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

ORDER MO-1313

Appeal MA-990307-1

Toronto Police Services Board

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BACKGROUND AND NATURE OF THE APPEAL:

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the provincial Act) to the Ministry of the Solicitor General and Correctional Services (the Ministry) for access to "... all records, logs, notes, forms, etc. including medical records by attending physicians and/or nurses" pertaining to the requester during his incarceration at a named detention centre.

The Ministry located a number of responsive records, including 18 pages of Toronto Police Services Board (the Police) records. The Ministry issued a decision relating to all records other than these 18 pages, and transferred the portion of the request relating to the 18 pages to the Police, pursuant to section 25 of the provincial Act. [The appellant appealed the Ministry's decision (Appeal PA-990190-1), which I have since dealt with in Order PO-1772.]

The Police issued a decision to the appellant under the Municipal Freedom of Information and Protection of Privacy Act (the Act), granting full access to 14 of the 18 transferred pages, and partial access to the remaining four pages. The Police claimed sections 9(1)(d) and 14(1) of the Act as the basis for denying access, and relied on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) and the factor listed under section 14(2)(g) in support of the section 14(1) exemption claim.

The pages at issue consist of the withheld portions of a "Crown Brief Cover" (page 3), a "Confidential Crown Envelope" (page 4) and a one-page Record of Arrest (page 6). Page 13 is a duplicate of page 6, so any decisions I make with respect to page 6 will apply to page 13.

The appellant appealed the decision to deny access to the severed portions of these pages. He also claimed that more responsive records should exist.

During mediation, the appellant pointed out that the portion of page 5 which contained his photograph was not legible, and asked for a new digital copy of the photo. The Police acknowledged that the quality of the photograph was poor, but explained that it was a printout of a digital black and white photo stored on its computer, and they were unable to produce a better copy. The Police also took the position that the appellant's request for a new digital photo was outside the scope of his original request. This issue was not resolved during mediation, and has been added to the scope of this inquiry.

Also during mediation, it was determined that pages 1 and 9 of the records, which were both disclosed to the appellant, include the notation "Page 1 of 2"; however the appellant did not receive the second page of either of these records. This issue was also not resolved during mediation, and has been added to the scope of this inquiry.

I sent a Notice of Inquiry initially to the Police. Because the records appear to contain the appellant's personal information, I included sections 38(a) and (b) of the Act within the scope of the inquiry. One paragraph on page 4 and part of page 3 are not legible on the copies of these records provided to the appellant and to this Office. The Police were asked to provide clear copies of these records and/or an explanation as to their content in their representations.

The Police submitted representations. I then sent the Notice of Inquiry to the appellant together with

the relevant and non-confidential portions of the Police's representations. The appellant did not submit representations in response.

PRELIMINARY MATTERS:

Three preliminary matters need to be addressed before I proceed with the substantive issues in this appeal:

1. Whether the appellant's request for a digital copy of his photograph which appears on page 5 is an expansion of the original request.

2. Whether the Police should be required to search for the "page 2" portions referred to on pages 1 and 9 of the records disclosed to the appellant.

3. Whether the Police should be required to produce more legible copies of pages 3 and 4 of the records.

The Police submit the following with respect to these issues:

> Needless to say, these 18 pages were not created during the stated time period, nor were they created at the locations referenced in the request. These 18 pages were located within a Ministry's file and transferred to this institution. Had the pages themselves not been transferred, and the request on its own sent, this institution would not have been in a position to reply as the request is specific as to the records sought. In keeping with the spirit of the Act, and in order to resolve an issue related to Appeal PA-990190-1, this institution agreed to accept the transfer.
> ...
>
> The only Toronto Police Service records at issue, therefore, are those transferred by the Ministry, as a result of their search (how else could this institution possibly know what records [of ours] were responsive?). During subsequent telephone conversations with the appellant, it was suggested that he forward a new request to our office in order to apply for access to records not contained within the Ministry file. Such records may include a mug shot, which is a distinct and separate record from the small photo portion on the Prisoner Transfer Form (page 5).
> ...
>
> Concerning page 5 ... it should be noted that the report forwarded to us from the Ministry was prepared and printed on 1998.10.19, the day of the appellant's arrest. This document would have accompanied the prisoner during movement from a police facility to other institutions, such as the detention centre or to a court appearance. Such record would follow the prisoner until his release on bail, at which time, it would be forwarded to the detention centre for filing.

