



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-1155**

**Appeal MA-980249-1**

**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 requester appeared in person at the offices of the Toronto Police Services Board (the Police) and submitted a written request for access to his own personal information. The request consisted of a completed Form 2 under Ontario Regulation 823 (the Regulation) made under the Act. The request stated:

I am requesting a complete copy of my personal file as a candidate with Toronto Police (ATS # 66883). This file request is inclusive of all aspects of my progress within the recruitment process (ie GAT-B, MMPI-2, interview scores and answers, background analysis in detail).

Please specify the area of concern Toronto Police had with my candidacy for police constable, which ultimately resulted in my permanent exclusion from future employment considerations within this field (ie. police constable with Toronto).

According to the requester, at the time of submitting the form, he also offered to pay the \$5 request fee under the Act, which the Police declined to accept. The Police have not disputed this assertion.

The Police subsequently wrote to the requester stating:

This letter is in response to your request regarding the release of human resource records and information concerning your application as police constable.

Human Resources is in the progress of developing a formalized policy with regard to requests of this nature and as a result *no information will be released at this time.*

Although we have not been able to develop our policy in a more timely fashion, completion is imminent.

Please be advised that should policy determine that information will be released as requested, or any part thereof, it will be forwarded to you at that time.

The requester (now the appellant) appealed the matter to this office. This office then sent a Request for Documentation form by facsimile to the Police, in which the Police were notified of the appeal and asked to forward all relevant documentation to this office for the purpose of processing the appeal.

In reply to the Request for Documentation, the Police sent a letter to this office stating:

As our secretary . . . advised you this morning, the Freedom of Information unit never received [the appellant's] request form. I understand that because he utilized an access form to write down his requirements, the Office of the Information and Privacy Commissioner considers this to be a request under [the Act]. [The appellant] submitted the form directly to our Human Resources area, which is the correct avenue of approach in this

case. His choice of stationery may be viewed as unfortunate or even incorrect, but his request was made of the Human Resources section of this Service.

Therefore, there are no documents to forward to you, no file number, no correspondence or decision letter or any materials that would normally relate to an access request file, since there was no access request.

Had [the appellant] submitted a Freedom of Information access request to this office, he would have received a decision letter explaining that the materials he requires are clearly "employment" related, and therefore exempt from coverage under [the Act] by Section 52.

I trust that [the appellant] will not have to submit a request to this office now, only to be frustrated in his attempts once again when a decision letter such as that described above is rendered.

This office sent a Notice of Inquiry to the appellant and the Police. Only the appellant made representations.

The issues in this appeal are whether or not the appellant has made a request for access to his own personal information under Part II of the Act and whether, if so, the Police have a duty to comply with the procedural requirements set out in Part I of the Act.

## **DISCUSSION:**

### **DID THE APPELLANT MAKE A REQUEST UNDER THE ACT?**

Section 36(1) of the Act provides individuals with a right of access to their own personal information:

Every individual has a right of access to,

- (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
- (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

Section 37(1) of the Act and sections 5.2 and 11 of the Regulation made under the Act describe the procedure for initiating an access request:

37. (1) An individual seeking access to personal information about the individual shall,

- (a) make a request in writing to the institution that the individual believes has custody or control of the personal information;
- (b) identify the personal information bank or otherwise identify the location of the personal information; and
- (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.

5.2 The fee that shall be charged for the purposes of clause 17(1)(c) or 37(1)(c) of the Act shall be \$5.

11. A request for access to a record under Part I of the Act or for access to or correction of personal information under Part II of the Act shall be in Form 2 or any other written form that specifies that it is a request made under the Act.

Although the Police did not make representations in response to the Notice of Inquiry, the letter from the Police sent in response to the Request for Documentation appears to set out their position on the issues raised by the appeal. The Police take the view that although the appellant submitted a request on a Form 2 as set out in the Regulation, his request was given to the human resources area. Thus, the Police suggest that because the requester did not submit his Form 2 to the correct person or department, he did not make a request under the Act. Further, the Police indicate that had the request been made under the Act, the appellant would have been advised that because the records were “employment related”, the records were excluded from the Act’s coverage, by virtue of section 52 of the Act.

Based on the material before me, I am satisfied that the appellant has met the requirements for an access request as set out in section 37(1) of the Act and sections 5.2 and 11 of the Regulation. The request was made in writing on Form 2, and it was sufficient to identify the location of the personal information. Although the Police did not accept the fee, the appellant discharged his responsibility under section 37(1)(c) by offering to pay the appropriate amount. Therefore, I conclude that the appellant has made an access request under the Act.

