



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

ORDER MO-1430

Appeal MA_000151_1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The appellant submitted a request to the Toronto Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a specific occurrence report, notes from two identified officers and any notes regarding a specific address.

The Police located responsive records and issued a decision, initially claiming that the records fell outside the scope of the *Act* pursuant to section 52(3) of the *Act*. The Police then issued an amended decision in which they withdrew their reliance on section 52(3), relying instead on the exemptions in sections 8(1)(b) (law enforcement) and 8(2)(d) (correctional record) in conjunction with section 38(a) (discretion to refuse requester's own information) and section 38(b) with reference to section 14(3)(b) (invasion of privacy) to withhold the records from disclosure.

The appellant appealed the amended decision issued by the Police.

During mediation the appellant argued that the Police did not fully respond to his request for notes regarding a specific address. However, this issue was resolved by the appellant agreeing to make a separate request for this information. Also during mediation, the appellant indicated that he was not seeking access to pages 4, 5, 6 and 7 of the records. These pages are, therefore, no longer at issue. Further during mediation, the Police indicated that they no longer rely on the exemption in section 8(2)(d) of the *Act*. Finally, the Police clarified that certain portions of the notes from the two police officers are not responsive to the request.

The appellant did not indicate during mediation whether he accepted that these portions of the officers' notes are not responsive. Therefore, I have included the responsiveness of records as an issue in this appeal.

I sent a Notice of Inquiry setting out the facts and issues in this appeal to the Police, initially. The Police submitted representations in response and I sent the non-confidential portions of them to the appellant along with a copy of the Notice of Inquiry. Although the appellant expressed an intention to submit representations, and was given an extended period of time to do so, in the end he did not submit them.

RECORDS:

The records at issue consist of the following records withheld in their entirety:

- Record 1 (page 1) - police officer's notes;
- Record 2 (pages 2 - 3) - police officer's notes;
- Record 3 (page 8) - occurrence report;
- Record 4 (pages 9 and 10) - supplementary occurrence report; and
- Record 5 (page 11) - occurrence information sheet.

PRELIMINARY MATTER:

NON-RESPONSIVE RECORDS

In Order P-880, former Adjudicator Anita Fineberg defined “responsive” as meaning “reasonably related to the request.” I agree with this interpretation.

The Police submit that certain portions of pages 1, 2 and 3 of the records contain information that is not responsive to the appellant’s request. In particular, the Police state that the non-responsive portions of these pages document other events in which the police officers were involved and contain information which is completely unrelated to the matter involving the appellant.

Upon review, I agree that the portions of the records which have been withheld as being non-responsive, in fact, do not pertain in any way to the appellant, but rather, contain information about other matters which is routinely found in these types of documents. Therefore, I find that these portions of the records are not reasonably related to the appellant’s request and were properly withheld as being non-responsive to the request.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the *Act* defines “personal information”, in part, as recorded information about an identifiable individual. The records pertain to a police investigation into an alleged break and enter at the appellant’s residence. The records contain information about the appellant, as complainant, including his name, address, date of birth, as well as information provided by him regarding the particulars of his complaint. As all of the records pertain to this police investigation, I find that they contain information about the appellant and his complaint, and as such, contain his personal information.

The Police submit that Records 3 and 4 contain the personal information of an individual other than the appellant (the suspect) as defined in paragraphs (d) and (h) of the section 2(1) definition of “personal information” as they contain this individual’s name, address, telephone number, date of birth and other information about the individual. I agree that Records 3 and 4 contain this individual’s personal information.

Records 1 and 2 contain information recorded prior to the identification of a suspect and would appear to only contain the personal information of the appellant. Record 5 does not refer to any identifiable individual. However, in the context of the overall police investigation which resulted in the identification of a suspect, charges laid against this individual and ultimately, a conviction at trial, I find that all of the records contain the personal information of the suspect whether or not he is referred to in them.

The Police indicate that the appellant lodged a complaint under the *Police Services Act* (the *PSA*) relating to the break and enter and an investigation was commenced. In particular, the public complaint was based on the appellant’s belief that officers from the Police and/or other police services are responsible for the break and enter at his home. The Police state that the public

complaint investigation in this matter focussed on identified officers as being potential suspects for the break and enter at the appellant's home. The Police do not identify the particular subject officers.

