



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

ORDER MO-1321

Appeal MA-990337-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The appellant submitted 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 information as follows:

Information or report regarding [a specific residence] originated from a [named complainant] bearing my name as indicated by [named Police employee] - existing dating 1993 or 1994 or any other following years. This is a follow up of my earlier request made 99/10/08.

The Police identified a three-page occurrence report as being responsive to the request, and provided partial access to page 3 of the report. The Police stated that pages 1 and 2 in their entirety, and portions of page 3 were being withheld on the basis of section 14(1)(f) (unjustified invasion of personal privacy) and 14(3)(b) (presumption for personal information compiled as part of an investigation into a possible violation of law).

The appellant appealed the decision of the Police to this office. The appellant later wrote to this office stating:

As a response to my request I had received the third page of a report entitled as "THEFT OVER" prepared by a police officer . . . dated December 19, 1994 in this report [a named complainant] indicated to the police officer that I . . . was a suspect in the theft . . . reported at [specific residence] that date. The first two pages I assume were describing what was reported missing and the circumstances. I as an accused person by implication should have the right to this information since earlier a similar report was made on February 22, 1991 during construction at the above address. That time the contractor was implicated by [named complainant] as suspect.

[The named complainant] had been [indicted] for fabrication of evidence of this year and it is important that I obtain the missing two pages as further evidence for Court procedure.

The appellant also advised this office that he believed there were more records responsive to his request in addition to the one the Police had already identified.

I sent a Notice of Inquiry setting out the issues in the appeal to the Police initially. In the Notice of Inquiry I sought representations on the application of section 38(b) in conjunction with section 14, since the records appeared to contain the appellant's personal information. The Police sent representations in response to this Notice of Inquiry. I then sent the non-confidential portions of the representations of the Police, together with a Notice of Inquiry, to the appellant. I received representations from the appellant in response.

The record identified by the Police as responsive to the appellant's request is a three-page General Occurrence Report dated December 19, 1994. The information at issue in this appeal consists of all of pages 1 and 2, and the portions of page 3 withheld from the appellant.

DISCUSSION:

PERSONAL PRIVACY

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual.

The Police submit that the record contains personal information of the appellant, and that this information was already disclosed to the appellant pursuant to his request. In the circumstances, I am satisfied that the record contains the appellant’s personal information, including his address, age and other information pertaining to the complaint made to the Police.

The Police further submit that the record contains information about the complainant and another individual. The appellant makes no specific submissions on this issue. In my view, the record also contains personal information of the complainant and other individuals, including their addresses, date of birth (in one case) and other information pertaining to their involvement in the matter.

RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF OTHER INDIVIDUALS’ 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) of the Act, where a record contains the personal information of both the appellant 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, 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].

The Divisional Court has stated that the only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 23 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. In this case, the Police have cited section 14(3)(b) in conjunction with section 38(b). Those 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;

The Police submit:

[The] Police responded to a complaint of theft over. The police were provided with information that the [appellant] was a potential suspect in this theft. The fact that the investigation did not conclude in an arrest does not negate the applicability of this section. Section 14(3)(b) only requires that there be an investigation into a possible violation of law.

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Section 38(b) places discretion with an institution in the release of personal information of the requester when such disclosure would constitute an unjustified invasion of another individual's personal privacy.

The question arises whether the access rights of the requester prevails over the privacy rights of the other individuals mentioned in the records.

In this appeal, there is information provided by and about third parties. In order to determine the issue of who has the greater right, that of the [appellant] for access with that of the affected parties for privacy protection, this institution considered the third party process as it relates to the records.

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Upon review of the records this institution determined that representations were not required from the affected parties in order to determine that the exemptions of section 14(1)(f) and 14(3)(b) applied to the records. As well, section 38(b) presumes that the information considered for release falls within section 14, and therefore recognizes that information to be an unjustified invasion of third party privacy . . .

The Police go on to list several factors taken into account in deciding not to disclose the withheld information to the appellant including:

- the appellant is not currently subject to any criminal charges as a result of these events;

- the appellant advised that “he is not suing”;
- a general expectation of confidentiality on the part of individuals supplying information to the Police;
- the right to privacy as one of the fundamental purposes of the Act, as recognized in section 1(b);
- the general interest of individuals in having a matter be treated as “closed”, and in not being reminded of unpleasant events (section 14(2)(e) and Order P-1167);and
- in the circumstances of this case, the affected persons’ interest in “closure”.

The appellant makes extensive representations, detailing the history of his legal and other interactions with the complainant and other individuals and organizations. However, these representations do not directly address the specific issues arising in this appeal, as described above and in the Notice of Inquiry sent to the appellant.

Based on the material before me, I accept the submission of the Police that the withheld information consists of personal information of individuals other than the appellant, and that this information was compiled and is identifiable as part of an investigation into a possible violation of law. It is clear that the Police compiled this information to determine whether or not charges were warranted under provisions of the Criminal Code dealing with theft [sections 322-334].

I am satisfied that disclosure of any of the information withheld by the Police would constitute an unjustified invasion of the privacy of individuals other than the appellant. Further, it is clear to me that the Police carefully considered each line of the record and provided the appellant with as much information pertaining to him as could reasonably be disclosed without unjustifiably invading the privacy of these other individuals. I am also satisfied that the Police properly exercised discretion under section 38(b), by taking into account all of the relevant circumstances of this appeal.