The fact that the appellant submitted his request to the human resources area of the Police, as opposed to some other area, does not alter my conclusion. In my view, where a person attends at the offices of an institution, and submits an otherwise valid access request to an officer or employee of the institution, regardless of job title or department, the person has fulfilled his or her obligations for the purpose of initiating an access request under the Act. The position of the Police is not sustained by section 37(1)(a) of the Act, which simply requires the submission of a request “to the institution”, without making a distinction between specific areas or individuals within the institution.

The Police also suggest that because in their preliminary view the responsive records were “employment related” and thus would have been excluded from the scope of the Act by virtue of section 52, they were entitled to treat the appellant’s request as not having been made under the Act. The problem with this

approach is that it has the effect of frustrating the appeal processes under the Act, by precluding requesters from asking this office to review the decisions of institutions on preliminary jurisdictional matters, in this case the application of the exclusion at section 52. One of the purposes of the Act, as set out in section 1(a)(iii), is:

. . . to provide a right of access to information under the control of institutions in accordance with the principle[] that decisions on the disclosure of information should be reviewed independently of the institution controlling the information . . .

Although the initial determination of the Police ultimately may prove to be correct, the appellant is entitled to a decision under the Act so that he may decide whether or not to seek an independent review of that decision. Whether or not a record falls within the scope of section 52 is not necessarily plain on the face of the request; that determination is always “record specific and fact specific” [Order M-1107].

I find support for this view in the decision of the Court of Appeal for Ontario in Ontario (Minister of Health) v. Big Canoe, [1995] O.J. No. 1277. In that case, the institution had received a request under the Act's provincial counterpart, the Freedom of Information and Protection of Privacy Act (the provincial Act) for records the institution claimed were outside the scope of the statute by virtue of the exclusion at section 65(2) (clinical records under the Mental Health Act). Although the institution challenged the Commissioner's jurisdiction to compel the production of those records, the court stated that:

It is common ground . . . that the Commissioner is entitled to determine, as a preliminary issue going to the Commissioner's jurisdiction to continue the inquiry, whether the records sought by the requester fall within the scope of section 65(2) of the Act.

Thus, the court accepted that the view that the Commissioner has the jurisdiction to conduct an inquiry into whether or not an institution has correctly decided that records are excluded from the scope of the access provisions of the Act.

To conclude, the appellant in this case has fulfilled the requirements for initiating an access request under the Act.

### **DID THE POLICE HAVE A DUTY TO COMPLY WITH THE PROCEDURAL REQUIREMENTS IN PART I OF THE ACT?**

Section 37(2) of the Act states that the access procedures set out in sections 4(2), 17(1.1), 17(2), 18, 19, 20, 20.1, 21, 22 and 23 (all contained in Part I) apply with necessary modifications to a request for one's own personal information made under section 36(1). Because I found above that the appellant made an access request under the Act, it follows that the Police have a duty to comply with the procedural requirements set out in Part I of the Act, regardless of their position that the section 52 exclusion applies.

This obligation is reflected in Management Board of Cabinet's Freedom of Information and Protection of Individual Privacy Manual (Toronto: Queen's Printer for Ontario, 1998), which states (at Chapter 3) the following with respect to exclusionary provisions of the Act:

Certain categories of records are outside the application of [the Act]. Access to these records is determined by considerations such as access provisions in other Acts. In order to make a decision on whether an exclusionary provision applies, an institution must first determine that the records in question meet criteria provided in the relevant legislation or developed by the [Information and Privacy Commissioner]. **Even if an institution makes a determination that a record is excluded from [the Act], it must issue a decision letter to that effect since the decision is still subject to appeal to the IPC.** [emphasis added]

Given the fact that the appellant made his request some two months ago, I am ordering the Police to provide the requester with a decision in response to his request in accordance with Part I of the Act within seven days of the date of this order, without recourse to the time extension provision in section 20 of the Act.

**ORDER:**

1. I order the Police to provide the appellant with a decision in accordance with Part I of the Act on or before **October 27, 1998**.
2. In order to verify compliance with the provisions of this order, I reserve the right to require the Police to provide me with a copy of the decision provided to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
David Goodis  
Senior Adjudicator

\_\_\_\_\_  
October 20, 1998