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

ORDER MO-1606

Appeal MA-020141-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "all the police reports for charges" between [two named individuals] on two specified dates in 2000. Specifically, the requester sought access to "all reports and memo books notes".

The Police located the requested records and denied access to them, in part, pursuant to the invasion of privacy exemption in section 38(b) of the *Act*. The Police relied upon the presumptions in sections 14(3)(b) (records compiled as part of a law enforcement investigation) and (h) (the records indicate an individual's racial or ethnic origin). The Police later located additional records responsive to the request and granted partial access to them. Access to the remaining portions of these records was denied pursuant to the following exemptions in the *Act*:

- Invasion of privacy – section 38(b), with reference to the presumption in section 14(3)(b); and
- Discretion to refuse requester's own information/relations with other governments – sections 9(1)(d) and 38(a).

The Police also indicated in its decision letters that portions of the records were not responsive to the request.

The requester, now the appellant, appealed the decision of the Police not to grant him full access to all of the records. During the mediation stage of the appeal, the Police provided an index of records to the appellant. The appellant also maintains that additional records, specifically a victim impact statement and a witness statement which he provided to the Crown Attorney, were not included in the identified documents. The appellant is also interested in receiving access to the information in the records which the Police have identified as non-responsive. Finally, the appellant has raised the possible application of the "public interest override" provision in section 16 of the *Act*.

Further mediation was not possible and the appeal was moved into the adjudication stage of the process. I decided to seek the representations of the Police initially, as they bear the burden of establishing the application of the exemptions claimed for the records. The Police made submissions which were shared, in part, with the appellant. Portions of the Police representations were withheld from the appellant due to their confidential nature. The appellant also made representations in response to the Notice of Inquiry provided to him.

RECORDS:

The 107 records at issue consist of the undisclosed portions of various police officer's notes, correspondence, memoranda, administrative forms and the Crown Brief. The records are more fully described in the index which the Police provided to the appellant.

DISCUSSION:

PERSONAL INFORMATION

The personal privacy exemption in section 38(b) applies only to information which qualifies as "personal information", as defined in 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 [paragraph (c)] 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 [paragraph (h)].

Based on my review of the representations of the Police and the records themselves, I find that all of the records contain the personal information of the appellant and the individual who was charged with and convicted of assaulting the appellant (the affected person). The records relate to the investigation undertaken by the Police of the accusations against the affected person made by the appellant and the prosecution of this individual for various offences under the *Criminal Code*. I find that the personal information relates to both the appellant and the affected person only.

Record 82 contains the vacation dates of the investigating officer which were provided to the Crown Attorney in order to assist her in determining a trial date. I find that this information relates to the officer in his personal capacity and qualifies as his personal information within the meaning of section 2(1)(h).

INVASION OF PRIVACY

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.

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.

In determining whether the exemption in 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 institution 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].

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 14 exemption. [See Order PO-1764]

If none of the presumptions in section 14(3) applies, the Police must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The Police rely on the "presumed unjustified invasion of personal privacy" in sections 14(3)(b) and (h) of the *Act*. These sections 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;
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

In support of this contention, the Police indicate that the records at issue were compiled and are identifiable as part of an investigation into a possible violation of law on the part of both the appellant and the affected person, as contemplated by section 14(3)(b). Charges were laid against both individuals and convictions were obtained following their disposition by the court. In addition, the Police submit that the records also contain information as to the racial or ethnic origin of the affected person and that this information falls within the ambit of the presumption in section 14(3)(h).

The appellant's representations do not address the application of the exemptions claimed to the records in any significant way.

I note that the Police have disclosed those portions of Records 1 to 32 which relate only to the appellant. Based on my review of the undisclosed information contained in these records and the representations of the Police, I find that the information contained in Records 1 to 32 was compiled and is identifiable as part of an investigation conducted by the Police into a possible

violation of law. These records include the notebook entries taken by the Police officers who conducted the investigation into the appellant's allegations, and the counter-allegations made by the affected person and the occurrence reports which the officers prepared in the course of their investigations. As a result, these records fall within the ambit of the presumption in section 14(3)(b). Accordingly, I find that their disclosure would constitute an unjustified invasion of the personal privacy of the affected person and that they are exempt from disclosure under section 38(b).

Records 33 to 68 relate to the prosecution of the affected person. Records 34 and 41 and certain severances from Records 43, 46, 47, 50, 51, 59, 65 and 66, relate solely to the appellant and were disclosed to him. Access to the remainder of Records 33 to 68 was denied under sections 14(1) and 38(b) of the *Act*, with the exception of Records 36 to 40 which were denied under section 9(1)(b), in conjunction with section 38(a) of the *Act*. I will address these records in my discussion below.

