



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-1652**

**Appeal MA-020352-1**

**Ottawa Police Services Board**

## **NATURE OF THE APPEAL:**

The Ottawa 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 police records relating to an investigation into a fire that took place at the requesters' place of business on a specified date. The request specifically asked for the following:

1. The sworn information forming the basis of the search warrant(s) issued in relation to the business premises;
2. A copy of the executed search warrant;
3. A list of the items seized from the premises in the execution of the search warrant;
4. The results of the forensic testing conducted by the RCMP;
5. The police report and notes from any and all officers attending at the scene of the fire or conducting follow-up interviews or investigations;
6. Copies of all the witness statements taken in the course of the police investigation;
7. Any and all other information in the possession, power or control of the Ottawa Regional Police Service pertaining to this matter is also expressly requested.

The Police located the requested information and granted partial access to them. In their decision letter, the Police relied on the following exemptions contained in the *Act* to deny full access to the requested records:

- Facilitate commission of an unlawful act - section 8(1)(l), in conjunction with section 38(a) of the *Act*;
- Law enforcement - section 8(2)(a), in conjunction with section 38(a) of the *Act*; and
- Invasion of privacy - sections 14(1) and 38(b), in conjunction with the presumption in section 14(3)(b) of the *Act* (compiled as part of a law enforcement investigation)

The requesters, now the appellants, appealed the decision to deny access in full to the requested records. In their letter of appeal, the appellants also indicated that, in their view, the decision letter did not provide sufficiently detailed reasons as to why the undisclosed records and parts of records were withheld.

During the mediation stage of the appeal, the Police agreed to disclose a previously prepared index of records indicating which exemptions applied to each page of the record that was severed or withheld. The Police also confirmed that they did not seek consent from affected parties to release records containing the personal information of these individuals.

I decided to seek the representations of the Police, initially. I received their submissions, which were then shared, in their entirety, with the appellants, along with a copy of the Notice of Inquiry. The appellants also made representations, which were shared with the Police. Finally, the Police also made submissions by way of reply.

## **RECORDS:**

The records at issue in this appeal consist of the following:

- General Occurrence Hardcopy – GO#2001-29098, dated October 8, 2002 (pages 1-35);
- Witness Statement (handwritten) 2003-Feb-15 (page 36);
- Witness Statement (handwritten) 2003-Feb-15 (page 37);
- Forensic Laboratory Report, dated March 13, 2001 (page 43-44);
- Appendix “C” - grounds for warrant (pages 51-54);
- Officers Notes (page 67, 69-115).

## **DISCUSSION:**

### **PRELIMINARY ISSUE**

#### **Was the decision letter issued by the Police in accordance with the requirements of sections 19 and 22 of the Act?**

In their letter of appeal, the appellants contend that the decision letter issued by the Police was inadequate as it failed to describe the information contained in the undisclosed records and the reasons why this information was withheld. They argue that, “without sufficient detail we are unable to make a determination as to the relevance of the information.”

The relevant portions of the decision letter provided to the appellants by the Police on October 15, 2002 read as follows:

After reviewing the information a decision has been made to grant partial access to the information requested. Access is denied to some information, pursuant to sections 8, 14 and 38 of the Act.

The decision then goes on to quote the specific exemptions claimed. During the mediation stage of the appeal, the Police agreed to provide the appellants with a copy of the Index of Records which it had prepared. This Index did not, however, contain a description of the records beyond listing them by number and the exemption(s) claimed for each. The Report of the Mediator provided to the parties at the conclusion of the mediation stage contained a much more detailed description of the records remaining at issue in the appeal.

In support of its position that the decision letter was adequate and met the requirements of the Act, the Police state:

The decision letter provided to the appellant[s] contained the relevant sections of the MFIPPA, along with the wording of those sections. The wording indicates the reasons the provisions apply to the records that were not disclosed. If the appellants did not understand the reasons then they could have contacted us to

discuss the reasons. As this was not the case, then we are of the understanding that the exemptions used were clear to the appellant[s]. We feel that the decision letter was in accordance with the Act.

