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

ORDER MO-1451

Appeal MA-990281-2

Ottawa-Carleton Police Services Board

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ottawa-Carleton Police Services Board (the Police), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The decision relates to a request from the appellants for access to information about themselves. In its decision, the Police provided access to one record, partial access to another record, and denied access to nine pages of records.

In support of its denial of access, the Police have relied on the discretionary exemptions in sections 8(1)(d) (confidential source of information) and 8(2)(a) (report prepared in the course of law enforcement) of the *Act*, the mandatory exemption in section 14(1)(f) (unjustified invasion of personal privacy), and the provisions of sections 38(a) and (b) (discretion to refuse requester's own information). In applying section 14(1)(f), the Police have referred to the presumption in section 14(3)(b).

I sent a Notice of Inquiry to the Police and to an affected party, initially, inviting representations on the issues in the appeal. The representations of the Police were shared with the appellants (with the exception of certain portions which were withheld for confidentiality reasons), who were also invited to and did submit representations. The representations of the affected party have not been shared with the appellants, for confidentiality reasons and also because they did not add anything material to those of the Police, essentially registering an objection to the disclosure of information.

RECORDS:

There are eleven pages of records at issue. Pages 1 and 2 are entitled "General Occurrence" and "Follow-up Investigation" and contain information about a report from an individual about the appellants and the actions taken by the Police in response to the report.

Page 3 is entitled "General Occurrence Report" and contains information relating to a separate incident, in which one of the appellants is named as the complainant.

Pages 4 to 11 consist of a document entitled "Narrative Summary", containing information about another incident, and letters and attachments relating to that incident.

The Police released pages 3 and 4, with the exception of the name of an individual on page 4, to the appellants. Pages 5 to 11 have been withheld in their entirety.

In withholding access to pages 1 and 2, the Police rely on the provisions of sections 8(2)(a), 14(1)(f), 14(3)(b), 38(a) and 38(b) of the *Act*. In withholding access to a portion of page 4, the Police rely on the provisions of sections 14(1)(f) and 14(3)(b). With respect to pages 5 to 11 of the records, the Police rely on the provisions of sections 8(1)(d), 14(1)(f), 14(3)(b), 38(a) and 38(b).

CONCLUSION:

I have concluded that the appellants have a right of access to pages 1 and 2 of the records, with the exception of a paragraph containing the personal information of another individual. I have also concluded that the information severed from page 4, and pages 5 to 11 in their entirety, are exempt from disclosure.

DISCUSSION:

INVASION OF PRIVACY

Personal information

It is necessary to decide, firstly, whether the record contains personal information, and if so, to whom that personal information relates, for the answer to these questions determines which parts of the *Act* may apply.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

On my review of the records, I am satisfied that they contain the personal information of the appellants, and of other individuals. Among other things, they contain the names of individuals who referred information to the Police about the appellants, correspondence from one of these individuals, and the views of individuals as well as of police officers about the appellants.

More specifically, on page 2 of the records, there is a paragraph which identifies an individual who referred information to the Police about the appellants, resulting in the creation of pages 1 and 2 (the General Occurrence form and Follow-Up Investigation form). I am satisfied that this paragraph contains the personal information of this individual, as well as of the appellants.

Also on page 2 is a reference to an employee of Canada Post, and a statement by him. It is apparent from the circumstances that the information about this individual is not given in a personal, but rather in an employment capacity, and as such, does not qualify as his personal information: see Reconsideration Order R-980015. Further, apart from his identity and the fact that he is employed by Canada Post, the statement given by him is about the appellants, and not about himself. I therefore find that this portion of the records does not contain the personal information of any individuals other than the appellants.

My conclusion with respect to pages 1 and 2 of the records, therefore, is that apart from a paragraph on page 2, the remaining information is either the personal information of the appellants only, or is non-personal in nature.

Pages 4 to 11 of the records consist of a document entitled "Narrative Summary" along with correspondence received from the affected party about the appellants. The name of this individual has been severed from page 4, which was otherwise provided to the appellants. I find that the name of the affected party is his personal information in that it reveals other information

about him, namely, that he was in contact with the Police. Although the affected party is identified with an employer, I am satisfied that the circumstances under which his information was provided to the Police are personal rather than professional, in nature. Pages 5 to 11, which consist of the correspondence provided to the Police by this affected party, contain the personal information of the appellants and of the affected party. Much of the information in these pages does not relate directly to the affected party; however, I accept the submissions of the Police that disclosure of these records would reveal personal information about him.

Discretion to refuse requester's own information

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access.

Section 38(b) of the *Act* provides:

> 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;

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester 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.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

As I have indicated, pages 1 and 2 of the records contain (in the first paragraph on page 2), the personal information of an individual other than the appellants. I find that this information is readily severable from other information in these pages, which is either the personal information of the appellants only, or is non-personal information. The disclosure of pages 1 and 2, apart from the first paragraph on page 2, would accordingly not constitute an unjustified invasion of another individual's personal privacy, and they do not qualify for exemption under section 38(b).