Records 69 to 107 relate to the prosecution of the appellant. Access was granted to many of these records, in whole or in part. Access to the undisclosed portions of Records 69 to 107 was denied under section 38(b) of the *Act*, with the exception of Records 95 and 96, which were denied under section 9(1)(d), taken in conjunction with section 38(a). I will address these records in my discussion below.

Records 83 to 93 are notebook entries taken by one of the investigating police officers. I find that these records were compiled and are identifiable as part of the police investigation into allegations of assault against the appellant. As a result, I find that they fall within the presumption in section 14(3)(b) and that their disclosure is presumed to constitute an unjustified invasion of the personal privacy of the affected person. Records 83 to 93 are, accordingly, exempt from disclosure under section 38(b).

I find that those records relating to the prosecution of the appellant and the affected person contained in the Crown briefs for each proceeding were not compiled and are not identifiable as part of an *investigation* into a possible violation of law. Rather, these documents relate to the criminal prosecution of the appellant and the affected person following the completion of the Police investigation. As a result, I find that the presumption in section 14(3)(b) has no application to this information.

The representations of the Police do not refer specifically to any of the listed considerations favouring the non-disclosure of the requested information under section 14(2). In its confidential submissions, the Police make reference to the circumstances surrounding the laying of charges against both the appellant and the affected person and the likelihood of further problems between them as a consideration favouring the non-disclosure of this information to the appellant. I agree that this is a significant factor in the circumstances favouring privacy protection.

The appellant has not made reference in his representations to any considerations, listed or otherwise, under section 14(2) in favour of the disclosure of this information. I note that access has been granted to those portions of the prosecution records which relate exclusively to himself.

I have found above that the only relevant consideration which is applicable in the present appeal is one which favours the non-disclosure of the requested information relating to the prosecution of the appellant and the affected person. As a result, I find that the disclosure of this information would result in an unjustified invasion of the personal privacy of the affected person and that it is, accordingly, exempt from disclosure under section 38(b).

Specifically, I find that Records 33, 35, 42, the undisclosed portion of Record 43, 44, 45, the severed portion of Records 46 and 47, 48, 49, the undisclosed portion of Records 50 and 51, 52, 53, 54, 55, 56, 57, 58, the undisclosed portions of Record 59, 60, 61, 62, 63, 64, the severed portions of Records 65 and 66, 67 and 68, relating to the prosecution of the affected person, are exempt under section 38(b). In addition, I find that the undisclosed portions of Records 72, 75, 77, 78, 80, 81, 83, 84 and 91, all of Record 92, the undisclosed portions of Records 97, 98, 100, 101 and 106 from the records relating to the appellant's prosecution are exempt under section 38(b).

The information which remains undisclosed from Record 82 relates to the vacation dates of the investigating officer, which I have found above qualifies as his personal information. In my view, this information was provided by the investigating officer to the Crown Attorney with an expectation that it would be treated confidentially, as contemplated by the factor listed in section 14(2)(h). Accordingly, as the only relevant consideration under section 14(2) favours privacy protection, I find that the disclosure of the remaining information in Record 82 would result in an unjustified invasion of the personal privacy of the investigating officer and that it is, accordingly, exempt from disclosure under section 38(b).

RELATIONS WITH OTHER GOVERNMENTS/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

The Police submit that Records 36 to 40, 95 and 96 are exempt from disclosure under section 38(a), taken in conjunction with section 9(1)(d) of the *Act*, which reads:

> 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,
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> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c); or

Record 36 to 40 is a memorandum from a Crown Attorney to the file relating to the prosecution of the affected person. The Police indicate that this document was included in the Crown brief by the Crown Attorney assigned to the affected person's prosecution on May 11, 2001. The Police indicate that the memorandum contains specific "notes/comments/instructions" relating to

the prosecution and were "created by and received in confidence" from an agency, the office of the Crown Attorney, of the Government of Ontario. The Police contacted the Freedom of Information Co-ordinator at the Ministry of the Attorney General seeking the Ministry's views on the disclosure of this record to the appellant. The Ministry advised the Police that it was opposed to the disclosure of the record on the basis that it is exempt under sections 19 and 21(1) of the provincial *Act*.

Records 95 and 96 set forth the confidential position of the Crown Attorney with respect to the disposition of the charge against the appellant and some notes referring to the Crown Attorney's view of the incident which gave rise to the charge.

