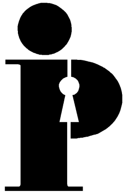

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1329

Appeal MA-000059-1

Toronto Police Services Board

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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 the original notebooks of six named police detectives for certain specified dates. The Police located the responsive records and denied access to them, in their entirety, claiming the application of the following exemptions contained in the Act:

- law enforcement - sections 8(1)(a) and (c)
- invasion of privacy - sections 14(1) and 38(b)
- discretion to refuse requester's own information - section 38(a)

The Police also advised the appellant that, pursuant to section 23 of the Act, they were not required to provide him with the opportunity to examine the requested records as it was not reasonably practicable for it to do so. The appellant was tried and convicted of a serious sexual assault with a weapon. His appeal of that conviction is set to be heard by the Ontario Court of Appeal in September of this year. The appellant is free on bail pending his appeal hearing.

The appellant appealed the decision of the Police and maintained that he ought to be afforded the opportunity to examine the original copies of the requested records. He takes the position that the records which were disclosed to him through his former counsel pursuant to section 603(a) of the Criminal Code of Canada indicate that they have been tampered with and have been "corrupted".

During the mediation of the appeal, the appellant agreed to narrow the scope of his appeal to include only certain enumerated pages of the notebooks of two named detectives. The appellant confirmed that he is not seeking access to the police "10-codes" which may be included in the records. As a result, the exemption provided by section 8(1)(c) is no longer applicable to the present appeal. The appellant also indicated that he is seeking access to the original versions of the 35 pages which comprise "Package A". He is seeking access to photocopies of the other 17 pages of records, designated as "Package B" in the Report of the Mediator. The pages in both packages are not numbered sequentially as some of the numbered pages contain information which is not responsive to the appellant's request.

Initially, I sought the representations of the Police on the application of the exemptions which they had claimed. Following the receipt of their submissions, I decided to seek the representations of the appellant. I also decided that portions of the representations of the Police would not be provided to the appellant, due to confidentiality concerns. I received the appellant's representations, which were then shared, in their entirety, with the Police, who were invited to, and did, make reply representations.

With his submissions, the appellant attached complete copies of a number of the records which are at issue in this appeal. Specifically, the appellant included unsevered versions of Records 2, 3, 4, 5, 7, 8, 9, 10, 12, 16, 17, 18, 21, 31, 32, 37 and 66. These records had been disclosed to him, or his former counsel, by the Crown Attorney in accordance with the Crown's disclosure obligations during the appellant's trial and subsequent appeal to the Ontario Court of Appeal. He also indicates that he is not seeking access to any information which may be contained in the records which relates to any of the witnesses who were called to testify against him or to the personal information of the officers in the notebooks, such as their hours of work or days off.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

"Personal information" is defined in section 2(1) of the Act. Only information which fits the definition can qualify for exemption under section 14.

> It is clear from the wording of the statute that the list of examples of personal information under subsection 2(1) is not exhaustive. This leaves it open for [the person who will be making the decision in this appeal] to decide whether or not information contained in the records which does not fall under subsections (a) to (h) ... constitutes personal information.
>
> [Order 11]

Package "A" Records

Based on my review of the records which comprise Package "A", I find that Records 2-5, 7-10, 12, 16, 57-63, 70, 71, 72, 73, 74, 75 and 80 contain the personal information of individuals other than the appellant. Each of these individuals were contacted by and provided information to the Police during the course of their investigation of the crime for which the appellant was ultimately convicted. The personal information includes the names, addresses, telephone numbers (section 2(1)(d)) as well as the names and other personal information of these individuals (section 2(1)(h)).

In addition, Records 17, 18, 21, 37 and 65-69 contain the personal information of the appellant, as well as other identifiable individuals. This information includes the names, telephone numbers and addresses of these individuals (section 2(1)(d)), along with their names and other personal information (section 2(1)(h)).

Finally, Records 31 and 32 contain only the personal information of the appellant.

Package "B" Records

Based on my review of the records which comprise Package "B", I find that only Records 54-56 are concerned with the investigation which led to the appellant's arrest. The remaining pages, identified as Records 40-53, relate to other criminal investigations being undertaken by the Police at that time. These other investigations did not involve the appellant in any way.

Records 54-56 contain the personal information of the individuals who were interviewed and provided statements to the Police during their investigation of the crime involving the appellant, as well as notes taken by the officer relating to other investigations underway at that time. It includes their names, addresses,

telephone numbers (section 2(1)(d)) and their names, along with other personal information (section 2(1)(h)). In addition, Record 56 also contains the personal information of the appellant, such as his name and the fact that he is a suspect in the investigation is stated therein (section 2(1)(h)).