Prior to determining this issue, I contacted the Police to determine the nature of the public complaint investigation, including the involvement of the Ontario Civilian Commission on Police Services (OCCOPS) in the matter and the identities of the police officers being investigated. The Police indicate that no individual police officer was named in the complaint. They continue that because of the nature of the complaint, the investigation did not involve a "subject officer", but rather, involved interviews with all officers involved in the matter (at the "take down"). With respect to the involvement of OCCOPS in this complaint, the Police note that the Police began investigating the complaint when it was made. The matter was referred to OCCOPS, not as an appeal, but as a review of the process decision made by the Police (whether to investigate the complaint as a policy or services matter, or as a conduct matter). The Police were not particularly forthcoming in explaining the nature of the investigation beyond this, however.

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official capacity, and found that in some circumstances, information associated with a person in his or her professional or official capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (See Orders P_257, P_427, P_1412 and P_1621). For example, information associated with the names of individuals contained in records relating to them only in their capacities as officials with the organizations which employ them, is not personal in nature but is more appropriately described as being related to the employment or professional responsibilities of the individuals (See Order R-980015). Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447 and M-122).

In most cases, the names of police officers involved in investigating an alleged crime would be considered as information associated with the person in his or her professional capacity since it relates to the police officer's professional responsibilities. However, in the circumstances of this appeal, I must determine whether this identifying information should be characterized otherwise. Despite the lack of particulars about the nature of the investigation into the public complaint, I am satisfied, based on the totality of the evidence submitted by the Police and the unique nature of the appellant's public complaint, that the investigation, at least in part, likely examined the behaviour of various police officers involved in the matter to determine the propriety of their conduct. On this basis, I find that information in the records which identifies the police officers involved in the matter qualifies as their personal information. This information is found on each page of the records.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

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(a) of the *Act*, an institution has discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 8, would apply.

Section 8(1)(b) provides that:

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

- (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 purpose of the section 8(1)(b) exemption is to provide the Police with discretion to deny access to records in circumstances where disclosure could reasonably be expected to interfere with an *ongoing* law enforcement investigation. The Police bear the onus of providing evidence to substantiate that, first, a law enforcement investigation is ongoing and second that disclosure of the records could reasonably be expected to interfere with the investigation [See Orders P-324, P-403 and M-1067].

Previous orders of this Office have found that in order to establish that disclosure "could reasonably be expected to" result in a particular harm, 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 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.)].

Law Enforcement

With respect to the first issue of whether the records relate to a law enforcement investigation, the records must satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. This section defines "law enforcement" to mean (a) policing, (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and (c) the conduct of proceedings referred to in clause (b).

The records at issue document a police investigation of a possible breach of the *Criminal Code*. This matter clearly falls within the definition of "law enforcement" as the term is defined in section 2(1) of the *Act*. The Police note, however, that an individual was ultimately arrested and charged with break and enter. The Police indicate further that, after pleading guilty to the charge, this individual was convicted and sentenced. Accordingly, I find that the records do not relate to an *on-going* investigation insofar as this matter is concerned.

The Police state further, however, that shortly after making his complaint about the break and enter, the appellant lodged a complaint under the *PSA* and an investigation was commenced. The Police refer to various provisions of the *PSA* which relate to the complaint process and in particular, the roles of the Chief of Police and the OCCOPS and the consequences of a finding that the complaint has merit, stating:

Once it was determined that the nature of the complaint related to the conduct of police officers, as opposed to policies or services provided by a police service, the matter was appealed to ... OCCOPS...

...

After OCCOPS had made a determination, the complaint was returned to the [Police] for further investigation ...

...

The public complaint was based on the requester's belief that officers from the [Police] and/or other police services are responsible for the break and enter to his home.

Subsequent to the receipt of the appeal in this matter, the PCB [the Public Complaints Bureau] was contacted to determine the status of the complaint. PCB advised that the matter had not been concluded, and therefore was still an ongoing public complaint investigation.

Previous orders of this office have found that investigations under the *PSA* into public complaints qualify as law enforcement investigations since such an investigation can lead to charges against the subject officer, and a hearing before a board of inquiry under the *PSA* (Orders PO-1708, P-1250, P-932 and M-757). I agree and find that the records at issue relate to a law enforcement investigation.

Interference

The Police provide detailed representations on the impact of premature disclosure of the records on this investigation stating:

The public complaint investigation in this matter has focused on identified officers as being potential suspects for the break and enter to the appellant's home. Should the investigation result in a hearing, the requester may be called to testify.

