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

INTERIM ORDER MO-1318-I

Appeal MA-990163-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The appellant, by his counsel, made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Toronto Police Services Board (the Police). The request was for access to all records relating to his arrest and subsequent detention by the Police. Specifically, the appellant sought access to records which would document his treatment by Police and any injuries which he received while in custody. The appellant alleges that he was physically and sexually attacked and tortured in the course of his arrest and interrogation by members of the Police.

The Police denied access to the requested records, claiming application of the exemptions provided by sections 8(1)(a), (b), (c), (d), and (l) (law enforcement), 8(1)(f) (right to a fair trial), 9(1)(d) (intergovernmental relations) and 14(1) (invasion of privacy) of the Act to some or all of the records. The Police also denied access to some of the information found in the records, on the basis that it was not responsive to the request.

The appellant appealed the decision of the Police, stating that the exemptions should not apply and requesting a review of the non-responsive records.

During mediation, the Mediator included sections 38(a) and (b) of the Act as issues in this appeal, because the records appeared to contain the personal information of the appellant.

This office provided the appellant and the Police with a Notice of Inquiry. Representations were received from both parties.

RECORDS:

The records at issue total approximately 876 pages and include the Record of Arrest with supplementary reports, Criminal Informations, a Crown Brief, officers' notebook entries, statements, Prisoner Transportation Logs, a short video tape, and other miscellaneous records. There are a number of duplicate records which I have identified as follows:

- Records 9 and 10, consisting of pages 5 and 6 of a Supplementary Record of Arrest dated January 20, 1999, is duplicated at Records 15 and 16, Records 24 and 25, Records 35 and 36 and Records 868 and 869;
- Part of Record 9 also appears as Record 788;
- Records 771 to 774 are duplicated at Records 776 to 779;
- Record 17, a one-page Record of Arrest dated January 20, 1999, is duplicated at Record 872.

I will address the application of the exemptions claimed to each of the original copies of the records and the decisions made with respect to them will apply equally to the duplicate copies.

PRELIMINARY ISSUE:

ARE THE RECORDS IDENTIFIED BY THE POLICE RESPONSIVE TO THE REQUEST?

Order P-880 indicates that the term "responsive" records in the context of a request under the Act means records which are "reasonably related to the request."

The Police initially claimed that certain records or parts of records are not responsive to the request. The Police indicated that the non-responsive information consists of unrelated entries in police officers' notebooks, court dockets, prisoner transportation logs, and references to the annual leave of involved officers. The Police submitted that parts of certain records give individual officer's leave dates, and other records identify individuals uninvolved in the incident in question, such as other accused persons who are listed in the Prisoner Transportation documents. Many of the records consist of notes contained in police officers' memorandum books. The Police indicated that since police officers record all significant events which occur during their tour of duty, there is information in the officers' memorandum books with is neither relevant nor responsive to the request. The Police submitted that an examination of the records will clearly demonstrate that the portions severed as "not responsive" are wholly irrelevant to the occurrence in question, and therefore are not reasonably related to the request.

The appellant submitted that he is not seeking access to information respecting why he was arrested and/or criminally charged, but is concerned with information which would show that he was attacked by police while he was under police supervision. Having had the benefit of the appellant's submissions, it appears clear to me that significantly more information which was identified by the Police as being responsive to the request does not, in fact, relate to the events surrounding his arrest and detention by the Police. The appellant has indicated that he is not pursuing access to records which document events which precede his being taken into custody by the Police. In addition, I am unable to identify a record or records which contain "information which would show that he was attacked by police while he was under police supervision."

Accordingly, it is my view that the only records which are responsive to this request are those which relate to the appellant while he was in the custody of the Police. Accordingly, I find that Records 9, 10, 17-18, 119, 120, 140, 142, 182-187, 195-197, 230, 231, 271, 300, 341, 418, 450, 451, 509, 732, 733, 771-774, 815-846, 874-876 and the videotape are responsive to the appellant's request. Based on the submissions of the appellant and my review of these records, I have determined that some of them also contain information that is not responsive to the appellant's request, including information about other investigations. I have highlighted this information in blue on the copy of some of the records being sent to the Police with this order. Because this information is not responsive, it should not be disclosed to the appellant.