The appellants rely on the provisions of sections 19 and 22 of the *Act* and submit, however, that:

. . . the Police merely recited the provisions contained in the Act. File specific reasons were never provided.

...

. . . the appeal was not based on a lack of understanding of the provisions cited by the Police, this is not the issue. The issue is how these provisions specifically relate to the file in question.

The appellants are entitled to case specific reasons as they relate to the provisions of the Act, not a mere regurgitation of the Act itself.

Section 19 of the *Act* states:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20, 21 and 45, within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

Section 22(1)(b) of the *Act* provides:

- (1) Notice of refusal to give access to a record or part under section 19 shall set out,
  - (b) where there is such a record,
    - (i) the specific provision of this *Act* under which access is refused,
    - (ii) the reason the provision applies to the record,

- (iii) the name and position of the person responsible for making the decision, and
- (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In my view, the decision letter as originally issued by the Police was deficient as it did not specifically describe the reasons why the exemptions claimed apply to the records. In Order M-913, former Adjudicator Anita Fineberg reviewed the rationale behind section 22 and made the following comments:

The appellant submits that the decision letter of the Police was inadequate in that it failed to provide any reasons for denying access to the requested information. He states that the decision merely refers to sections of the *Act* and that it is insufficient "... to allow our client to make informed decisions and meaningful representations in this appeal".

...

The decision letter issued by the Police stated that access was being denied to the listing of police officers pursuant to sections 13, 14(1)(f) and 14(3)(d) of the *Act*. The letter went on to note that "... These sections apply because ..." followed by a paragraph setting out the language of these sections.

In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). In this case, I agree with the appellant that the decision letter of the Police should have provided him with **reasons** for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii) [section 22(1)(b)(ii)] of the *Act*. It does not provide an explanation of why the exemptions claimed by the Police apply to the record. Section 29(1)(b)(i) [section 22(1)(b)(i)] already requires that the notice contain the provision of the *Act* under which access is refused.

Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations which I have referred to in my disposition of all the issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellant.

I adopt the analysis and conclusion in Order M-913 with respect to the present appeal. It is useful to an appellant for institutions to include in its decision letters the reason why exemptions are claimed. This assists the appellant in making a determination as to whether to appeal an

institution's decision. Having some better understanding of why the exemption applies also assists an appellant during the mediation process. In the present appeal, I find that no useful purpose would be served by requiring the Police to provide a new decision letter, however.

## **PERSONAL INFORMATION**

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information "about" an identifiable individual. The appellants submit that "most of the information contained in the documents relate to them directly and as such . . . it is the personal information of the appellants and they are entitled to view it."

The Police argue that the undisclosed portions of the records contain the personal information of both the appellants and other identifiable individuals as it contains information which falls within the ambit of sections 2(a), (b), (c), (d), (g) and (h) of the definition. This includes information such as home addresses, telephone and cell phone numbers, identifying numbers assigned to individuals, the views or opinions of certain individuals and other personal information along with the name of the individual.

I have reviewed the contents of the records and find that, with one exception, each of them contains the personal information of the appellants and other identifiable individuals. The exception relates to the Forensic Laboratory Report comprising Record 43-44 and the information provided to a Justice of the Peace in support of an application for a search warrant in Record 51 to 54 of the records. Pages 43 and 44 do not contain any personal information as that term is defined in section 2(1) of the *Act* and they cannot, therefore, qualify for exemption under sections 14(1) or 38(b) of the *Act*. I will examine whether these records are exempt under the discretionary exemption in section 8(2)(a), as claimed by the Police. Record 51-54 contain the personal information of one of the appellants and I will, accordingly, decide whether these pages are exempt from disclosure under the discretionary exemption in section 38(a), taken in conjunction with section 8(2)(a).