INVASION OF PRIVACY

The Position of the Police

The Police have relied on the "presumed unjustified invasion of personal privacy" in sections 14(3)(b) and (d) of the Act. 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;

With respect to the application of section 14(3)(b), the Police submit that:

> Clearly, disclosure of the victim's relatives, her address, telephone number, and other personal information exempted from the documents received by the appellant through disclosure, would constitute an unjustified invasion of personal privacy. The memorandum books were created for the purpose of the police investigation into a criminal act, and the pursuant apprehension, trial and conviction of the appellant. Unquestionably, section 14(3)(b) of the Act applies to these pages of the record.
>
> The memorandum book notes pertaining to the accused were created by the police and compiled as part of the information forwarded to the Crown Attorney for the purpose of the prosecution of the appellant based on the complaint of the affected individual and subsequent investigation into that complaint by the police. These notes were therefore compiled and identifiable as part of a law enforcement investigation and, in accordance with section 14(3)(b) of the Act, disclosure is presumed to constitute an unjustified invasion of personal privacy. Given the nature of the contact between the affected individual and the appellant, disclosure of these pages would clearly constitute an unjustified invasion of personal privacy in accordance with section 14(1)(f).

With respect to section 14(3)(d), the Police argue that:

> Throughout these notes, the times when officers reported for duty, reported off duty and worked overtime are noted. Moreover, the occupations of other parties, some of whom

> are uninvolved in the incident involving the requester, are noted (for example the occupation of a suspect noted on memorandum book page no. 59 of Package “B”). The former information is personal, belong to the individual officers to whom it applies and the latter information in no way relates to the incident or the requester.

I note that the appellant indicates that he is not seeking access to the personal information relating to the officers involved in the investigation. As a result, I find that this information has been removed from the scope of this appeal.

The Position of the Appellant

The appellant maintains that disclosure of the records is necessary to ensure that he is able to fully answer the charges against him at the pending appeal hearing (section 14(2)(d)). The appellant submits that:

> There is no information written in the pages at issue that was withheld when the disclosure was made. According to the copies that were recently disclosed to me, nothing has been deleted from these pages. **To claim an unjustified personal privacy and safety concerns that could be resulted from having access to the original notebooks is absolutely baseless, since there is no new information that is related to any individual that I could possibly learn from having access to the original pages whose undeleted copies have already been disclosed to me.** Those records have been falsified to secure my conviction. Since a crime against the administration of justice has been committed by one or more public officials, there is a compelling public interest in favour of disclosure of these notebooks.
>
> . . .
>
> The notebooks are part of the evidence and the judicial proceedings against me are still before the Courts, therefore section 14(1)(d) is applicable since section 603(a) of the Criminal Code expressly authorizes the disclosure.
>
> . . .
>
> The purpose of a criminal prosecution is not to obtain a conviction, but it is to lay before a jury what the crown considers to be credible evidence relevant to what is alleged to be a crime. **If what the crown considered to be credible evidence, in this case, is being hidden from the appellant, the public must be concerned.** [emphasis added by the appellant]

Analysis

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

Under section 38(b) of the Act, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an

unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.
Section 38(b) of the Act introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

Where, however, a requester seeks personal information of another individual, section 14(1) of the Act prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception which could apply in the present circumstances is section 14(1)(f), which reads:

> 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.

In determining whether the exemptions in sections 14(1) or 38(b) apply, sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution 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. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the Act or if a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [See Order PO-1764]

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

Based on the material provided to me, I am satisfied that the information contained in all of the undisclosed records was compiled and is identifiable as part of a police investigation into a possible violation of law. The police officers' notes which comprise the records in this appeal were prepared in the course of their investigation of a serious sexual assault which led to the conviction of the appellant. Accordingly, I find that

the disclosure of all of the remaining records at issue would constitute a presumed unjustified invasion of the personal privacy of the individuals named therein within the meaning of section 14(3)(b).
The appellant maintains that disclosure of the records is necessary in order for him to properly prepare for his appeal, raising the factor listed in section 14(2)(d). This section reads:

> 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,
>
>> the personal information is relevant to a fair determination of rights affecting the person who made the request;

However, as noted above, no factors or combination of considerations under section 14(2) can overcome the operation of a presumption under section 14(3) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767]. As a result, even if I were to find that section 14(2)(d) applied, disclosure of the withheld information would still be considered an unjustified invasion of other individuals' privacy.