For reasons of security, the Police declined to provide this office with copies of Records 119 and 120, 271, 300, 341, 418, 450 and 451, 509, 732 and 733 and 771 to 774, though I was able to view these records at their offices. In accordance with my reasoning set out above, I find that those portions of these records which recount events prior to the arrest of the appellant are not responsive to the request and need not be disclosed to the appellant. I will address the application of the exemptions claimed for the responsive portions of these records below.

I also find that all of the remaining records originally identified by the Police are not responsive, and will not be addressed further in this order. The records to which the Police applied the exemptions in sections 8(1)(c) and (f) and 9(1)(d) fall within these non-responsive records. It will not be necessary for me to address the application of these exemptions to those records, accordingly.

DISCUSSION:

PERSONAL INFORMATION

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

The Police indicate that the records contain the personal information of the appellant as well as two other individuals who are also accused in the matter. Their names, addresses, involvement in the criminal offence investigated and other personal information concerning these individuals is described throughout the records.

The Police submit, however, that because the appellant did not personally make the request or file the appeal, the requester of the information is the appellant's lawyer. Accordingly, the Police submit that the records do not contain the personal information of the actual requester and sections 38(a) and (b) do not apply. Although the lawyer provided an authorization from the appellant, the Police submit that the lawyer did not represent the appellant's interests in the criminal trial and did not provide further clarification of his interest in the matter.

Similar submissions by the Police were addressed by Assistant Commissioner Tom Mitchinson in Interim Order MO-1277-I and Order MO-1314. Assistant Commissioner Mitchinson, after reviewing the circumstances, stated:

> The appellant has represented to the Police that he has his client's authority in this respect and the signed waiver provides ample evidence of this authority. In these circumstances, it is clear that the appellant has both express and ostensible authority to act on his client's behalf and that he stands in the client's shoes for the purpose of making the request and taking ancillary steps in this appeal. Lawyers and their clients operate in this fashion before courts and tribunals on a daily basis and this facilitates the better administration of justice. For these reasons, I find that the appellant, as agent, has made the request as if the client had made it himself.
>
> If a request is received from a lawyer for information on behalf of a client which would otherwise be considered a Part II request if made by the client directly, and the lawyer has satisfied the institution that he/she has been given the requisite authority by the client, then the request should be processed as a Part II request for personal information not as a Part I request for general records. The discretionary exemptions provided by section 38(b) of the Act would be available to institution in these circumstances, if appropriate, and the $10.00 appeal fee provided; by section 5.3(1)(b) of Regulation 823 would apply.

I agree with Assistant Commissioner Mitchinson, and find that the appellant's lawyer, acting on behalf of the appellant as his counsel, has made the request as if the appellant had made it himself. In my view, the lawyer does not have to connect his authority to act for the client to any active proceeding. It is sufficient that he has shown that he has the authorization of the appellant to act on his behalf. Therefore, I find that the request for information should be dealt with under Part II of the Act.

Having reviewed the responsive parts of the records which remain at issue, I find that the responsive portions of Records 9 and 10, 17, 18, 119, 120, 140, 142, 183, 184, 185, 186, 187, 771 to 774, 817, 821, 823, 824, 825, 826, 827, 828, 829, 830, 831, 833, 834, 835, 837, 838, 840, 846, 874, 875 and 876 contain the personal information of the appellant and other identifiable individuals.

