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

ORDER MO-1310

Appeal MA-990339-1

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). The request, made by legal counsel on behalf of the victim of an assault, was for any occurrence reports or witness statements relating to a police investigation of the assault. For ease of reference, I will refer to the victim of the assault, rather than his counsel, as the appellant. Because the responsive record appeared to contain the personal information of other identifiable individuals (the affected persons), the Police were required, under section 21(1), to notify the affected persons in order to seek their consent to the disclosure of the information contained in the record to the appellant.

Following receipt of the submissions of the affected persons, the Police granted the appellant access to portions of the record. The Police denied access to the remainder of the record, based on the application of the mandatory exemption contained in section 14(1) of the Act (invasion of privacy), with reference to the presumption in section 14(3)(b). The Police also advised the appellant that portions of two pages of the record contained information which was not responsive to the request. In addition, the Police advised that they were unable to locate the notebook containing entries made by one of the investigating police officers.

The appellant appealed the Police decision to deny access to the severed portions of the record which it located and the non-existence of the second officer's notes, arguing that the notebook is referred to in one of the records which was disclosed to him and must exist, even if it is no longer physically in the second investigating officer's station.

During the mediation of the appeal, the appellant agreed that he was no longer seeking access to the information which was identified as "non-responsive" in Pages 6 and 10 of the officer's notebook. Because the record at issue appeared to contain the personal information of the appellant, the Mediator assigned by this office made reference in her Report of Mediator to the possible application of section 38(b) to the information contained in the record.

I provided a Notice of Inquiry to the Police and the affected persons initially. I received representations from the Police. One of the Notices which was sent to an affected person was returned as undeliverable. I then provided the appellant with a modified version of the earlier Notice of Inquiry which was sent to the Police and the affected persons, along with the non-confidential representations of the Police. I did not receive any representations from the appellant.

The record at issue consists of the undisclosed portions of one of the investigating officer's notebooks, specifically the undisclosed portions of Pages 6, 8 and 9 and all of Page 7.

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 part, in section 2(1) of the Act as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual;
>
> (d) the address, telephone number, fingerprints or blood type of the individual;
>
> (h) the individual's name if 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;

Only information which fits the definition can qualify for exemption under sections 14 or 38(b). As noted above, the undisclosed portions of the record relate to the investigation of an assault against the appellant. The notes which comprise the record include statements taken from witnesses to the assault (the affected persons) and indicate their names, addresses, telephone numbers, dates of birth and information relating to their employment. I find that this information, contained in Pages 6, 7, 8 and 9 of the record, qualifies as their personal information as defined by sections 2(1)(d) and (h) of the Act.

In addition, portions of the record also relate to the appellant, describing his involvement in the assault and his race. I find that this information also qualifies as the personal information of the appellant as defined in sections 2(1)(a) and (h) of the Act.

Pages 7, 8 and 9 of the record also contain descriptions of the assault and the alleged perpetrators which were given to the Police by the affected persons. The individuals who committed the assault are not identified by name and, given the very general nature of the descriptions provided, I find that they are not identifiable. As the term "personal information" is defined as "recorded information about an identifiable individual", I find that the descriptions of the perpetrators which are contained in the record cannot qualify as the personal information of these individuals.

To summarize, I find that the record contains the personal information of one or more of the affected persons and also contain the personal information of the appellant.

INVASION OF PRIVACY

Since I found above that the records contain the appellants' personal information, section 36(1) applies. 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(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.

Sections 14(2) and (3) 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 the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) [Order P-1456, citing John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

In this case, section 38(b), together with the presumption in section 14(3)(b) could apply. These sections read:

> **38.** A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;
>
> **14.** (3) 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;

In Order MO-1192, Adjudicator Laurel Cropley stated, in the context of a request for police records concerning an alleged assault:

> The Police indicate that the personal information pertaining to the suspect which is contained in the records was compiled as part of a law enforcement investigation into an alleged assault at a high school. The Police state further that the occurrence report consists of the facts in the case and the manner in which the officer concluded his investigation. Therefore, the Police submit that, since the personal information pertaining to individuals other than the appellant relates to records compiled as part of an investigation into an assault, the disclosure of the personal information is presumed to be an unjustified invasion of their personal privacy.