The appellant has also referred to the operation of the exception to the prohibition against disclosure of personal information in section 14(1)(c) (personal information collected and maintained specifically for the purpose of creating a record available to the general public). In the present appeal, the records at issue were not collected or maintained by the Police **specifically** for the purpose of creating a publicly available record. The disclosure of some of the records to him through his counsel was made in order to comply with the requirements of section 603(a) of the Criminal Code. In my view, it cannot be said that the records were collected in order to create a record which would be available to the general public, as contemplated by section 14(1)(c).

Based on my finding above as to the application of section 14(3)(b) of the Act to the records, I find that the records which contain only the personal information of individuals other than the appellant, Records 2-5, 7-10, 12, 16, 57-63, 70, 71, 72, 73, 74, 75 and 80 from Package "A" and Records 40-53, 54 and 55 from Package "B" are exempt from disclosure under section 14(1). Those records which contain the personal information of the appellant, along with other identifiable individuals, Records 17, 18, 21, 31, 32, 37 and 65-69 from Package "A" and Record 56 from Package "B" are exempt from disclosure under section 38(b). The Police have provided me with submissions as to the manner in which they exercised their discretion not to disclose the records which are exempt under section 38(b) to the appellant. I have reviewed these representations and am satisfied that the Police properly exercised discretion under section 38(b), by taking into account all of the relevant circumstances of this appeal.

Because of the manner in which I have addressed the application of the invasion of privacy exemptions to the records, it is not necessary for me to consider whether they are also exempt under sections 8(1)(a) or 38(a).

Absurd Result

As noted above, the appellant has provided me with unsevered copies of Records 2, 3, 4, 5, 7, 8, 9, 10, 12, 16, 17, 18, 21, 31, 32, 37 and 66 from Package "A" which were made available to him or his trial counsel through the disclosure process in his trial and subsequent appeal of a conviction on a charge of sexual assault under the Criminal Code.
The appellant submits that because he is in possession of a copy of the record, its contents are known to him, and he would not be obtaining any new information about the affected person or any other individualby viewing the original record.

In Order PO-1679, Assistant Commissioner Tom Mitchinson reviewed several decisions of this office regarding the disclosure of information to a requester when the requester is already in possession of a photocopy of the requested record. He held that:

> Several previous orders of this Office have considered whether information that an appellant was previously aware of, or which was provided to or received from an appellant by an institution, should be subject to a presumption against non-disclosure (eg. Orders M-444, M-613, M-1077 and P-1263). These orders found that non-disclosure of personal information which was originally provided to an institution by an appellant would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. They determined that applying the presumption to deny access in these circumstances would, according to the rules of statutory interpretation, lead to an "absurd result". This reasoning was found to be equally applicable, in certain circumstances, to information which was provided by others, or was obtained by an institution in the presence of the appellant (eg. Order P-1414).
>
> In my view, denying the appellant the right to view the original lottery ticket which he co-owns with the affected person, would similarly lead to an "absurd result" in the present circumstances. The appellant has a photocopy of the record, and is clearly aware of its contents. Any personal information of the affected party that is contained in the record is known to the appellant, and any information concerning the affected person's "finances", "income" or "financial activities" associated with her share of the ownership of the ticket have been communicated to the appellant, and to the public, through the Court process that determined the ownership issue.
>
> For these reasons, I find that section 21(3)(f) is not applicable in the circumstances of this appeal.

Adopting the reasoning of the Assistant Commissioner in Order PO-1679, I find that denying the appellant in this case access to those records which he already possesses, in their entirety, would lead to an absurd result. Any personal information contained in those records is already within the appellant's knowledge as a result of the disclosure made to him and his counsel at trial and through the appeal process. Accordingly, I find that sections 14(1)(f) and 38(b) have no application to Records 2, 3, 4, 5, 7, 8, 9, 10, 12, 16, 17, 18, 21, 31, 32, 37 and 66 from Package "A" as their disclosure would not result in an unjustified invasion of personal privacy.

PUBLIC INTEREST IN DISCLOSURE

Section 16 may operate to permit disclosure of a record even if a provision in section 14 would otherwise prohibit such disclosure. Section 16 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.

In Order P-984, former Adjudicator Holly Big Canoe discussed the meaning of section 16, as follows:

> In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

There is nothing in the material before me demonstrating a compelling **public** interest which outweighs the protection of other individuals' personal privacy. The appellant's reasons for seeking the information at issue are essentially private, involving his defence of the criminal proceedings against him.

METHOD OF ACCESS

In Order PO-1679, Assistant Commissioner Mitchinson evaluated the merits of an appellant's request that he be granted access to the original copies of the records at issue, pursuant to section 30(2) of the provincial Act, which is the equivalent of section 23(2) of the Act.