In addition, I find that the responsive portions of Records 182, 195, 196, 197, 230, 231, 271, 300, 341, 418, 450, 451, 509, 732, 733, 815, 816, 818, 819, 820, 822, 832, 835, 836, 839, 841, 842, 843, 844 and 845 contain only the personal information of the appellant. I have highlighted in yellow on a copy of Records 182, 195, 196, 197, 230, 231, 815, 816, 818, 819, 820, 822, 832, 835, 836, 839, 841, 842, 843, 844 and 845, which I have provided to the Police with a copy of this order those portions which relate only to the appellant. As no other exemptions have been claimed for these records and no mandatory exemptions apply to them, I will order that they be disclosed to him. Finally, I find that the responsive portions of Records 271, 300, 341, 418, 450 and 451, 509, 732 and 733 also contain only the personal information of the appellant. As no other exemptions have been claimed for these records and no mandatory exemptions apply to them, they too should be disclosed to him.

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) 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 head 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].

In their decision letter, the Police rely on the application of sections 14(3)(b) and (d) of the Act, which 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.

The appellant submits that section 14(3)(d) is irrelevant because he is not interested in and did not request any information dealing with any police officer's or the appellant's employment or educational history. I have determined that the information from the records to which the Police applied the section 14(3)(d) presumption is not responsive to the request. I find that this presumption does not, therefore, apply to the responsive records.

The appellant submits that section 14(3)(b) is also irrelevant because he is not seeking access to information respecting why he was arrested and/or criminally charged, but concerned with information which would show that he was attacked by police while he was under police supervision. In my view, the responsive records or parts of records remaining at issue are concerned with the Police interrogation and questioning of the appellant in furtherance of its investigation into a possible violation of law.

Accordingly, because the information which documents the appellant's time in police custody was compiled and is identifiable as part of an investigation into a possible violation of law, in this case the Criminal Code, the presumption applies to all of the responsive personal information contained in Records 9 and 10, 17, 18, 140, 142, 119 and 120, 183, 184, 185, 186, 187, 771 to 774, 817, 821, 823, 824, 825, 826, 827, 828, 829, 830, 831, 833, 834, 837, 838, 840, 846, 874, 875 and 876, which I have found relates to both the appellant and other identifiable individuals. Because I have found that the section 14(3)(b) presumption applies to the personal information contained in them, these records or parts of records qualify for exemption under section 38(b).

However, in my view, the presumption cannot apply to information contained in the records which was provided to the Police by the appellant for to do so would lead to an "absurd result." In Order MO-1314, Assistant Commissioner Mitchinson assessed the application of the section 14(3)(b) presumption to certain information provided by a requester. He found that:

> The Commissioner's position on the "absurd result" principle was first enunciated in Order M-444 by former Adjudicator John Higgins as follows:
>
> > However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the

> Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.
>
> Several subsequent orders have supported this position and include similar findings (eg. Orders M-613, M-847, M-1077 and P-1263).
>
> In this case, Records 1-12A consist of information given by the appellants to the Police. I find that to apply the presumption in section 14(3)(b) to these records would lead to an absurd result. Consequently, I find that disclosure of these records would not result in an unjustified invasion of privacy, and Records 1-12A do not qualify for exemption under section 38(b).

In the present appeal, the Police Officer's memorandum books contain statements given by the appellant in response to certain questions posed to him by the Police during the course of his interrogation. The notes also indicate that throughout the questioning by the Police, the appellant was allowed to read the questions and answers which he provided. Accordingly, in my view, to apply the presumption in section 14(3)(b) to these portions of the records would lead to an absurd result. In accordance with the principles enunciated in Order MO-1314, I find that the disclosure of the information contained in the highlighted portions of Records 183, 184, 185, 186, 187, 817, 823 to 831, 833 and 846, as well as the videotape, which record the questions and answers given during the appellant's interrogation and booking would not result in an unjustified invasion of privacy and that they do not qualify for exemption under section 38(b).

I have highlighted in yellow on a copy of the records which I have provided to the Police with this order those portions of the records which are not exempt under section 38(b) through the operation of the "absurd result" principle. Similarly, Records 771 to 774 document an interview with the appellant during the course of his interrogation. In accordance with the reasoning set out above, I find that the appellant is entitled to obtain those portions of these records which describe the questions posed to him by the Police and his answers.

