



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

ORDER MO-1219

Appeal MA-980269-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The appellant is the owner of a business at a specific location. On September 8, 1997, a fire occurred at this location. She subsequently made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Toronto Police Services Board (the Police) for access to all records respecting this fire. In particular, the appellant is seeking all documents, police officers' notebooks, including those produced by three named police officers, statements, photographs, reports, tapes, videos and any other material and/or thing pertaining to the fire.

The Police located responsive records and denied access to them in full on the basis of the following sections of the Act:

- law enforcement - section 8;
- relations with other governments - section 9;
- invasion of privacy - sections 14(1) and 38(b); and
- discretion to refuse requester's own information - section 38(a).

In their decision, the Police advised the appellant that the investigation into this matter was still open and ongoing. The Police also indicated to the appellant that portions of the police officers' memorandum books were not responsive to her request as they pertain to other matters which have occurred during their tour of duty.

The appellant appealed the decision of the Police to deny access to the requested records on the basis that the fire occurred over one year ago and she is not the subject of any investigation or charges by the police. The appellant takes the position that this matter is not ongoing. She also indicates that she requires the information for the purpose of a civil proceeding. In this regard, the appellant has raised the possible application of section 14(2)(d).

I sent a Notice of Inquiry to the Police and the appellant. Representations were received from the Police.

RECORDS:

The records consist of occurrence reports, police officers' notes, handwritten notes, C.P.I.C. and C.O.P.S. printouts, search warrant documents, other internal documents and a witness statement videotape. The Police claim that sections 8, 14 and 38 apply to all of the records and that section 9(1)(d) applies to pages 105, 121-124, 126, 133 and 149-161. As I indicated above, portions of the police officers' notebooks have been withheld as they are not responsive to the request.

PRELIMINARY MATTER:

NON-RESPONSIVE RECORDS

The Police indicate that a police officer carries his or her notebook at all times while on duty, and maintains a constant up to date record of the events in which he or she is involved. The Police state that since police officers record all significant events which occur during their tour of duty, there are other areas of the

officer's memorandum books which are neither relevant nor responsive to the request. In particular, the Police submit that the withheld portions of the police officer's notes which are marked as non-responsive contain information which is completely unrelated to the matter involving the appellant.

I have reviewed these portions of the records and I agree with the Police. The non-responsive portions of the records document other events involving the three police officers which occurred during their tour of duty and do not pertain, in any way, to the officers' investigation into the fire at the appellant's place of business. Therefore, I find that these portions of the records were properly withheld as being non-responsive to the request.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The records pertain to an investigation by the police into the circumstances of the fire which occurred at the appellant's place of business. As such, they contain observations made by the police officers in attendance, notes taken from interviews with witnesses and other individuals and a record of the investigation which was conducted by the police in relation to this event. Some of the records only pertain to the fire itself and do not contain any personal information. Some of the records contain information which was provided by witnesses and other individuals regarding their observations and/or actions. This information qualifies as the personal information of these identifiable individuals. Some of these records also contain information pertaining to the appellant and they qualify as her personal information.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 38(a) of the Act, the Police have the discretion to deny access to an individual's own personal information in instances where certain exemptions, including sections 8 and 9, would apply to the disclosure of that personal information. I will consider the application of section 38(a) to those records which contain the appellant's personal information.

The Police claim that sections 8(1)(a) and (b) apply to all of the records, that section 8(1)(l) applies to portions of pages 13-17, 19 and 57 and that section 9(1)(d) applies to pages 105, 121-124, 126, 133 and 149-161.

LAW ENFORCEMENT

Sections 8(1)(a) and (b) read as follows:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The purpose of these exemptions is to provide the Police with discretion to deny access to records in circumstances where disclosure could reasonably be expected to interfere with an ongoing law enforcement matter or investigation. The Police bear the onus of providing evidence to substantiate that a law enforcement matter or investigation is ongoing, and that disclosure of the records could reasonably be expected to interfere with the matter or investigation.