[I]t is the position of this institution that there exists a reasonable expectation of interference with the investigation should the requester be provided with the information he originally provided to the police.

... a fair and untainted investigation is essential to the proper decision-making of the investigators on the issue of whether charges are warranted or not.

...

The ability of the investigators to ensure the integrity of the investigation by preserving evidence (by not allowing the requester to refresh his memory) untainted by being refreshed is a factor which weighs in favour of non-disclosure of the appellant's information.

The Police conclude:

The public and the [Police] regard complaints against the conduct of police officers as a very serious and sensitive matter, going to the very core of the public's belief and trust in the integrity of the police in providing policing services and maintaining law and order in their community.

I am satisfied that, given the nature of the public complaint made by the appellant, the premature disclosure of the information in the records, which would in all likelihood be used by investigators as part of their investigation into the merits of his complaint, could reasonably be expected to interfere with this investigation.

On-going

As I noted above, the Police state in their representations that, at the time the appeal was filed, the investigation into the public complaint had not been concluded. However, a period of time has passed since this appeal was filed. Prior to determining this issue, I contacted the Police to determine the status of the investigation.

The Police indicated that the investigation into the public complaint has been completed. Based on this change in circumstances from the time the appeal was initiated, I find that the law enforcement investigation is no longer on-going, and a requisite component of the exemption in section 8(1)(b) has not been met. Accordingly, I find that section 8(1)(b) does not apply to the information in the records. As a result, it is not necessary for me to consider the possible application of section 38(a).

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 section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 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 16 exemption.

The Police claim that all of the information which has been withheld from the records falls within the presumption in section 14(3)(b) of the *Act* as this information was compiled and is identifiable as part of a law enforcement investigation into an alleged break and enter contrary to the *Criminal Code* and then subsequently an investigation into the appellant's public complaint under the *PSA*.

The records document the police investigation into the break and enter at the appellant's residence, beginning with the response to the initial complaint. The personal information in the records is contained in the investigating police officers' notes as well as in an occurrence report and supplementary report. The particulars of the complaint and investigation were captured on an occurrence information sheet.

As I indicated above, these records were also used by the Police during their investigation into the appellant's complaint under the *PSA*.

I am satisfied that all of the personal information in these records was compiled and is identifiable as part of an investigation into a possible violation of law (the *Criminal Code* and/or the *PSA*) and its disclosure would constitute a presumed unjustified invasion of privacy under section 14(3)(b).

In explaining why they exercised their discretion in favour of non-disclosure of the personal information in the records, the Police state that because of the sensitivity and social stigma attached to those against whom allegations of criminal misconduct are directed, individuals involved in police investigations have a reasonable expectation of confidentiality with respect to their personal information. The Police note that, as far as they are aware, the appellant does not require the information in order to exercise a legal right. The Police also indicate that they considered the fairness to the suspect (in the *Criminal Code* investigation) of "a continuing and potentially public reminder of these unpleasant events". The Police note that the suspect was ultimately charged with break and enter to which he pleaded guilty and was convicted and sentenced. The Police state that they considered the right of the suspect to have some closure

from events that are now concluded. Finally, the Police state that the appellant has brought a complaint against certain police officers in regard to the break and enter and submit that the information should be protected from disclosure in order to protect the integrity of the police investigation into the complaint.

In his letter of appeal, the appellant notes that he is seeking the requested records in order to assist with his insurance claim arising from the theft of his property. In doing so, the appellant has alluded to the relevancy of the factor in section 14(2)(d) (fair determination of rights). The appellant did not provide any additional information relating to this issue, however. Even if I were to find that he is seeking the requested records for this purpose, this factor cannot override the presumption in section 14(3)(b).

I am satisfied, based on the representations of the Police, that they have properly exercised their discretion in favour of not disclosing certain portions of the suspects personal information to the appellant that is contained in Records 3, 4 and 5. In general, these portions of the records contain specific identifying information about the suspect such as his name and date of birth, other information specifically about him and his activities, and the police officers' views regarding the sequence of events as they involve the suspect relating to the break and enter.

In addition, given the circumstances surrounding the appellant's public complaint, I am satisfied that the Police have properly exercised their discretion in withholding the names of the various police officers involved in this matter. This information is found on all of the pages. Record 4, in particular, lists the police officers involved in the investigation in varying capacities.