Section 38(b) may be applicable to the first paragraph of page 2, which contains the personal information of the appellants intermingled with that of another individual, the name of the affected party on page 4, and all of pages 5 to 11.

In determining whether section 38(b) applies, sections 14(2), (3) and (4) 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 a determination as to 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(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.

With respect to section 14(3), 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 other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to in favour of disclosure.

In the case before me, the Police have relied on section 14(3)(b), which provides:

> 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 Police submit that the information in the records was collected for the sole purpose of interviewing all parties and ascertaining if criminal charges were warranted. As such, the information was compiled and is identified as part of an investigation into a possible violation of law.

It does not appear that any criminal charges have been laid as a result of the investigations. However, previous decisions have stated that the absence of charges does not negate the application of section 14(3)(b): see, for instance, PO-1715. I am satisfied that section 14(3)(b) applies in that the information in the records was compiled and is identifiable as part of investigations into possible violations of law. It must be presumed that the disclosure of the personal information of affected persons would be an unjustified invasion of their personal privacy.

A finding that section 14(3)(b) applies does not necessarily end the matter, for section 38(b) grants the Police a discretion to disclose personal information of an affected person which is contained in a record also containing the personal information of the requester, *even* if it would be an unjustified invasion of that affected person's privacy. It has been said that the exercise of discretion under section 38(b) to disclose personal information of an individual other than the requester would be rare; however, the decision is a discretionary one that must be made by balancing the competing interests present in a particular fact situation: see Order M-532.

I have reviewed the submissions of the Police on their reasons for deciding against the release of the information in the records, some of which have not been shared with the appellants for confidentiality reasons. I am satisfied that the Police properly exercised their discretion under

section 38(b) of the *Act*, in deciding against disclosing portions of the records which contain the personal information of affected persons. My finding applies to one paragraph on page 2 of the records, the identity of the affected party on page 4, and pages 5 to 11 in their entirety.

The appellants have submitted that the principle of an "absurd result" applies in the circumstances of this appeal, and have referred to Order M-444, in which former Adjudicator John Higgins stated:

> Turning to the presumption in section 14(3)(b), the evidence shows that the undisclosed information was compiled and is identifiable as part of an investigation into a possible violation of law (namely, a murder investigation) and for that reason, it might be expected that the presumption in section 14(3)(b) would apply.
>
> 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.
>
> It is possible that, in some cases, the circumstances would dictate that this presumption should apply to information which was supplied by the requester to a government organization. However, in my view, this is not such a case. Accordingly, for the reasons enumerated above, I find that the presumption in section 14(3)(b) does not apply. In the absence of any factors favouring non-disclosure, I find that the exemption in section 38(b) does not apply to the information at issue in the records.

In the Notice of Inquiry, I asked the parties for their submissions on the applicability of this principle to the circumstances of this appeal. The Police have satisfied me that the principle does not apply here, in that the information in the records was not supplied to the Police by the appellants, although some of it may have originally been authored by the appellants. The disclosure of this information would, as submitted by the Police, reveal personal information about the individual who supplied this material to the Police.

LAW ENFORCEMENT

In addition to section 38(b) of the *Act*, another exemption to the general right of access is found in section 38(a) of the *Act*, under which the institution has the discretion to deny an individual access to his or her own personal information in instances where the exemptions in sections 6, 7, **8**, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

In this case, the Police have relied on sections 8(1)(d) in relation to pages 5 to 11, and 8(2)(a) in relation to pages 1 and 2, in exercising their discretion under section 38(a). Since I have found the information in pages 5 to 11 exempt from disclosure under the provisions of section 38(b), it is unnecessary to consider whether section 38(a) might also apply to those records. In the following, therefore, I will consider whether section 38(a) together with section 8(2)(a) apply to exempt pages 1 and 2 of the records from disclosure.

Section 8(2)(a)

Section 8(2)(a) reads as follows:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law; In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three part test:

Only a report is eligible for exemption under this section. The word "report" is not defined in the *Act*. For a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information (Order P-200). Generally speaking, results would not include mere observations or recordings of fact (Order M-1048).

In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the Police must satisfy each part of the following three part test:

1. the record must be a report; **and**

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

In their representations, the Police state

> Section 42(1(e) of the Police Services Act states that the duties of police officers include: Laying of charges, prosecuting and participating in prosecutions. Part of the process of laying charges is to first gather information and to investigate to determine if charges are warranted. Criminal charges are warranted when a police officer, on reasonable and probable grounds believe [sic] that an offence has been committed. The purpose of one of these reports was to determine if the

> family may have been at harm or if there had been damage caused to the rental property by the appellant. In this case there were no charges laid.

The Police refer to Order M-84 in support of their position, and submit that, considering all the information, the requirements of the 3 part test under section 8(2)(a) have been met.

