



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-1129

Appeal M-9800054

Toronto Police Services Board



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The 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 records relating to two specified incidents which resulted in sexual assault charges being laid against a named taxi driver (the affected person). The information was requested by the Toronto Licencing Commission (the Commission) as part of its ongoing investigation into a complaint against the affected person. The Police denied access to the records on the basis of the following exemptions under the Act:

- law enforcement - sections 8(1)(a) and (f)
- invasion of privacy - section 14(1)

The Commission appealed the decision to deny access to the records, which consist of 81 pages of confidential Crown envelopes, witness lists, records of arrest, witness statements, police officers notes and videotapes of statements taken by the Police.

During mediation, the Commission argued that the records should be disclosed to it on the basis of section 32(f)(ii) (disclosure by a law enforcement institution to another law enforcement agency in Canada). This office provided a Notice of Inquiry to the Commission and the Police and the parties were invited to comment on the application of section 32(f)(ii) of the Act, as well as the exemptions raised by the Police. Representations were received from both parties.

PRELIMINARY MATTER:

DISCLOSURE PURSUANT TO SECTION 32(f)

The Commission submits that it is a law enforcement agency which is empowered to revoke any licence issued under By-law 20-85 for specific reasons, including circumstances where “the conduct of the applicant of the business in respect of which the licence is sought would infringe the rights, or endanger the health or safety, of other members of the public.” The Commission explains that the information in the records is required in order to commence proceedings before it to determine whether the affected person should be allowed to continue driving a taxi.

The Commission relies on previous orders of this agency which held that by-law enforcement proceedings qualified as law enforcement proceedings for the purposes of sections 8(1)(b) of the Act (Orders M-657 and M-773). The Commission submits that it should therefore be considered a “law enforcement agency” for the purposes of section 32(f)(ii) of the Act. This section reads:

An institution shall not disclose personal information in its custody or under its control
except,

if disclosure is by a law enforcement institution,

to another law enforcement agency in Canada.

The Police submit that under section 29(1)(b) of the Act, disclosure of personal information pursuant to section 32 is discretionary and that under section 32(d), personal information is provided even to its own employees only on a “need to know” basis. The Police go on to draw a distinction between the functions of its police service and the licencing functions of the Commission in relation to the term “law enforcement agency”. The Police point out that any concerns of public safety can be addressed under the Commission’s powers to suspend or revoke a licence. The Police submit that the personal information in the records relates to two serious charges under the Criminal Code and that disclosure could prejudice the rights of the affected person and the rights of his victims.

In Order M-1118, which resolved an appeal between the Commission and another police service, Adjudicator Donald Hale addressed the same issue. In that order, he relied on Order M-96 in which Assistant Commissioner Tom Mitchinson stated as follows:

Section 32 is contained in Part II of the Act. This Part establishes a set of rules governing the collection, retention, use and disclosure of personal information by institutions in the course of administering their public responsibilities. Section 32 prohibits disclosure of personal information except in certain circumstances; it does not create a right of access. The Federation’s request to the Board was made under Part I of the Act, and this appeal concerns the Board’s decision to deny access. In my view, the considerations contained in Part II of the Act, and specifically the factors listed in section 32, are not relevant to an access request made under Part I.

I also agree with the position taken by Assistant Commissioner Tom Mitchinson, also followed in Orders P-940 and P-1014, and find that it applies equally to the circumstances of this appeal. Additionally, the Commission acknowledges that because it was not able to obtain the records from the Police under Part II of the Act, it filed an access request under Part I which has resulted in the subject appeal. Therefore, based on the foregoing, I find that the factor described in section 32(f) under Part II is not relevant in the context of this appeal, which resulted from an access request made under Part I of the Act.

DISCUSSION:

PERSONAL INFORMATION AND INVASION OF PRIVACY

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 and find that they contain information relating to the affected person and other identifiable individuals and constitutes the personal information of these individuals. The records do not contain the personal information of the individual who made the request on behalf of the Commission.

Where a record contains the personal information of individuals other than the requester, section 14(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in this section applies.

The only exception which might apply in the circumstances of this appeal is section 14(1)(f) which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy."

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 Commission submits that the factor in section 14(2)(b) (may promote public health and safety) is relevant since the information is required to make a determination whether "the potential risk to public safety warrants suspension or revoking of the driver's licence".

The Police submit that the presumption in section 14(3)(b) applies as the records were compiled as part of an investigation into a possible violation of the Criminal Code. The investigation resulted in charges which are presently before the courts.

Having reviewed the records, I find that they relate directly to a Police investigation into allegations of sexual assault by the affected person. I find that these records were clearly compiled as part of a Police investigation into a violation of the law and that the presumption in section 14(3)(b) applies to the personal information in the records. Even if I were to find that the factor in section 14(2) referred to by the Commission applied in the circumstances of this appeal, the Ontario Court's (General Division) decision in the case of John Doe et al. v. Ontario (Information and Privacy Commissioner) held that the considerations in section 14(2) cannot be used to rebut a presumption in section 14(3). I find that section 14(4) does not apply in the circumstances of this appeal. The Commission has, however, raised the application of section 16.

The Commission submits that a compelling public interest exists in the disclosure of the personal information in the records. Section 16 of the Act states:

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.

There are two requirements contained in section 16 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

The Commission states that the information is required in order for it “to assess the risk to public safety and whether the taxi driver should be permitted to continue driving a taxi.” The Commission states that the affected person has been charged with two counts of sexual assault and that there is concern for the safety of the members of the public who regularly use taxis. The Commission submits that a public interest in disclosure exists as the Commission is entrusted with ensuring that persons which it licences are not a danger to the public.

The Commission points out that timing is critical in that it may take two years before the matter is resolved in the courts. The Commission acknowledges that premature disclosure of information that might be vital to a criminal court proceeding is a concern. In this regard, the Commission states that while its tribunal hearings are normally held in public, its enabling By-law also provides for in-camera hearings and states that any hearing held as a result of the records being disclosed under the Act will be held in the absence of the public.

The Police state that the Commission has already received one direct complaint against the affected person. The Police submit that this would logically provide the Commission with the basis to conduct its own investigation and proceed to exercise its mandate to suspend or revoke the affected person’s licence. The Police submit that disclosure under the Act of police records relating to a pending trial should not be necessary to enforce the terms of the Commission’s By-law and points out that other avenues such as subpoena, court order or making bail conditional on suspension of the licence are all available to the Commission. On this basis, the Police submit that a compelling public interest does not exist in the disclosure of the records.

I have carefully considered all the evidence before me. I find it difficult to reconcile the existence of a public interest in disclosure of police records relating to charges under the Criminal Code against the Commission’s mandate to determine whether to suspend, revoke or continue the affected person’s licence. In my view, the investigative and enforcement powers accorded to the Commission under its By-law are factors which are relevant to the circumstances of this appeal. I agree that a public interest exists in ensuring that licences are issued only to individuals who would not pose a threat to the safety of consumers. However, in my view, a larger public interest exists in ensuring and maintaining the personal privacy of the affected person and the personal privacy of the other individuals referred to in the records. Therefore, while the Commission makes a persuasive argument, I find that a compelling public interest does not exist in the disclosure of the records such that it clearly outweighs the purpose of the section 14(3)(b) exemption.

Because I have found that section 14(1) applies to exempt the record from disclosure, I do not need to address the application of section 8(1) to the records.

ORDER:

I uphold the decision of the Police.

Original signed by: _____

Mumtaz Jiwan
Adjudicator

_____ July 13, 1998