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

FINAL ORDER MO-1304-F

Appeal MA-990226-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

This is my final order in respect of the outstanding issues from Interim Orders MO-1277-I and MO-1287-I.

BACKGROUND:

The Toronto Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) from a lawyer representing an individual who was injured in an incident involving the local transit authority. The request was for a copy of the notebook entries of the two investigating police officers.

After notifying a witness identified in the records (the affected person) and receiving no response, the Police granted partial access, claiming section 14(1) of the Act as the basis for denying access to information relating to the affected person. The Police relied on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the Act in support of the section 14(1) exemption claim.

The appellant appealed this decision.

I sent a Notice of Inquiry to the Police, the appellant and the affected person. Only the Police and the appellant responded by submitting written representations. After reviewing the representations and the one-page record which remained at issue, I issued Interim Order MO-1277-I . In that order, I found that the record satisfied the requirements of section 14(3)(b) of the Act, but that the Police had improperly processed the request under Part I rather than Part II of the Act. As a consequence, the Police had failed to exercise discretion under section 38(b) of the Act, which provides the Police with discretion to balance two competing interests - the appellant's right of access to his personal information and the affected person's right to privacy. If the Police were to conclude that the balance weighs in favour of disclosure, the record could be released to the appellant, even if the Police have determined that this disclosure would represent an unjustified invasion of the affected person's privacy.

I included a provision in Interim Order MO-1277-I requiring the Police to exercise discretion under section 38(b) with respect to the record and to provide me with representations as to the factors they considered. I received representations from the Police in compliance with this provision.

After reviewing their representations I came to the conclusion that the Police had not properly exercised discretion in this instance, based on my view that the Police did not adequately take into account the competing interests of access and privacy protection, nor was it clear to me that the Police took the particular circumstances of this case into account in exercising discretion in favour of denying access. My conclusion was based on the following statements made in Interim Order M-1277-I:

- I accept the Police's submission that the nature of police institutions and the work they do are valid considerations in the exercise of discretion, but I do not accept that this places the Police in a "unique status" as it relates to the safeguarding of privacy interests of individuals. All institutions under the Act are charged with the responsibility to balance access and privacy rights under section 38(b) of the Act,

including police institutions, and the fact that the Police gather personal information as part of their law enforcement mandate is only one factor that must be taken into account in the proper exercise of discretion.

- Although the Police state that they weigh privacy and access rights in every access request file, and have done so "in light of the particular circumstances of this request", the representations provided by the Police do not establish this. Other than a brief response to my reference to section 14(2)(d) in Interim Order MO-1277-I, the Police do not discuss the appellant's right of access to his personal information, nor do the Police identify the particular privacy interests of the affected person being considered in balancing the two rights.

- Although the affected person was notified by both the Police before responding to the request and by me during this inquiry, at no point did he provide representations as to the sensitivity of his personal information contained in the record. The Police do not appear to have taken this relevant fact into account in exercising discretion.

- Although in Order M-532, former Inquiry Officer [John] Higgins expresses his view that the exercise of discretion under section 38(b) to disclose personal information of an individual other than the requester would be rare, he also states clearly in his discussion that the decision is a discretionary one that must be made by balancing the competing interests present in a particular fact situation.

Accordingly, I decided to again return this appeal to the Police to reconsider the exercise of discretion under section 38(b) of the Act and to provide me with representations as to the factors they considered while doing so. I received representations from the Police.

DISCUSSION:

With respect to their exercise of discretion, the Police state, in part:

> As stated in our previous representations, none of the information which could be considered as the personal information of the appellant could be disclosed without revealing the personal information of the [affected person]. The statement in question is told, both literally and psychologically, from the [affected person's] point of view. Although the [affected person] has chosen not to respond to the police or the IPC request for his opinion concerning release of his statement, this lack of response should not permit the arbitrary abrogation of his rights. Subsection 5(4) [of the Act] states that:
>
> > "A person who is given notice under subsection (2) **may** make representations forthwith to the head concerning why the record or part should not be disclosed."

The above is reiterated in subsection 21(2)(c), which states that the notice to an affected person shall contain:

> "a statement that the person **may**, within twenty days after the notice is given, make representations to the head as to why the record or part should not be disclosed."

The operative word in the foregoing subsections is "**may**" not "**must**". Although the IPC can compel municipal institutions to respond to it's orders and demands, the *Act* does not compel citizens to do so or, indeed, to reply to institutions. Nor, I believe, does the *Act* intend that citizens must either respond to a notice to an affected party or forfeit their privacy rights by not so doing. The lack of a response may be the result of numerous factors (ie. the person may be out of town, or have a language barrier, or not understand what is being asked, or not wish any further involvement with the incident). The lack of a response must not be taken as acquiescence to release or indifference to the violation of their privacy.

Regardless of whether a statement is inculpatory or exculpatory, the right to silence is an accepted right in common law, the Canadian Criminal Code and the Canadian Charter of Rights. Silence is neither an indication of guilt, nor an acceptance of judgement or opinion, but an enshrined right. An individual must be able to take it as a given that, in the absence of express consent to release, the right of silence will be upheld.

...

This appeal boils down to one issue: Whether the access rights of [the requester] requesting his own information prevails over the privacy rights of the [affected person]. In order to answer the foregoing, this institution explored the third party process as it relates to the record/information. As stated earlier, the IPC agrees with the institution that the information clearly falls under section 14(3)(b) and the dissemination of that information is therefore considered to be an unjustified invasion of third party privacy, and warrants the application of section 38(b).