Definition of law enforcement

For a record to qualify for exemption under either of these sections, the matter or investigation with which the disclosure could interfere must first satisfy the definition of “law enforcement”, which is a term found in section 2(1) of the Act.

This section defines “law enforcement” to mean (a) policing, (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and (c) the conduct of proceedings referred to in clause (b).

I am satisfied that, in investigating the circumstances of the fire at the appellant’s business premises, the Police were engaged in “law enforcement” activities, as defined in section 2(1) of the Act.

Interference with an ongoing law enforcement matter or investigation

The Police take issue with the appellant’s assertion that the fire occurred over one year ago and she is not the subject of any investigation or charges by the police. In point of fact, the fire occurred almost two years ago.

With respect to the first point raised by the appellant, the Police submit that the time span following an incident is not preclusive of a crime being solved, nor does it lessen the impact of the dissemination of information pertaining to the investigation. The Police state that this is an active and ongoing investigation into an arson. The Police attached copies of two Crime-Stoppers articles which were printed in the Toronto Star and the Toronto Sun in October and November 1998, respectively. The Police confirm that the officer in charge of the investigation was queried at the time of the request as to the status of this matter and advised that this matter was still under current and active investigation.

With respect to the appellant's second point, the Police submit that the release of information to any individual, whether or not the person is a suspect in an investigation, may seriously compromise the outcome of that investigation.

The Police continue that it is the compilation and close examination of the aggregation of this information which often leads to the solution of an investigation. The Police indicate that it is not possible, prior to the conclusion of an investigation, to determine the importance of any piece of information. Therefore, the Police submit that the premature disclosure of any of the information in the records could reasonably be expected to have a detrimental effect on the investigation, the ultimate laying of charges and the eventual prosecution of the accused.

In this regard, the Police explain that should a suspect or involved party to the investigation become aware of the extent of information already in the possession of the police, they could flee the jurisdiction to escape arrest and prosecution. Further, knowledge of the information in the records could tip an involved party as to the direction of the investigation and provide an opportunity to tamper with evidence which has not yet been uncovered. The Police point out, as noted by former Commissioner Tom Wright in Order P-178, that disclosure of the records to a party with an interest in the investigation must be viewed as disclosure to the public generally.

Findings

I am not completely persuaded by the arguments presented by the Police that time is not a factor in determining whether a matter or an investigation is "ongoing" or "active". In my view, the unique circumstances of each case will be determinative, and the longer a time span following the last activity relating to the matter is a factor which would carry considerable weight in the final analysis. That being said, however, I am satisfied that this investigation is current and ongoing. In my view, the Police have provided sufficient evidence to demonstrate that the matter not only remains open, but that they are actively pursuing this matter and have gone as far as seeking information from the public to assist in their investigation.

The records clearly describe the nature, extent and direction of the investigation which has been conducted by the investigating officers to date. I am satisfied that disclosure of any of these records could reasonably be expected to interfere with the continuation of this investigation and eventual outcome of this matter.

Finally, I agree with the Police that the issue of whether disclosure of the records could reasonably be expected to interfere with an investigation does not turn on whether a requester is a "suspect" or not, or whether the requester has an interest in the investigation. In my view, the interest of the requester in the matter and her stated need for the records are appropriate factors to take into consideration in the exercise of discretion of the Police to withhold or release the records in the face of the exemption. I have reviewed the exercise of discretion of the Police in deciding to withhold the records and note that they have taken into

consideration the competing interests in this matter. I find that their exercise of discretion is proper and there is, therefore, no reason to interfere with it.

In conclusion, I find that disclosure of the records at issue in this appeal could reasonably be expected to interfere with a current and ongoing law enforcement matter and/or investigation and they are properly exempt under sections 8(1)(a) and (b). I also find that the records which contain the appellant's personal information are also exempt under section 38(a).

Because of these findings, it is not necessary for me to consider the application of sections 8(1)(l), 14(1) or 38(b).

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ June 24, 1999