I find that pages 1 and 2 of the records were prepared in the course of law enforcement investigations, by an agency which has the function of enforcing and regulating compliance with a law.

However, I am not satisfied that these records meet the definition of "report" under the *Act*. Generally, occurrence reports and supplementary reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120. In Order M-1109, Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

> An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".

On my review of the occurrence report and follow-up investigation report at issue in this appeal, I am satisfied that they also do not meet the definition of "report" under the *Act*, in that they record actions taken by the police officer in response to a complaint, and information conveyed by others. The content of these records is descriptive and not evaluative in nature.

I conclude, therefore, that section 8(2)(a) does not apply to exempt the information in pages 1 and 2 from disclosure to the appellants.

OTHER MATTERS

In part of the appellants' representations, they object to the severance of part of the representations of the Police. Section 41(13) of the *Act* states, in part, that "no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person." The *Code of Procedure* of this office and Practice Direction number 7 make it clear that I have the authority to withhold representations from a party, in accordance with established criteria, and I am content that these criteria support the withholding of certain portions of the representations of the Police from the appellants.

In other parts of the appellants' representations, they make reference to sections 32(h) and 7(2)(k) of the *Act*. I am satisfied that these provisions are not applicable to the circumstances of this appeal. The evidence before me does not establish any compelling circumstances affecting the health or safety of an individual linked to the disclosure of these records, as contemplated by section 32(h). As for section 7(2)(k) (reasons for a final decision, order or ruling), even if any

decisions made by the Police were the type of decisions to which this section applies, the records do not contain any reasons for their decisions.

The appellants also submit that the decision to refuse access under section 8(2)(a) of the *Act* was made by someone other than "a head", as required by that section. As I have found section 8(2)(a) inapplicable to the records for which it was claimed, it is unnecessary to address this issue. I note that the appellants may be equating a "head" for the purposes of the *Act*, with the Chief of Police. The *Act*, however, does not require the Chief of Police to act as the "head".

The appellants have submitted that the Police are wilfully withholding records under the *Act* to cover up their misconduct. Even if I had the authority to overrule the application of otherwise valid exemption claims on the basis of objectionable motives on the part of an institution, I find insufficient evidence to establish the existence of such motives in this appeal. In this part of their submissions, the appellants have also referred to section 14(1)(d) of the *Act*, permitting disclosure of personal information where authorized by statute, but have provided no factual basis for the application of this section. The appellants have also referred to Ontario Police Service Regulations, but again, have not provided any factual basis for the application of those regulations to this appeal.

The appellants have also submitted in their representations that the Police have failed to disclose the existence of further records. They refer to further police reports, filed by them, written wiretap records, 9-1-1 and switchboard audio and written records on their calls for police help, Police Services Board records and Professional Standards Section records. I find that it is too late in this appeal for the appellants to raise issues about the existence of other records. It should be noted that the Report of Mediator, which was sent to the appellants for review, and which is intended to record issues that remain in dispute, does not make mention of a dispute about the existence of other records. Although the appellants did respond to this Report, it was not apparent that an issue of reasonable search was being raised, and no mention was made of the types of records the appellants now assert should have been disclosed by the Police. I will indicate to the appellants, however, that it is open to them to make a further request to the Police for the records they are seeking.

Finally, I wish to address briefly what appears to be a misconception on the part of the appellants. In their letter in response to the Report of Mediator, the appellants appear to suggest, among other things, that their request should have been processed under the *Freedom of Information and Protection of Privacy Act* (the provincial Act), in addition to the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal Act). To be clear, the provincial Act does not apply to the Police, and the Police do not administer the provisions of that Act. Having made their request to the Police, and not to an institution to which the provincial Act applies, the provisions of the municipal Act govern the handling of that request and their entitlement to access.

Further, based on that letter, it also appears that the appellants have a misconception that the Police incorrectly limited their request to their "personal records", instead of "general records" relating to themselves. For the benefit of the appellants, there is no distinction between "personal records" relating to an individual and "general records" relating to an individual, and I find no basis for concluding that the Police have made such a distinction. The *Act* defines

"personal information" as recorded information "about an identifiable individual". The very fact that the information is "about an identifiable individual" is what brings it within the definition of "personal information". A "general record" which is "about" the appellants, therefore, contains their personal information.

ORDER:

1. I order the Police to disclose pages 1 and 2 of the records, with the exception of the first paragraph on page 2.

2. I uphold the decision by the Police to deny access to the remaining information in dispute.

3. For greater certainty, I have provided a copy of pages 1 and 2 to the Police, highlighting the portion of the records which shall be **withheld**.

4. I order disclosure to be made by sending the appellants a copy of pages 1 and 2 of the records, excluding the exempted portion, by no later than **August 7, 2001**, but not before **July 30, 2001.**

5. 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 records which it provided to the appellants.

Original signed by: June 29, 2001
Sherry Liang
Adjudicator