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

ORDER MO-1327

Appeal MA-990192-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The appellant 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 documents related to a criminal charge laid against the appellant in 1996. The appellant specified that the request included officers' notes, any documents or notes outlining a statement made by the appellant to a named police detective after the appellant's arrest, the original complaint filed and signed by a named individual, any correspondence or communication between the detective and another named police detective from the sex crimes unit, and any documents provided to the provincial crown attorney for prosecution of this matter.

The Police identified responsive records and granted access to some of them. The Police denied access to other records under section 9(1)(d) (information received from an agency of the Ontario government), and section 14(1)(f) in conjunction with section 38(b) (personal privacy) of the Act. The Police also withheld parts of the police officers' notebooks because they were not responsive to the request.

The appellant appealed the decision of the Police to deny access.

During mediation, the appellant indicated that he is no longer seeking access to certain records subject to the appeal. As a result, only four pages of records remain at issue, consisting of two two-page forms entitled "Pretrial Meeting Notes". The only exemption claimed by the Police for these records is section 9(1)(d).

This office sent a Notice of Inquiry setting out the issues in the appeal to the Police initially. The Notice of Inquiry sought representations on the application of section 38(a) in conjunction with section 9(1)(d), since the records appeared to contain the appellant's personal information. The Police sent representations in response to this Notice of Inquiry. This office then sent the non-confidential portions of the representations of the Police, together with a Notice of Inquiry, to the appellant. The appellant provided representations in response.

In his representations, the appellant questioned the constitutional applicability of certain sections of the Act, and appeared to seek a remedy under the Canadian Charter of Rights and Freedoms. This office then notified the appellant that pursuant to section 109 of the Courts of Justice Act, unless he issued a Notice of Constitutional Question (NCQ) and served it on the Attorneys General of Canada and Ontario, this office could not consider his constitutional argument or grant the requested remedy. As a result, the appellant did serve a NCQ on this office and the Attorneys General of Canada and Ontario. The appellant also provided this office with extensive additional submissions in support of his constitutional claim.

In response to the NCQ, both Attorneys General advised that they would not be intervening in this appeal.

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 records at issue "list the appellant's name as it pertains to his criminal prosecution as well as the personal information of the complainant including name, sex, date of birth and statement provided to the police."

While other records withheld from the appellant may contain personal information of the complainant, the four pages of records remaining at issue contain personal information of the appellant only, including his name and information about the disposition of the criminal charge. These records do not contain any personal information relating to the complainant or to any other individual.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/INFORMATION RECEIVED IN CONFIDENCE FROM AN AGENCY OF THE GOVERNMENT OF ONTARIO

Introduction

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. In this case, the exception at section 38(a) of the Act may apply. That section 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]

In this case, the Police have claimed the application of section 9(1)(d) in conjunction with section 38(a). Section 9(1) reads, in part:

> 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,
>
> . . .
>
> (b) the Government of Ontario . . .
>
> (d) an agency of a government referred to in clause . . . (b) . . .

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 an agency of the government of Ontario **and** that this information was received by the Police in confidence.

Representations

The appellant's representations do not address the particular requirements of section 9(1)(d). Rather, they focus on the circumstances of the police investigation and subsequent prosecution of the criminal charges

against him. The appellant alleges misconduct on the part of the Police and the Crown Attorney's office, and argues that he should be given access to the records in question in order to assist him in addressing these issues.

The Police submit:

> The four records in question are prepared by the Ministry of the Attorney General [MAG], and were contained in the "**Confidential Crown Envelope**". The records were prepared for the primary purpose of litigation and with the intention that they be kept confidential.
>
> Our decision to withhold information on the Crown Envelope using section 9(1) was upheld in Order MO-1202 where Adjudicator Holly Big Canoe cited the following reference:
>
> > 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 ...

As successfully argued in Order MO-1202, there is an expectation of confidentiality

> by [MAG] concerning information passed between the Crown's Office and any police service. Although the MAG was not specifically contacted on this file, previous contacts regarding the release of similar information has only reinforced their desire to preserve the confidentiality of using crown envelopes as a vehicle to transport information between the two institutions (and at times between courtrooms).
>
> It is important to note that the purpose for which these records have been included in the Confidential Crown Envelope is not at issue. Section 9 of the Act mandates the refusal of information received in confidence from one of the identified bodies - it does not infer in any way that the denial be based upon the resulting actions, if any, taken by the recipient. Consequently, the fact that some information obtained from the Crown's office was not directed to the Officer in Charge of the case (i.e. Pretrial Meeting Notes) does not negate the fact that this information was received by this institution from [MAG] in confidence. [emphasis added]

Findings

In Order MO-1202, Adjudicator Big Canoe, after reciting the passage from the Williams Commission Report relied on by the Police, stated as follows:

> 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).

More recently, in Order MO-1313, Assistant Commissioner Tom Mitchinson applied the reasoning in Order MO-1202 in an appeal where the Police claimed the application of section 9(1)(d) to material included in a confidential crown envelope. Assistant Commissioner Mitchinson stated:

> Applying this approach [from Order MO-1202], 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.

In my view, the approach to section 9(1)(d) in Order MO-1202, as applied by the Assistant Commissioner in Order MO-1313, should be followed in this case, and I see no reason to depart from the finding in Order MO-1313. As in the earlier appeal, the criminal litigation relevant to this case has been completed, and the information contained in the records does not, in my view, enjoy on-going protection - it is accurately described as "ordinary work product". Thus, any privilege which may have attached to the four pages of records has now been terminated. Further, I am not satisfied that there is any reasonable basis for a continuing expectation of confidentiality in these records in the circumstances of this appeal.

As a result, the records at issue in this appeal are not exempt under section 9(1)(d), and I will order the Police to disclose them to the appellant.

CONSTITUTIONAL ISSUE

In light of my finding that section 9(1)(d) is not applicable to the records at issue, in the circumstances, it is not necessary for me to address the issues raised by the appellant under the Charter.

ORDER:

1. I order the Police to disclose the four pages of records at issue to the appellant by **August 18, 2000**.

2. 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 material disclosed to the appellant pursuant to provision 1.

Original signed by: July 28, 2000
David Goodis
Senior Adjudicator