> As explained during mediation, a better copy of this "exact" record does not exist within Toronto Police Service files, since the report's date and time, preparing officer's name and badge number, and any handwritten notations on the document make it a unique record.
>
> Page 5 ... [is an] example of a record which was of very poor quality from the time of creation, however, due to the technology and equipment available during this period, it is likely that these records represented the best available copy at the time ... In other words, the document depicted in page 5 ..., although of poor quality by today's standards, was typical of similar records documents created several years ago.

As far as page 4 is concerned, the Police submit:

> While the appellant was before the courts, a copy of his recognizance of bail [page 4] would have been on file with the Toronto Police Service records unit. However, once a disposition was rendered concerning his criminal charges, the corresponding recognizance of bail would have been destroyed, since it was no longer in effect. For this reason, there are no other documents to which we can refer in order to obtain an exact interpretation of page 4. While Toronto Police Service agrees that handwriting on a record should be legible, the conditions recorded on this document were written by some unidentified member of court personnel rather than an employee of the Toronto Police Service, and as such, this institution has no control over the quality of such notations.
>
> We did, in fact, scrutinize this portion of page 4 very closely. Despite having numerous individuals view the record, no consensus of opinion concerning the exact contents was obtained. The original crown envelope was also retrieved and viewed in the hope that it would be somewhat clearer, however, it was of no better quality than the record at issue.

Finally, with respect to the illegible part of page 3, the Police point out that it is a portion of a different record that was inadvertently protruding from the back of page 4 at the time page 3 was photocopied.

The 18 pages of records that were located within the Ministry's file and transferred to the Police pursuant to section 25 of the provincial Act are the only records at issue in this appeal. As the Police note in their representations, efforts were made to have the appellant submit a request directly to the Police for other related records that may be in its custody or control. The appellant decided not to avail himself of this opportunity, and I find that no additional search activities are required.

As far as the poor quality of page 4 is concerned, I accept the explanations provided by the Police that they attempted to obtain better copies but none are available. I also accept their explanation regarding page 3. The reason why one portion of this page is illegible is that it was never intended to be photocopied and only includes portions of copied text, and I find that this portion is outside the scope of the appellant's request.

Finally, regarding the appellant's request for a new digital photograph, I find that this is outside the scope of his transferred request.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, as recorded information about an identifiable individual.

The remaining information severed from page 3 consists of notes about the appellant concerning his court appearance. I find that this information qualifies as the personal information of the appellant only.

The information severed from page 4 consists of the name of an individual other than the appellant; and the undisclosed parts of page 6 consist of an event number, and a telephone number. The Police explain that the event number is a unique number that is assigned to a complaint received through "Police Radio". By inputting this number into the Police computer, the Police are able to identify the name, address and telephone number of the person making the complaint. According to the Police, the event number listed on page 6 was included in error, and identifies an occurrence and complainant that is unrelated to the occurrence involving the appellant. Because all of the records contain information about the arrest and detention of the appellant for specified criminal offences, I find that pages 4 and 6 contain his personal information. I also find that these pages contain the personal information of other identifiable individuals.

INVASION OF PRIVACY

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), where a record contains the personal information of both a requester and another individual (ie. pages 4 and 6), and the institution determines that the disclosure of the information would constitute an unjustified invasion of the other individual's personal privacy, the institution has discretion to deny the requester access to that information. Sections 14(2) and (3) provide guidance in determining whether disclosure would result in an unjustified invasion of privacy. Section 14(2) provides some criteria for the head to consider in making this determination, and 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].

The Police rely on the presumption of an unjustified invasion of privacy contained in section 14(3)(b), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> 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;

The records that remain at issue consist of a "Confidential Crown Envelope" (page 4) and a "Record of Arrest" (page 6), both of which were prepared because the appellant had been charged by the Police with two criminal offences. In my view, these records pertain to the charges themselves, and were not compiled as part of any investigation leading to the charges. Therefore, I find that section 14(3)(b) does not apply to this information (Orders M-734 and MO-1224).

