records are exempt under section 14(1) of the Act.

I also find that none of the provisions of section 14(4) are applicable.

COMPELLING PUBLIC INTEREST

Section 16 of the Act reads as follows:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

In order for section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the personal information exemption.

The appellants submit that as investigative reporters they are conducting an in-depth investigation into the Police discipline process in order to analyze its efficiency, effectiveness and fairness. Their objective is to write feature stories informing the public about the process and they regard this issue as a matter of important public interest. They seek the information contained in the records in this appeal in order to obtain complete information as to how many hearings were conducted and the nature of the charges. As stated in their representations, the appellants are seeking information "to provide us with data from which to seek out more specific information on situations which shed particular light on the Police discipline process, and to determine whether we can come to some conclusions, based on the overall statistical and other information, as to the efficacy of the discipline process".

The appellants further argue that because the public is so vulnerable to the Police, they must be held to a high standard of openness and accountability and that there already exists a recognized compelling public interest toward open hearings.

The Police submit that disclosure of the records would not contribute in any meaningful way to the public's understanding of the internal discipline process at the Police Discipline Tribunal level, and would be contrary to the other central purpose of the Act, that of protecting privacy. The Police argue that "[b]y addressing areas of "public concern" at regular and open meetings of the [Police Services Board], which the media regularly attends, the public is adequately and properly served by this practice".

Even if a compelling public interest is established, the Police submit that it would be insufficient to outweigh the purpose of the mandatory personal information exemption. The Police state:

> The docket sheets have limited information with which to inform the public about the activities of the institution; there are no details and no indication of the degree of misconduct allegedly committed by the office, there are no details about how the institution either investigated or dealt with this matter subsequently, and finally, there is no finding of guilt or innocence noted on the docket sheets."

In my discussion of the section 14(1) exemption claim, I found that the records were, at the time the charges were heard, made available to the public, through the posting of the dockets outside the hearing room. In addition, the Police and the appellants both point out that the media is able to attend these hearings and does so quite frequently. Therefore, having considered the representations of the appellants, including statements submitted by both appellants and materials referred to me by the appellants from previous appeals, I find that they have not established that the **additional** disclosure of the records is necessary in order to address public interest concerns. In my view, the public interest in disclosure of these records is adequately and properly served by the practice of posting the docket sheets outside the hearing room on the dates of the hearings and the ability of the media to attend and report on these hearings.

REASONABLENESS OF SEARCH

The appellants' request is worded as follows:

> We request copies of these lists (or any lists in a different format that set out the names and charges related to daily trials held in the police trials court) for the period 1986 to 1996 inclusive.

The appellants attached sample records to their request.

The appellants submit that the wording of their request was not restricted to the actual docket sheets, but also included responsive records in another form, and that the searches undertaken by the Police were inadequate.

The Police point out that when their Freedom of Information and Privacy Office (the FOIP Office) received the request in November 1996, staff were aware that the responsive records resided in the Trials Office, but did not obtain them. In the view of the Police, the samples provided by the appellants were sufficient to raise the jurisdictional issue under section 52(3) of the Act, without actually retrieving the records. It was only after Order P-936 was issued that the FOIP Office attempted to obtain the records from the Trials Office, and it was only at that point they learned that no records prior to January 1, 1997 existed.

As noted earlier, according to the Police, the preparation and posting of dockets only began in late 1993 or early 1994, so no responsive records would exist prior to that time. As far as the subsequent

time period is concerned, the Police point out that the records are routinely destroyed at the end of each calendar year. I will discuss the destruction of records issue later in this order.

The Police submit that it might be possible to reconstruct these records using information contained in various other computer and paper files, but that to do so would take considerable time and effort and would unreasonably interfere with operations. The Police also point out that reconstruction of the records would be an exercise in futility, since they would be identical in nature to the existing records for 1997, which are prohibited from disclosure under section 14 of the Act.

Having considered all representations on this issue, I make the following findings.

First, because dockets were not prepared until either late 1993 or early 1994, I accept that responsive records prior to this date do not exist. Because the Police destroy dockets at the end of each calendar year, I also accept that responsive records for 1993/1994 (whatever the case may be) and 1995 did not exist at the time of the appellants' request. Therefore, I find that the search conducted by the Police for records prior to 1996 was reasonable.

As far as the 1996 records are concerned, I find that the Police erred in not obtaining copies of all responsive records from the Trials Office at the time of the request. In my view, the explanation offered by the Police for not doing so is unsatisfactory, and contributed to the premature destruction of responsive records.

That being said, I find that docket sheets prepared by the Trials Office are the only type of records responsive to the appellants' request. Although the appellants do not restrict their request to the docket sheets, it is restricted to lists in any format that set out names and charges related to daily trials held in the police trials courts. In my view, it is not reasonable to require the Police to reconstruct the records by obtaining information from various computer and paper files in order to satisfy their search obligations. The appellants requested lists, and I accept that the only lists in existence at the time of the request were the docket sheets maintained in the Trials Office.

Accordingly, I find that the search by the Police for all records responsive to the request was reasonable in the circumstances.

DESTRUCTION OF RESPONSIVE RECORDS

In Order M-936, Inquiry Officer Fineberg ordered the Police to make an access decision with respect to the records. The Police explain that when they attempted to retrieve the responsive records they were informed that this type of record is destroyed at the end of each calendar year. Consequently, the appellants were advised that no responsive records exist prior to January 1, 1997, the time period covered by the request. However, the Police offered to extend this time period to the date of Order M-936, and the appellants agreed.

The Police explain that because their record retention schedule was created by by-law in 1992, before any decision was taken to prepare and post docket sheets, these records are not covered by the schedule. The Police do not explain why the schedule was not updated when these new types of records were created.

The appellants, understandably, express strong objection to the fact that the records which existed at the time of their request were subsequently destroyed.

I too am concerned about the fact that responsive records were destroyed by the Police after the request was received, and I find the explanation offered by the Police to be unacceptable. The facts on this issue are quite clear. The request was submitted and received by the Police on November 29, 1996. It was clear to the FOIP Office which records were responsive to the request and where they were located, in the Trials Office. At a minimum, the Police had a responsibility at that time to advise the Trials Office to retain a copy of all responsive records until the request had been satisfied and any subsequent proceedings before the Commissioner or courts was completed. They failed to do so, which has compromised the integrity of the access process.

Section 30 of the Act places a clear responsibility on the Police to ensure that personal information is retained and disposed of in accordance with section 5 of Regulation 823. This regulation reads as follows:

> Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution on behalf of the institution, unless the individual to whom the information relates consents to its earlier disposal.

Our office will be in touch with the Police to ensure that the retention and disposal policies and procedures with respect to these records are amended to ensure compliance with section 30 of the Act and section 5 of Regulation 823. I would also strongly encourage the Police to amend their records retention by-law to include these records.

ORDER:

I uphold the decision of the Police to deny access to the records.

Original signed by: December 22, 1997
Tom Mitchinson
Assistant Commissioner