The Police have provided me with the following submissions with respect to the application of section 9(1)(d) to Records 36 to 40, 95 and 96. They submit that:

> The Confidential Crown Brief is a repository of information that although created by our institution, houses records also belonging to the Crown Attorney's office. By collating the information, continuity of an offence enforced by this Institution [the Police] and prosecuted by the Crown Attorney's office is preserved.
>
> One a *Criminal Code of Canada* charge has been laid, it is the Crown Attorney's office who bears the responsibility for prosecuting the matter. The office of the Crown Attorney has the authority to direct police to further their investigation and/or inquiries into the matter until such time as the criminal charge has been dealt with by the Court.
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> The records at issue, contained within the Confidential Crown Brief, were created by the Crown Attorney's office to convey questions, comments and/or instructions, and include notes/comments/instructions regarding aspects of the proceedings for others involved in the prosecution.
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> The existence of a confidential channel of information exchange is essential in order for the MAG [Ministry of the Attorney General] and Toronto Police Service to work together to carry out the administration of justice, and to ensure a fair judicial proceeding.
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> In previous discussions between this office and the MAG, it has specifically identified that there is an expectation of confidentiality – both during and after the judicial proceedings. The very name of the file itself – Confidential Crown Brief – makes this implicitly clear, and we have abided by the *Act*, section 9(1)(d) 'A head shall refuse to disclose' and obtained confirmation that this is also [the] Ministry's explicit direction in these matters.

In Order MO-1581, Adjudicator Sherry Liang reviewed in detail a number of past decisions of the Commissioner's office addressing the application of section 9(1)(d) and its equivalent provision in the provincial *Act*. In her analysis of section 9(1)(d), which I am reproducing in its entirety, Adjudicator Liang elucidates the approach to be taken when making a determination as

to the confidentiality of the information received by a municipal institution from another government source. She found that:

> The section 9(1) exemption has been applied in a variety of circumstances, including information provided to a police service from other police services (Order M-202), information provided to a municipality by the Ontario Realty Corporation (an agency of the provincial government) (Order M-1131), information provided to a police service by a ministry of the provincial government (Order MO-1569-F), and information provided to a police service by Crown Attorneys (see discussion below).
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> In these cases, it has been said that in order for section 9(1) to apply, the institution must demonstrate that the disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section **and** that the information was received by the institution in confidence.
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> In addition, in the specific case of information provided to a police service by Crown Attorneys, certain orders have linked the application of the section 9(1) exemption under the municipal *Act* to the application of an exemption under the provincial *Act*. In Order MO-1202, for example, former Adjudicator Holly Big Canoe discussed the requirements for the application of the section 9(1) exemption, in very similar circumstances to the ones before me. The record consisted of a Confidential Crown Envelope bearing entries made by a Crown Attorney. In that order, former Adjudicator Big Canoe considered whether the information would be exempt under the provincial *Act*, in the hands of the Ministry. She found that the information would fall under section 19 (solicitor-client privilege) of the provincial *Act*, and that the requirements for section 9(1) under the municipal *Act* were accordingly met.
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> This approach has been followed subsequently, in Orders MO-1292, MO-1313, and MO-1327 (the "Toronto Police Service cases").
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> I find the analysis in the Toronto Police Service cases sound, to the extent that a consideration of whether the information would have been exempt under the provincial *Act*, had it remained in the hands of the provincial institution, may be a significant factor in determining whether the same information was "received in confidence" and therefore exempt under section 9(1) of the municipal *Act*.
>
> However, to the extent that there is also a suggestion in these cases that there is a direct link between the application of an exemption under the provincial *Act*, and the application of section 9(1) under the municipal *Act*, I have some reservations about such an approach. In my view, the applicability of an exemption under the provincial *Act* is not necessary and may not even be sufficient to the application of section 9(1)(d) of the municipal *Act*. As expressed in Order M-128 originally, and applied in other cases subsequently, the requirements for the application of

section 9(1) (that disclosure of the record could reasonably be expected to reveal information received from one of the governments, agencies or organizations listed in the section, **and** that this information was received by the institution in confidence) are essentially questions of fact. Whether or not the information might have been exempt under the provisions of the provincial *Act* is a factor which may assist in applying section 9(1), but may not be determinative of the issue. A finding that the information would have been exempt had it remained in the hands of the provincial institution does not necessarily lead directly to a finding that the same information is exempt in the hands of a municipal institution. Likewise, a finding that certain information would *not* have been exempt in the hands of the provincial institution does not dictate a conclusion that the information is not exempt in the hands of the municipal institution.

It should be noted that section 15(b) of the provincial *Act*, which is the provincial equivalent to section 9(1), also exempts information "received in confidence from another government or its agencies by an institution". Orders of this office applying section 15(b) of the provincial *Act* have adopted a fact-based approach to the issue more in keeping with Orders M-202, M-1131 and MO-1569-F than the approach in the Toronto Police Service cases, and have essentially looked for evidence as to the nature of the confidentiality understanding surrounding the provision of the information. In Order P-1629, for example, Assistant Commissioner Tom Mitchinson accepted the submission of the Ministry of Economic Development, Trade and Tourism that certain information in the records was received from the federal government in confidence, but did not accept that other information at issue was provided on a confidential basis. In Order PO-1915-F, Senior Adjudicator David Goodis found that the Ministry and the City had not provided the "necessary detailed and convincing evidence" to establish that disclosure of these records would reveal information the Ministry of the Attorney General received "in confidence" from the City of Toronto, either expressly or by implication.