Exercise of Discretion

As stated earlier, this appeal involves a request that should have been processed by the Police under Part II of the Act. This section grants the Police the discretion to balance two competing interests - in this case, the appellant's client's right of access to his personal information, and the affected person's right to privacy. If the Police conclude that the balance weighs in favour of disclosure, the records may be released to the appellant, even if the Police have concluded that this disclosure would represent an unjustified invasion of the affected person's privacy.

In Order 58, former Commissioner Sidney B. Linden found that a head'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. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the head to reconsider the

exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed.

In Order P-344, Assistant Commissioner Mitchinson considered the question of the proper exercise of discretion as follows:

> ... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the Act.
>
> In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

The reasoning in Order P-344 is equally applicable to the exercise of discretion under section 38(b) of the Act in the present appeal.

The Police did not claim section 38(b) and did not make representations concerning the exercise of discretion under this section of the Act. For this reason, I have decided to return this matter to the Police for the purpose of properly exercising discretion in deciding whether or not to claim exemption for the undisclosed information pursuant to section 38(b) of the Act.

By way of summary, the information which has been highlighted in yellow on the copy of the records which I provided to the Police with a copy of this order, as well as the videotape and the personal information in Records 271, 300, 341, 418, 450 and 451, 509, 732, 733, 771 to 774 and 776 to 779 relates to the appellant only or was supplied to the Police by the appellant. This information should be disclosed to the appellant as it is not exempt from disclosure under section 38(b).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

The Police claim the application of sections 8(1)(a) and (b), to all of the records at issue. Section 8(1)(d) was also applied to Records 784, 834 and 836 to 839; while section 8(1)(l) was claimed to generically apply to some or all of the records at issue.

These sections state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(l) facilitate the commission of an unlawful act or hamper the control of crime.

Under section 38(a) of the Act, the Police have discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 8 would apply. In the case of those records which contain the appellants' personal information, I will consider the application of sections 8(1)(a), (b), (d), and (l) as a preliminary step in determining whether these records qualify for exemption under section 38(a).

The words "could reasonably be expected to" appear in the preamble of section 8(1), as well as in several other exemptions under the Act, dealing with a variety of anticipated "harms." Previous orders of this Office have found that in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of the record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order P-373 and 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 and 40 (Div. Ct.)].

Sections 8(1)(a) and (b)

These sections state:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The use of the word "interfere" contemplates that the particular investigation or law enforcement matter is still ongoing. (Orders P-285, P-316, P-403, P-567, M-258, M-302, M-420, M-433). The purpose of the exemptions contained in sections 8(1)(a) and (b) of the Act is to provide the institution with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter or investigation. The institution bears the onus of providing evidence to substantiate that, first, a law enforcement matter or investigation is ongoing and second that disclosure of the records could reasonably be expected to interfere with the matter or investigation. (Order M-1067)

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the Act.

I am satisfied that the arrest and detention of the appellant fall within the meaning of the term "law enforcement" as it is used in the Act.

At the time the Police made their submissions, the appellant had been charged and his trial was underway. Because the prosecution arising from the law enforcement investigation had begun by the time the Inquiry stage of the appeal was reached, I am not persuaded that disclosure of the record could reasonably be expected to interfere with an **ongoing** law enforcement investigation. (Orders P-1584 and MO-1252) Therefore, I find that section 8(1)(b) is no longer applicable.

As far as section 8(1)(a) is concerned, since the matter was currently before the Court at the time the Police submitted their representations, the law enforcement matter was ongoing. The Police assert that disclosure would interfere with an active law enforcement matter. However, I find that their representations on this issue focus in only a general way on the relationship between the Police and the Crown Attorney's Office in such matters. The Police do not explain how the disclosure of the specific information contained in the records could interfere with this particular ongoing law enforcement matter. Based on the material before me in the Police representations and the records, I am unable to draw any such conclusion.