In reaching this decision, the institution referred to the Management Board of Cabinet's Manual (dated 1990) which, under Third Party Procedure, states:

> "If the head can determine without representations from the third party that an exemption applies and the record will not be disclosed, notice to the third party is not required."

In weighing the privacy vs. access of this information, the institution also turned to previous Orders for guidance. Although Order No. P-653 deals with different institutions and disparate records, the Order does provide theoretical support for the application of section 38(b).

In essence, Order P-653 deals with the implicit expectation of confidentiality, and in that respect it was the finding of Inquiry Officer Holly Big Canoe that a determination needs to be made as to:

> "... whether the information was supplied in confidence, either explicitly or implicitly. I have received no evidence from any of the parties that there existed an explicit understanding regarding the confidentiality of the information supplied."

Similarly, an officer gathering information during the course of an investigation would not generally explicitly address the issue of the confidentiality to witnesses providing statement.

However, Inquiry Officer Holly Big Canoe goes on to state that:

> "[In a labour relations context such as this], however, it is normally the practice that where an impartial third party is performing services analogous to those of a mediator or conciliation officer, any information supplied by a party is not disclosed without the consent of the supplying party. I find that the circumstances surrounding the submission of most of the information contained in the records to be similar in nature to mediation and conciliation and that, logically, it follows that an expectation of confidentiality existed concerning the information supplied by the parties."

Likewise, when an officer is investigating an incident he too is performing a similar function to that of a mediator or conciliation officer. He/she is not in a position to determine guilt or innocence, but by obtaining information from various witnesses, the officer attempts to discern the actual events which occurred and whether the incident arose from, or entailed any, criminal culpability. The officer would be rendered incapable of making that determination if citizens did not provide their version of the events which transpired. Statement taking would be critically compromised if witnesses felt compelled to give that statement in a guarded manner (ie. by withholding essential facts such as the complete details of an incident, or their full name and address) for fear of an institution favouring release over the protection of their privacy.

...

It is the position of this institution that, although the appellant may be contemplating civil action against the [local transit authority], there has been no convincing argument put forth indicating that disclosure of the third party personal information is significant to the determination of the rights of the appellant.

In conclusion, the only relevant factors in this appeal weigh in favour of privacy protection. Accordingly, balancing the appellant's right to access his own personal information against the privacy rights of the third party, I must decide in favour of protecting the third party.

As I noted in Interim Order MO-1287-I, an institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility to ensure that this exercise of discretion is in accordance with the Act. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion (Order 58).

Clearly, sections 5(4) and 21(2)(c) do not compel an affected person to participate as a party to any processes under the Act. However, as long as an institution is reasonably certain that an affected person received the required notification under section 5(4), the fact that submissions are not provided may, in certain circumstances, be a relevant factor to take into account in balancing access and privacy rights through the exercise of discretion under section 38(b). For example, if some affected persons with a similar interest consent to disclosure and others express no view after having been notified, the absence of submissions may be a relevant factor for an institution to consider in determining the appropriate weight to give to privacy interests when balanced against the requester's access rights. Similarly, if the institution is independently aware of particular facts which reduce the potential sensitivity of an affected person's personal information or reduce the likelihood that the information was provided in confidence, the fact that the affected person also decided not to provide submissions regarding his/her privacy interests may be a factor to take into account in weighing the various considerations associated with the exercise of discretion under section 38(b). To be clear, these are only examples; my point is simply that it is the responsibility of the Police and other institutions to take the absence of participation by affected persons into account, whenever appropriate, in discharging their responsibilities to weigh the competing considerations inherent in the application of section 38(b) of the Act.

I accept that police officers conducting law enforcement investigations must be able to rely on the frank, fulsome and honest participation of witnesses. I also accept that witnesses when providing statements to police officers generally do so with an expectation of confidentiality, and that this expectation is a weighty factor which favours privacy protection. However, a proper exercise of discretion under section 38(b) must go further. The Police must also consider all other relevant factors present in the circumstances, including the fact situation involving the requester, the particular privacy interests of an affected person and the way in which they relate to the requester's access rights, the relationship between the requester and the affected person and any impact this might have, the type of record under consideration, etc. The same factors are not relevant in every circumstance, but it is important to recognize that all factors that are relevant receive careful consideration.

In the present appeal, having now asked the Police twice to properly exercise discretion, the bulk of their representations on this issue still do not address the privacy interests of this particular affected person and the relative weight these interests have when balanced against the access rights of this particular requester. The Police's reference to Order P-653, which involved the application of a different mandatory exemption claim (section 17(1)(d) of the provincial statute) concerning records created by neutral third parties appointed to resolve labour relations disputes, does not assist the Police in this regard.
That being said, the Police do point out that the information at issue in this appeal falls within the scope of section 14(3)(b), and that its disclosure would constitute a presumed unjustified invasion of the affected person's privacy. The Police have also taken into account the appellant's interests under section 14(2)(d),

and are unconvinced that "disclosure of the [affected person]'s personal information is significant to a determination of the rights of the appellant" in this particular instance. In so doing, I find that the Police have properly exercised discretion in favour of denying access to the requester under section 38(b) of the Act.

FINAL ORDER:

I uphold the decision of the Police and find that the record qualifies for exemption under section 38(b) of the Act.

Original signed by: May 18, 2000
Tom Mitchinson
Assistant Commissioner