## **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 institution 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 have relied on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act* and the factors listed under sections 14(2)(f), (h) and (i) of the *Act*.

The Police submit that the information to which it has applied the exemption in section 38(b) was compiled and is identified as part of an investigation into a possible violation of law, within the meaning of the presumption in section 14(3)(b). The investigation was undertaken by the Police into the possible laying of charges under the arson provisions of the *Criminal Code*. The Police submit that:

The information contained in these records was used to investigate this arson and to prosecute the offender(s). Unfortunately, the investigator did not feel that he had [in]sufficient evidence to proceed with criminal charges. However he did indicate that if further information comes to light that the investigation will be re-opened and that the file is listed as unsolved. If the investigation is re-opened an individual(s) may be charged with an offence and a court proceeding commenced.

The fact that no criminal proceedings were commenced against any individuals at this time does not negate the applicability of section 14(3)(b). The presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law.

The appellant relies on the consideration listed in section 14(2)(d) (the information is relevant to a fair determination of rights affecting the appellants) which weighs in favour of the disclosure of personal information. However, the decision in *John Doe* clearly states that no factor or combination of factors in section 14(2) is sufficient to outweigh the application of a presumption under section 14(3).

In my view, all of the personal information to which the Police have applied the exemption in section 38(b) falls within the ambit of the presumption in section 14(3)(b). The information was compiled and forms part of the criminal investigation by the Police into a possible arson. As a result, I find that the undisclosed information contained in the General Occurrence Reports comprising Records 1 to 35, the witness statements in Records 36 and 37 and the officer's notes from Records 67 and 69 to 115 are exempt under section 38(b).

### **LAW ENFORCEMENT/DISCRETION TO REFUSE ACCESS TO REQUESTER'S OWN INFORMATION**

As noted above, 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(a) of the *Act*, the Police have the discretion to deny an individual access to their 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. [my emphasis]

The Police take the position that Record 43-44 is exempt from disclosure under section 8(2)(a) while Record 51-54 is exempt under section 38(a), taken in conjunction with section 8(2)(a), which reads:

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 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.

[See Order 200 and Order P-324]

***Part 1 of the Test – Are Records 43-44 and 51-54 Reports?***

The word “report” is not defined in the *Act*. However, previous orders have found that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

I find that the forensic report comprising Record 43-44 is clearly a “report” within the meaning of section 8(2)(a). This record is formal statement of the results of the collation and consideration of information gathered by the Police in compiling evidence to support the laying of charges under the *Criminal Code*.

Similarly, Record 51-54 is a statement of the evidence gathered and the conclusions reached by the investigating officers of the crime scene and the interviews which they conducted. I find that Record 51-54 also qualifies as a “report” for the purposes of section 8(2)(a).

***Parts 2 and 3 of the Test under Section 8(2)(a)***

With respect to the second and third parts of the test under section 8(2)(a), I find that Records 43-44 and 51-54 were prepared in the course of law enforcement investigations undertaken by the Ottawa Police Service, which is an agency which has the function of enforcing and regulating compliance with a law.

As a result, all three parts of the test under section 8(2)(a) have been satisfied with respect to Record 43-44 and it qualifies for exemption from disclosure under that exemption. I further find that Record 51-54 is exempt under section 38(a), taken in conjunction with section 8(2)(a).

**EXERCISE OF DISCRETION**

As indicated above, sections 38(a) and (b) are discretionary exemptions. Therefore, once it is determined that a record qualifies for exemption under sections 38(a) or (b), the Police must exercise their discretion in deciding whether or not to disclose it.

The Police submit that they have properly exercised their discretion in respect of the appellants’ request. The Police state that in the circumstances of this request it has responded to the requester in an appropriate fashion, taking all relevant factors into consideration in deciding not to disclose all of the requested information.

In the circumstances, I am not persuaded that the Police have erred in exercising their discretion.

**ORDER:**

I uphold the decision of the Police to deny access to the records.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ May 28, 2003