Finally, Record 5, an occurrence information sheet, is in the form of a checklist which indicates whether or not various elements/activities are present in the circumstances of a particular investigation. This record provides a quick snapshot of the nature and seriousness of the criminal activity and/or investigation. As this information is as much about the suspect as it is about the appellant, I find nothing improper in the Police exercising their discretion in favour of non-disclosure of this record.

In summary, I find that the discretionary exemption in section 38(b) of the *Act* applies to these identified portions of the records at issue.

Absurd Result

In Order M-444, former Adjudicator John Higgins found that non_disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first place would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This reasoning has been applied in a number of subsequent similar orders of this Office and has been extended to include, not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (eg. MO-1196, P-1414 and PO-1679).

The information in Records 1 and 2 and portions of the information in Records 3 and 4 relate specifically to the appellant, the nature of the call made by the appellant, the manner in which the

police officers responded to him and include a description of damage/loss as provided by the appellant or which was clearly obtained in his presence.

The Police submit that withholding this information from the appellant in the circumstances of this appeal would not result in an absurd result because its premature disclosure would interfere with an on-going investigation. In this regard, the Police state:

During the investigation stage of a public complaint, the investigator not only gathers documentary evidence in the form of memorandum book notes and occurrence reports, he also contacts the complainant in order to obtain a statement.

It is essential that the original recollections of the complainant at the time of taking a statement be captured, and even tested at a later date should there be any doubt as to the credibility of the complaint. Specific details provided at the time of the offence may change when the complainant is interviewed at a future date. Such changes can result in the investigation being quashed and even mischief charges being laid.

As the subject matter of the complaint is the belief that police officers were responsible for the break and enter, the details of the method of entry, the time of the entry and the list of items taken would certainly be important issues in the investigation.

Public Complaints Bureau (the PCB) advises that at no time during their investigation are copies of actual statements or records provided to a complainant, nor is the complainant allowed to view them.

Although not raised by the Police in their decision, during mediation or specifically in their representations, the Police allude in this discussion to the possible application of sections 8(1)(a) (interfere with a law enforcement matter) and 8(1)(f) (right to fair trial) of the *Act* as a basis for determining that the principle of "absurd result" should not be applied in this case. They state:

In the event that charges are laid, both the prosecution and the defence have the opportunity to examine the complainant's original information with that of the subsequent statement provided to the investigator. This provides them the opportunity to cross-examine the complainant on his evidence with the knowledge that the information he supplied was not affected by having refreshed his memory from records obtained in a process outside of the complaint investigation.

Similar to the investigation stage, if facts change, are added or are deleted from evidence originally provided by a witness, the prosecutor must evaluate the credibility of the witness and his evidence. This test of evidence goes to the weight and credibility to be applied to that evidence.

It is the position of this institution that in order to preserve the integrity of the process, the need to have any possible evidence tested as to its validity, accuracy

and credibility is also a compelling reason for non-disclosure. As well, any parties who may ultimately be charged as a result of this investigation also deserve the right to a fair and impartial adjudication.

As I indicated above, the Police state that the investigation into the public complaint has been completed. Although provided with an opportunity to fully address the status of this matter, the Police have not provided any further information regarding it. It is reasonable to conclude, therefore, that no charges were laid as a result of it. This conclusion is supported by the fact that an individual was caught, charged, pleaded guilty and was ultimately convicted for the break and enter at the appellant's residence.

On this basis, I am not persuaded that the absurd result principle should not be applied in the circumstances of this appeal to information about the appellant, including information that was provided by him or of which he is clearly aware. Consequently, I find that the discretionary exemption in section 38(b) does not apply to these remaining portions of the records. I have highlighted this information in yellow on the copy of the records I am sending to the Freedom of Information and Privacy Co-ordinator for the Police with this order.

ORDER:

1. I order the Police to provide the appellant with the portions of the records that I have highlighted in yellow on the copy of them that I am sending to the Freedom of Information and Privacy Co-ordinator for the Police with this order by sending him a copy of this information on or before June 18, 2001.
2. I uphold the decision of the Police to withhold the remaining information from disclosure.
3. In order to verify compliance with the provisions of this order, I order the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: _____

Laurel Cropley
Adjudicator

_____ May 28, 2001