In my view, the approach taken in the above orders, in essentially seeking to determine the basis on which information was shared between governments, is in keeping with the rationale for the section 9(1)/15(b) exemption, as discussed in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission), at pages 306-7:

> ... 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*. ... [emphasis added]

In conclusion, I prefer the approach to this issue taken in Orders M-202, M-1131, MO-1569-F and the provincial orders cited above, over the approach taken in the Toronto Police Service cases. Accordingly, although it may be helpful to determine whether information would have been exempt in the hands of the sending institution (such as through the application of the solicitor-client privilege), it is not a necessary path to take in order to reach a conclusion on the applicability of section 9(1) of the *Act*.

In the case before me, I am satisfied that Records 38 and 40 contain information supplied to the Police by Crown counsel, and that the information was received by the Police in circumstances of confidentiality. In this respect, I accept the representations of the Police and of the Ministry as to the explicit and implicit understandings surrounding the receipt of this kind of information, in the context of the roles of these two institutions in criminal court proceedings.

I conclude, therefore, that Records 38 and 40 qualify for exemption under section 9(1)(d) of the *Act*.

I adopt the approach set forth by Adjudicator Liang in Order MO-1581 for the purposes of the current appeal. In my view, the contents of Records 36 to 40, 95 and 96 clearly indicate that they were received by the Police from the Crown Attorney. These records were included in the Crown brief and their subject matter, as well as the representations of the Police regarding the relationship between the office of the Crown Attorney and the Police demonstrate that the information was intended to be treated in a confidential manner. As a result, I find that the Police have established the application of section 9(1)(d) to the information contained in Records 36 to 40, 95 and 96.

In Order MO-1581, Adjudicator Liang made certain findings with respect to the exercise of discretion under section 38(a) by the Police to disclose records which are subject to the mandatory exemption in section 9(1)(d) in situations where the records also contain the personal information of the requester. In the appeal which gave rise to the decision in Order MO-1581, the Police made representations which are identical to those submitted in the present appeal. Adjudicator Liang reviewed the submissions of the Police on the exercise of discretion issue as follows:

> Although section 9(1)(d) is a mandatory exemption, the fact that these records contain the personal information of the appellant brings them under section 38(a), which gives the Police a discretion on disclosure or non-disclosure. The Police have made submissions on the exercise of their discretion in favour of non-disclosure. They state that they weighed the right of the appellant to his personal information with that of the possible harm to the administration of justice should the confidential exchange of information and instructions between Crown counsel and the Police be compromised. The Police submit that the free flow of information and instructions between these two institutions, which is an essential element of the proper administration of justice and ultimately a fair and proper judicial proceeding, could be severely restricted. Should this disruption occur, the right of the public to retain their confidence in the performance of the Police and the Ministry could be damaged. The public expects a high level of cooperation and interaction between those institutions whose mandate it is to investigate and prosecute criminal offences. The Police submit that in the absence of such cooperation, due to the restriction of free flow of information and instructions, the public would lose confidence in those agencies entrusted with a significant public trust – that being the proper administration of justice. The Police state that having weighed the right of the appellant to his personal information with these concerns, the Police concluded that the possible harm of compromising the established confidentiality relationship between the Police and Crown counsel weighed in favour of non-disclosure.
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> Having regard to the above, I am satisfied that the Police have exercised their discretion properly in deciding not to grant access to Records 38 and 40.

I concur with the findings of Adjudicator Liang for the purposes of the current appeal and conclude that the Police have properly exercised their discretion in deciding not to grant access to Records 36 to 40, 95 and 96.

PUBLIC INTEREST IN DISCLOSURE

The appellant indicated at the mediation stage of the appeal that he was of the view that there exists a public interest in the disclosure of the information contained in the records, as contemplated by section 16 of the *Act*. This section states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

In my view, the interest which exists in the disclosure of the records in the present appeal is neither public nor is it compelling. The appellant has not provided me with any evidence to demonstrate that there is any "public" interest in the subject matter of the records. Rather, I find that his interest in them is purely a private one. As a result, I find that section 16 has no application to the current appeal.

ORDER:

I uphold the decision of the Police to deny access to the records and parts of records at issue.

Original signed by: January 24, 2003
Donald Hale
Adjudicator