In his representations, the appellant submits that he has a “right to be aware of charges or statements made against” him and that “[u]ndisclosed charges and concealment of critical documents [have] deprived [the appellant] of his right to defend against these charges.” These representations suggest the application of the factor favouring disclosure at section 14(2)(d) which 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;

As indicated above, once a presumption under section 14(3) is established, that presumption cannot be overcome by one or any combination of factors under section 14(2). 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 the affected persons' privacy.

Therefore, the withheld information qualifies for exemption under section 38(b) of the Act.

SCOPE OF THE REQUEST

As noted above, the appellant's request in this appeal reads as follows:

Information or report regarding [a specific residence] originated from a [named complainant] bearing my name as indicated by [named Police employee] - existing dating 1993 or 1994 or any other following years. This is a follow up of my earlier request made 99/10/08.

The appellant's earlier request to the Police was specifically for records relating to a February, 1991 incident. In response to the initial request, the Police advised the appellant that the responsive record did not exist because it had been destroyed. The appellant did not appeal that decision.

In his letter of appeal, and during the mediation stage of the appeal, the appellant stated that more records responsive to his request should exist, apart from the occurrence report identified by the Police. In particular, the appellant indicated that he had made a complaint to the Police about the conduct of the complainant, and that he would like access to the police officer's notes pertaining to his complaint. The appellant did not specify the date of this complaint. The appellant further indicated that he would like access to the occurrence report arising from the 1991 incident. The appellant made no further submissions on this issue in his representations.

The Police take the position that the request was sufficiently clear to identify any responsive records, and therefore it was not necessary to contact the appellant to clarify his request. The Police state:

The fact that the appellant identified further records he wished access to during the mediation stage of this appeal does not alter the fact that this institution properly responded to the scope of his request.

At no time during the [Police] analyst's contact with the [appellant], either during the original request or subsequent request, did he identify or even indicate that he was seeking any records other than an occurrence report. In fact, their conversations only centred on occurrence reports.

Following his conversation with the analyst, the [appellant] submitted his second request, the subject of this appeal. The [appellant] was aware that requests for information needed to be sufficiently specific as to the records being sought. This request for information met that test and identified the 1994 occurrence report as the responsive record to this request.

Based on the above information, and the fact that the [appellant], in his access request, indicated “OR” as opposed to “AND”, it is the position of this institution that reasonable efforts had been made to identify the records responsive to this request.

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The requester only raised the issue of memorandum books during the mediation stage of this appeal. This late raising of specific identifiable records would indicate that he was aware that such records existed, but that he failed to include them at the submission of his request. An institution should not be held accountable for a requester’s omissions at the time of formulating the request.

At no time during the history of dealing with this [appellant] or the request itself did the requester specifically identify memorandum books as being records he was seeking access to.

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Any reference to events **prior** to the requested 1993/1994 occurrence report cannot be included in the scope of this request, especially given the inclusion of the phrase “or any other **following** years” in his request [emphasis added by the Police].

In fact, the issue of the 1991 occurrence report had been dealt with by a previous request in which the [appellant] was advised the 1991 occurrence report no longer exists pursuant to the Record Retention Schedule. It should be noted that the [appellant] did not appeal that request, although as required by the Act, the appeal procedure was clearly outlined in his decision letter.

As well, to include an expansion of this request to include the 1991 report would not only be repetitive of the earlier request, it would not advance his ability to obtain a copy of that report. It simply does not exist any more.

In my view, the appellant’s current request on its face, and given the circumstances of the earlier request, cannot reasonably be construed as including records relating to the 1991 incident, and I accept the explanation of the Police that it was intended to cover only the more recent events in 1994.

However, I do not accept the explanation of the Police that the current request clearly does not cover other records which may exist relating to the 1994 events, such as police officers’ notebooks. At a minimum, in the context of an access request, the use of the word “or” creates an ambiguity in the scope of the request. The word “or” could be construed as meaning that the requester would be satisfied with receiving one record or group of records, or the other; on the other hand, such a request could be construed as meaning that the requester seeks **both** records or groups of records.

It appears from the face of the appellant’s request that he may not have had knowledge of the specific records which might contain the information he was seeking, which is not unusual in the access to information context. Both requesters and institutions have obligations in relation to the formulation of an access request under the Act. Section 17(1)(b) of the Act requires a person seeking access to a record to

“provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.” On the other hand, section 17(2) states:

If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

In circumstances where the request is not clear as to which type of types of records are being sought, it is incumbent on an institution to inform the requester of the defect and offer assistance in reformulating or clarifying the request. The Police did not do so.

Given that the request could be construed as covering both the occurrence report and other records relating to the 1994 incident, including police officers’ notebooks, and given that the appellant subsequently identified that he is seeking records in addition to the report, I find in the circumstances that it was not reasonable for the Police to interpret the request as covering only the occurrence report. As a result, I will order the Police to issue an access decision with respect to any additional records relating to the incident in question.

ORDER

1. I uphold the decision of the Police to withhold portions of the three-page occurrence report dated December 19, 1994.
2. I order the Police to conduct a search for, and issue an access decision with respect to, any other records relating to the 1994 incident in question in this appeal, in accordance with sections 17 to 23 of the Act, using the date of this order as the date of the request.

Original signed by: _____
David Goodis
Senior Adjudicator

July 17, 2000