



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

ORDER MO-1202

Appeal MA-980259-1

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 appellant submitted a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Toronto Police Services Board (the Police). The request was for access to all records concerning the appellant, including records related to an assault charge and investigation which took place in January of 1998.

The Police granted partial access to the records identified as responsive to the request, claiming the application of the exemptions found in sections 9(1)(d) (relations with other governments) and 38(b) (invasion of privacy). The Police informed the requester that some information was withheld because it was not responsive to the request and that one responsive record had not yet been created. The Police also advised the appellant that some of the information he had requested was not within their custody or control and directed the appellant to other government sources where that information might be located.

The Police subsequently located additional responsive records and denied access to them based on the exemptions already claimed.

The appellant appealed the decision of the Police to deny access to the records, and indicated that it is his belief that additional responsive records exist. Specifically, the appellant believes that a micro-cassette recording made by an investigating officer and other records should exist.

During mediation of the appeal, the appellant obtained written consents to disclosure of the personal information of three individuals named in the records. The Police disclosed this information to the appellant. The appellant then narrowed the scope of the records at issue to the information which was withheld on Record 60 of the records (Toronto Police Confidential Crown Envelope).

The only issues remaining in this appeal are the application of section 9(1)(d) to Record 60 and whether additional records responsive to the request exist. I sent a Notice of Inquiry to the Police and the appellant. As it appears that Record 60 may also contain the personal information of the appellant, section 38(a) (discretion to refuse appellant's own information) was included as an issue in this notice. Representations were received from both parties.

RECORDS:

Record 60 is the Toronto Police Confidential Crown Envelope prepared for the assault charge laid against the appellant. One entry on the envelope, consisting of three lines of information and a date, has been severed and withheld.

DISCUSSION:

PERSONAL 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 Record 60, and I find that it contains information about the appellant and, therefore, qualifies as his personal information.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the institution has the discretion to deny access to an individual's own personal information in instances where the exemptions in sections 6, 7, 8, **9**, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

RELATIONS WITH OTHER GOVERNMENTS

As I indicated above, the Police have claimed section 9 to withhold access to part of Record 60. This section provides, in part:

A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

...

(b) the Government of Ontario or the government of a province or territory in Canada;

...

(d) an agency of a government referred to in clause (a), (b) or (c);

...

In order to deny access to a record under section 9(1), the Police must demonstrate that the disclosure of the record could reasonably be expected to reveal information which the Police received from one of the governments, agencies or organizations listed in the section **and** that this information was received by the Police in confidence.

The Police indicate that the information on Record 60 was recorded on behalf of a Crown Attorney with the Ontario Ministry of the Attorney General. The Police take the position that there exists an expectation of confidentiality with respect to the exchange of comments, questions and/or instructions between the Crown Attorney and the Police during the prosecution of a matter. The Police indicate that the Ministry of the Attorney General was contacted during the mediation of this appeal. The Police submit that the Ministry did not consent to the disclosure of the information based on the confidential nature of the record and the expectation that the communication would remain private.

In Volume II of their report entitled Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy/1980 (at page 306-7), the members of the Williams Commission discussed the need for an exemption for information received in confidence from other governments in the provincial access to information scheme:

... It is our view that an Ontario freedom of information law should expressly exempt from access material or information obtained on this basis from another government. Failure to do so might result in the unwillingness of other governments to supply information that would be of assistance to the government of Ontario in the conduct of public affairs. An illustration may be useful. It is possible to conceive of a situation in which environmental studies (conducted by a neighbouring province) would be of significant interest to the government of Ontario. If the government of the neighbouring province had, for reasons of its own, determined that it would not release the information to the public, it might be unwilling to share this information with the Ontario government unless it could be assured that access to the document could not be secured under the provisions of Ontario's freedom of information law. A study of this kind would not be protected under any of the other exemptions ... and accordingly, could only be protected on the basis of an exemption permitting the government of Ontario to honour such understandings of confidentiality. ...

I have reviewed the information to determine whether, in the hands of the Ministry of the Attorney General, any of the exemptions in the provincial Freedom of Information and Protection of Privacy Act would apply.

I am satisfied that the information was prepared or obtained for the dominant purpose of existing or reasonably contemplated litigation. I am also satisfied that it was prepared or obtained with an intention that it be confidential in the course of the litigation. In my view, the information would fall within section 19 of the provincial Freedom of Information and Protection of Privacy Act.

Accordingly, I find that the requirements for section 9(1) have been met and the severed information on Record 60 is exempt under section 38(a).

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the Police indicate that further records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge their obligations under section 17 of the Act, the Police must provide me with sufficient evidence to show that they have made a reasonable effort to identify and locate records responsive to the request.

The Police submit that when the appellant's access request was received, the Police chose to contact the appellant to seek further information in order to identify records responsive to his broadly worded request. The Police advised the appellant that some of the information he had requested was not within their custody or control and directed the appellant to other government sources where that information might be located.

The Police also asked the requester about the “any and all records” portion of the request in order to determine what further records the requester was seeking to access.

The Police indicate that they advised the appellant that they do not have a computer system which coordinates all information about a named individual. Records may be contained on various electronic databases or in paper form only, depending on the nature of the records and their location. The Police further explained to the appellant that even though he may not know the formal name or identification of other records, providing more information about the type of records he believes exist would assist them in identifying other responsive records. The Police advised the appellant that without further clarification of the request, the Police would check occurrence reports, criminal records, the Crown Brief and memorandum books for responsive records. The Police submit that the appellant did not provide further explanation of the requested records during the processing of the request or during mediation of the appeal, other than to indicate that it was his belief that a micro-cassette tape recording should exist.

With respect to the micro-cassette tape recording, the Police indicate that they contacted the officer in charge of the investigation concerning the appellant. The officer conducted two separate searches of the files for a micro-cassette or a regular sized audio cassette recording, but no such tape was located. The officer also advised that although regular sized audio cassette recording equipment is available for use in the division, it is unlikely that a uniformed officer while in the field would use such equipment. As to the use of a micro-cassette recorder, the office advised that he was aware of only one such piece of equipment in the division, and that it belonged to the Unit Commander. It would not normally be accessible nor used by officers in the field.

The Police also contacted both arresting officers, who advised that they did not use a micro-cassette tape recording during the appellant’s arrest. Both officers advised that it is not their practice to use micro-cassette recording equipment, nor do they personally own micro-cassette recording equipment. One of the arresting officers suggested that perhaps his mitre, a hand-held radio used to contact the Communications Bureau, could have been mistaken for a micro-cassette recorder, as both items are relatively the same size and colour, and both involve verbal communication.

I am satisfied that the search for records which are responsive to the request by the Police was reasonable in the circumstances.

ORDER:

1. I uphold the decision of the Police not to disclose the severed information on Record 60.
2. I find that the search for records responsive to the appellant’s request by the Police was reasonable.

Original signed by: _____
Holly Big Canoe
Adjudicator

_____ April 7, 1999