> The appellant submits that since the Police made a judgment call not to lay charges against the suspect, they have not established the application of the presumption in section 14(3)(b).
>
> I am satisfied that the Police investigated an alleged assault on the appellant at the named high school and that the investigation was conducted with a view to determining whether criminal charges were warranted. Accordingly, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law and its disclosure would constitute a presumed unjustified invasion of personal privacy. The presumption may still apply, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225). As I indicated above, once a determination has been made that the presumption in section 14(3)(b) applies, it cannot be rebutted by factors in section 14(2). Therefore, even if I were to find that section 14(2)(d) applies in the circumstances, it would not be sufficient to rebut the presumption in section 14(3)(b). I have considered section 14(4) and find that it does not apply in the circumstances of this appeal.

In my view, the principles articulated by Adjudicator Cropley in Order MO-1192 are applicable here. It is clear from the face of the records that the information in question was compiled and is identifiable as part of an investigation into a possible violation of law, in this case provisions of the Criminal Code, regardless of the fact that no charges were laid. Therefore, the section 14(3)(b) presumption of an unjustified invasion of personal privacy applies to the withheld personal information which relates to the affected persons. As noted above, the information relating to the unidentifiable assailants does not qualify as "personal information" and cannot, therefore, be exempt from disclosure under sections 38(b) or 14(1).

Since none of the exceptions under section 14(4) applies, disclosure of those portions of the records which contain the personal information of the affected persons is presumed to be an unjustified invasion of their privacy, and this information is, therefore, exempt under section 38(b).

The Police have provided me with representations concerning the exercise of their discretion not to disclose the record to the appellant, under section 38(b). In reviewing these submissions, I find that the Police have properly exercised this discretion in favour of denying access to the appellant under section 38(b) after weighing the appellant's right of access to his own personal information against the privacy interests of the affected persons.

I have provided a highlighted copy of Pages 6, 7, 8 and 9 of the records to the Freedom of Information and Privacy Protection Co-ordinator for the Police indicating those portions of these pages which are exempt under section 38(b). The remaining, not-highlighted portions of these records are not exempt under section 38(b). As no other exemptions have been claimed for this information, and no mandatory exemptions apply, it is to be disclosed to the appellant.

REASONABLENESS OF SEARCH

In his letter of appeal, the appellant submits that the notebook entries for the second investigating officer are referred to in another record which was disclosed to him. For this reason, the appellant is of the view that the notebook containing the information transcribed by the second investigating officer should exist, in addition to those notes which were identified by the Police as being responsive to his request.

In cases where a requester provides sufficient details about the records which he or she is seeking and the institution indicates that records do not exist, it is my responsibility to insure that the institution has made a reasonable search to identify any records that are responsive to the request. The Act does not require the institution to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the institution must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request.

The Police have provided a detailed description of the efforts they have made to locate the second investigating officer's notebook. The storage area where such notebooks are normally kept was searched. The second investigating officer himself was requested to attempt to locate his notes as well. However, the Police were unable to locate the notebook as a result of these efforts. The Police acknowledge that the requested notebook should exist, but that neither the officer conducting the search nor the second investigating officer himself were able to locate it.

I am satisfied, following my review of the representations of the Police, that the searches undertaken to locate the second investigating officer's notebook were reasonable and I dismiss that part of the appeal.

ORDER:

1. I order the Police to provide the appellant with a copy of those portions of Pages 6, 7, 8 and 9 of the records which are **not** highlighted on the copy of these pages which I have provided to the Freedom of Information and Privacy Co-ordinator for the Police with a copy of this order by **July 20, 2000** but not before **July 13, 2000**.

2. I uphold the decision of the Police to deny access to the highlighted portions of Pages 6, 7, 8 and 9 of the records.

3. I find that the Police conducted a reasonable search for the notebook of the second investigating officer and I dismiss that part of the appeal.

4. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Police to provide me with a copy of the records which it provided to the appellant.

Original signed by: June 14, 2000
Donald Hale
Adjudicator