The Police submit that because the event number and telephone number on page 6 were included in error, they are unlikely to be accurate or reliable in the context of the appellant's criminal matter, thereby raising the factor listed under section 14(2)(g) which favours non-disclosure. I concur, and find that this factor is a relevant consideration in the circumstances of this appeal.

Given the nature of the records and the circumstances surrounding their creation, I also find that the personal information of the other identifiable individuals is highly sensitive, and that the factor listed in section 14(2)(f) is another relevant consideration favouring non-disclosure.

Having reviewed the records, and in the absence of representations on this issue from the appellant, I find that no factors favouring disclosure are present in the circumstances.

In my view, the two factors favouring privacy protection are more compelling in the context of this appeal than any circumstances favouring disclosure. Consequently, I find that disclosure of the personal information of the individuals other than the appellant contained on pages 4 and 6 would constitute an unjustified invasion of their privacy, and this information qualifies for exemption under section 38(b) of the Act.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/RELATIONS WITH GOVERNMENTS

Section 38(a) of the Act reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, **9**, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information; [emphasis added]

This section provides the Police with discretion to deny access to a record which contains an individual's own personal information in instances where the section 9 exemption claim would otherwise apply.

The Police claim section 9(1)(d) as the basis for denying the appellant access to the information severed from page 3. I will consider whether this information satisfies the requirements for exemption under section 9(1)(d) as a preliminary step in determining whether it qualifies for exemption under section 38(a).

Section 9(1)(d) of the Act states:

> 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,
>
> > 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 words "could reasonably be expected to" appear in the preamble of section 9(1), as well as in several other exemptions under the Act dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)]. This requirement also applies in the context of section 9(1)(d) (Order MO-1292).

The Police submit that:

> As indicated in Order MO-1202, there is an expectation of confidentiality by the Ministry of the Attorney General (MAG) concerning information passed between the Crown's Office and any police service during the prosecution of an individual, when that information was prepared for the purpose of or during litigation.

In Order MO-1202, former Adjudicator Holly Big Canoe reviewed each of the component parts of the section 9(1) exemption and the rationale behind the exemption itself when applied to certain severed information contained in a "Confidential Crown Envelope", the same type of record as that is at issue in this appeal. She stated:

> 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).

Applying this approach, I will now determine whether the information severed from page 3 would qualify for exemption under section 19 of the provincial Act if it was in the possession of the Ministry of the Attorney General.

Page 3 is a Crown Brief Cover, most of which has been disclosed to the appellant. The undisclosed parts contain handwritten notes which appear to have been made by the particular Crown Counsel responsible for the prosecution of the appellant. The purpose of these notes was for use in the criminal prosecution. It is not clear whether this information was prepared or obtained with an intention that it would be treated confidentially in the course of this litigation. In fact, there are indications on the face of the record that it was intended to be disclosed to the appellant's counsel. For this reason, I am unable to conclude that the information at issue would qualify for exemption under section 19 of the provincial Freedom of Information and Protection of Privacy Act if the information were in the hands of the Ministry of the Attorney General.

Even if the information would have qualified for exemption at the time of the prosecution, the litigation which gave rise to the creation of page 3 ended with the appellant's conviction. The severed information does not enjoy ongoing protection under litigation privilege; it deals with the disclosure of the information by the Crown to counsel for the appellant and is accurately characterized as "ordinary work product". Because the prosecution has been completed, even if I were to accept that the information qualified for litigation privilege prior to the completion of the prosecution, any such privilege has now terminated (see Orders MO-1202 and MO-1292).

Accordingly, I find that the information severed from page 3 does not satisfy the requirements of section 9(1)(d), and therefore does not qualify for exemption under section 38(a) of the Act.

ORDER:

1. I order the Police to disclose the remaining responsive portions of page 3 to the appellant by **July 7, 2000**. I have attached a highlighted version of page 3 with the copy of this order sent to the Freedom of Information and Privacy Co-ordinator of the Police which identifies the portions that should be disclosed.

2. I uphold the decision of the Police not to disclose the remaining parts of pages 4, 6 and 13.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Police to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: June 22, 2000
Tom Mitchinson
Assistant Commissioner