The Police submit that disclosure to any accused person under the Act while there is an ongoing trial would interfere with the operation of the criminal justice system. The Police submit that any request for information within the context of the criminal trial process must remain under the direction of the Crown, and that all rulings with respect to disclosure in that context should be made by the courts in order to ensure the effective and efficient administration of criminal justice.

There is nothing in the Act which suggests that it is not available to an accused person while there is an ongoing trial. In fact, section 51 could be interpreted as indicating that the two mechanisms can operate concurrently without affecting each other (Order PO-1688). Section 8(1)(a) presents the opportunity for an institution to exercise its discretion to refuse access if, in any particular case, disclosure could reasonably be expected to interfere with a law enforcement matter.

In this case, the Police have not presented sufficient evidence to demonstrate that the disclosure of the records in these circumstances would interfere with the appellant's trial, or the administration of justice as a whole. In fact, it appears that much of what is at issue in these records would likely have been included in the materials disclosed to the appellant by the Crown Attorney, or is information already known to the appellant. The Police have not provided evidence from the Crown Attorney involved in the prosecution of the appellant confirming what was or was not disclosed to the appellant pursuant to the Crown's disclosure obligation in the context of the criminal proceeding. The Police have confirmed that the videotape was disclosed as part of this process. In my view, the Police have not provided any cogent reasons why disclosure of any of the records, including the videotape, would interfere with the appellant's trial or the administration of justice generally.

Accordingly, based on the evidence and arguments provided by the Police and my review of the records, I am not persuaded that disclosure of these records could reasonably be expected to interfere with a law enforcement matter. Therefore, I find that section 8(1)(a) is not applicable.

Section 8(1)(d)

The Police argue that the disclosure of the information contained in Record 784, Record 834 and Records 836 to 839 could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter. Again, I have found above that the information contained in Record 784 falls outside the scope of the request. Accordingly, I need not address the application of the section 8(1)(d) exemption to it.

Record 834 and Records 836 to 839 are notes taken by the Police during the appellant's interrogation. The information contained therein was supplied by the appellant to the Police. Their disclosure would not, accordingly, reveal the identity of a **confidential** source of information as the appellant is, in fact, the source referred to. Therefore, I find that section 8(1)(d) has no application to these records.

Section 8(1)(l)

The Police have made generalized submissions with respect to the application of this exemption to the records. Their concerns appear to surround those records which document events prior to the arrest and detention of the appellant, which I have found above to fall outside the scope of the appellant's request. I find that this exemption has no application to the records which remain at issue, however.

INTERIM ORDER:

1. I find that those portions of the records which are highlighted in blue on the copy of the records which I have provided to the Police's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order, as well as those portions of Records 119 and 120, 271, 300, 341, 418, 450 and 451, 509, 732, 733 and 771 to 774 which contain information that predates the appellant's arrest are not responsive to the request and need not be disclosed to the appellant.

2. I order the Police to disclose to the appellant those portions of the records which are highlighted in yellow on the copy provided to the Police with this order, as well as the responsive portions of Records 271, 300, 341, 418, 450 and 451, 509, 732 and 733 and the complete videotape by providing him with copies by **August 8, 2000** but not before **July 31, 2000.**

3. I find that those portions of the records which are **not** highlighted in either blue or yellow on the copy of the records which I have provided to the Police's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order satisfy the requirements of section 14(3)(b) of the Act and are exempt under section 38(b) of the Act.

4. I order the Police to consider the exercise of discretion under section 38(b) with respect to the information highlighted in yellow which is contained in the records and to provide me with representations as to the factors considered in doing so by **July 21, 2000**. The representations concerning the exercise of discretion should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

5. I remain seized of this appeal in order to deal with the exercise of discretion under section 38(b) by the Police with respect to the records.

6. In order to verify compliance with Provision 2 of this order, I reserve the right to require the Police to provide me with a copy of the material sent to the appellant.

Original signed by: June 29, 2000
Donald Hale
Adjudicator