Section 23(2) of the Act states:

> If a person requests the opportunity to examine a record or a part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

Section 2 of O. Reg. 823 addresses the question of the duty of the head to maintain the security of a record where access to the original is granted. The section provides, in part:

> (1) A head who provides access to an original record must ensure the security of the record.
>
> (2) A head may require that a person who is granted access to an original record examine it at premises operated by the institution.

Assistant Commissioner Mitchinson went on to state that:

> Section 30(2) [the equivalent to section 23(2) in the Act] is a mandatory provision, subject only to the requirement of reasonable practicability. In other words, unless an institution has determined that it is not reasonably practicable to give a requester the opportunity to examine an original record, the head **must** do so, upon request. In these circumstances, the regulations require the head to ensure security of the record, and to consider whether the examination should take place at premises operated by the institution. If a requester disputes the head's determination on the question of reasonable practicability, that decision can be appealed to the Commissioner, and the onus is on the institution to justify its determination.

The Police rely on the findings of former Commissioner Tom Wright in his decision in Order P-233. In that decision, former Commissioner Wright determined that "the head must establish why it would not be reasonably practicable to comply with the preferred method of access." In support of its position that granting access to the original documents is not reasonably practicable, the Police submit that granting access as requested to the original document would:

(a) permit access to information unrelated to the appellant;

(b) permit access to certain personal information of the appellant's victim;

(c) contravert the legislated process of Crown disclosure in court disclosure, and

(d) endanger the safety and security of vital and irreplaceable institutional documents.

The submissions of the Police on this issue focus on the impracticality of disclosing the records to the appellant without the risk of other information which is unrelated to the request or properly exempt also being disclosed to him. I note that the appellant is seeking access only to the original copies of those records which have been disclosed to him in their entirety. In my view, there is no risk of disclosing exempt or unrelated information if the appellant is only granted access to the original versions of Records 2, 3, 4, 5, 7, 8, 9, 10, 12, 16, 17, 18, 21, 31, 32, 37 and 66 from Package "A" and not to the other records in Packages "A" which I have found to be exempt under sections 14(1) and 38(b). I note that the appellant is no longer seeking access to the original records which comprise the remaining records from Package "A" or those described as Package "B".

The Police have not indicated where the original copies of Records 2, 3, 4, 5, 7, 8, 9, 10, 12, 16, 17, 18, 21, 31, 32, 37 and 66 from Package "A" are presently located. As the appellant's proceeding before the Ontario Court of Appeal is scheduled to commence in September of this year, I find that it is reasonable to assume that they are in the custody of the Crown Attorney conducting the appeal. The appellant provided me with correspondence between himself and the Crown Attorney in which the appellant requested that he be given the opportunity to personally inspect the records. The Crown Attorney responded by advising the appellant that his appeal counsel examined the original versions of the records and was provided with copies of them, which were then reproduced for the appellant. In my view, the Police have not provided me with sufficient evidence to substantiate its position that the disclosure of the original copies of Records 2, 3, 4, 5,

7, 8, 9, 10, 12, 16, 17, 18, 21, 31, 32, 37 and 66 from Package "A" would subvert or contravene the legislative process of Crown disclosure. On the contrary, the disclosure mechanisms under the Act and the Criminal Code operate concurrently and are not intended to be mutually exclusive.

Finally, in my view, because of the discrete nature of Records 2, 3, 4, 5, 7, 8, 9, 10, 12, 16, 17, 18, 21, 31, 32, 37 and 66 from Package "A", they may be easily separated from the other records which I have found to be exempt. The Police may, and are indeed required, by section 2 of Regulation 823, to take whatever steps they feel are necessary to safeguard the security of these records while they are being examined by the appellant. This includes a requirement that the appellant attend at the offices of the Police and examine the records in the presence of Police staff. By taking these steps, I am satisfied that the Police will be able to address their security concerns while granting the appellant access to the original documents sought.

ORDER:

1. I order the Police to provide the appellant with access to the original copies of Records 2, 3, 4, 5, 7, 8, 9, 10, 12, 16, 17, 18, 21, 31, 32, 37 and 66 from Package "A" through on-site examination of the record by **September 5, 2000** but not earlier than **August 31, 2000** at a time and place mutually agreed upon by the parties.

2. I order the Police to contact the appellant to make the necessary arrangements to comply with Provision 1.

3. I order the parties to advise this office once the above provisions are complete.

4. I uphold the decision of the Police to deny access to the remaining records in Package "A" and all of the records in Package "B".

Original signed by: August 1, 2000
Donald Hale
Adjudicator