



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

# **ORDER MO-1819**

**Appeal MA-030404-1**

**Toronto Police Services Board**



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## **NATURE OF THE APPEAL:**

This appeal concerns a decision of the Toronto Police Services Board (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made a request under the *Act* for an occurrence report (the report) relating to a specific incident.

By way of background, the incident involves an allegation of assault causing bodily harm against an affected person. The alleged victim of the assault is the appellant.

The Police denied access to the contents of the report pursuant to section 38(a) of the *Act*, in conjunction with sections 8(1)(a) and 8(1)(b) (law enforcement), and section 38(b) of the *Act*, in conjunction with sections 14(1)(f) and 14(3)(b) (personal privacy).

The appellant appealed the Police's decision.

No issues were resolved during the mediation stage and the file was moved to inquiry.

I first sought and received representations from the Police. The Police agreed to share the non-confidential portions of their representations with the appellant. I provided the appellant with a copy of the Police's non-confidential representations and sought representations. The appellant submitted very brief representations.

In this appeal I must decide whether the information at issue in the record is exempt under section 38(a), in conjunction with sections 8(1)(a) and 8(1)(b), or section 38(b), in conjunction with sections 14(1)(f) and 14(3)(b).

## **RECORDS:**

There is one record at issue, a three-page occurrence report, dated November 11, 2003 (occurrence #: 2003/0181604).

## **DISCUSSION:**

### **DOES THE RECORD CONTAIN PERSONAL INFORMATION?**

The exemptions under section 38(a) and 38(b) apply only to information that qualifies as "personal information", as defined under section 2(1) of the *Act*. Therefore, the first issue I must decide is whether the record contains personal information, and if so, to whom it relates.

"Personal information" is defined, in part, to mean recorded information about an identifiable individual, including information relating to the age or sex of the individual [paragraph (a)], information relating to the criminal history of the individual [paragraph (b)], the individual's address and telephone number [paragraph (d)], the personal opinions or views of the individual except where they relate to another individual [paragraph (e)], the views or opinions of another individual about the individual [paragraph (g)] 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)].

The Police submit that the record contains the name, address, telephone number and date of birth of the appellant and the affected person, as well as the personal information of another individual. The Police also submit that the record contains a synopsis of the incident between the appellant and affected person and the investigating officers' actions in response to the incident.

The appellant does not provide any representations on this issue.

On my review of the Police's representations and the record I find that it contains the appellant's personal information, including his name, address, telephone number and date of birth, relationship to the affected person and a summary of some of the details regarding the alleged assault. I also find that the record contains personal information about other identifiable individuals, specifically the affected person and another individual. The personal information about the affected person includes his name, address, telephone number and date of birth, and the appellant's views of the affected person's involvement in this incident. The personal information about the other individual includes her name and relationship to the affected person.

Having found that the record contains the personal information of the appellant and other individuals, I will consider the application of sections 38(a) and (b) to this record.

**DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(a), IN CONJUNCTION WITH SECTIONS 8(1)(a) AND/OR 8(1)(b), APPLY TO THE RECORD?**

**General principles**

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

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

Because section 38(a) is a discretionary exemption, even if the information falls within the scope of section 8, the institution must nevertheless consider whether to disclose the information to the requester.

Here, the Police rely on section 38(a) in conjunction with sections 8(1)(a) and/or 8(1)(b). These sections read:

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

- (a) interfere with a law enforcement matter;
- (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 term “law enforcement,” which appears in sections 8(1)(a) and (b), is defined in section 2(1) of the *Act* as follows:

“law enforcement” means,

- (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).

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context (*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)).

Under sections 8(1)(a) and (b), the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm.” Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption (Order PO-2040; *Ontario (Attorney General) v. Fineberg*, above).

### **Sections 8(1)(a) and 8(1)(b): law enforcement matter/investigation**

In order for sections 8(1)(a) or 8(1)(b) to apply, the “law enforcement matter” or “investigation” in question must be specific and ongoing. The exemptions do not apply where the matter or investigation is completed, or where the alleged interference is with “potential” law enforcement matters or investigations (Orders PO-2085, MO-1578).

The Police submit that the record concerns the investigation of the affected person for an assault on the appellant. The Police submit confidential representations regarding the result of this investigation. While I am not at liberty to disclose the contents of these submissions, the Police make it clear that the matter is ongoing.

Relying upon past orders of this office (Order 178 and Order M-918), the Police state that disclosure of such records to a party with an interest in the investigation could reasonably be expected to interfere with an ongoing law enforcement matter. The Police submit that disclosure could reveal information that could tip-off an involved party or suspect as to the direction of the investigation, providing an opportunity to tamper with evidence. In effect, in the Police's view, "premature release" of information could allow suspects the opportunity to "cover their tracks and evade charges".

The appellant does not make any submissions on the application of section 8(1)(a) or (b).

In reviewing the Police's representations I note that the Police recently made the argument in Order MO-1780 that premature disclosure could allow a suspect to tamper with evidence and possibly cover their tracks and evade charges. However, in that case, Adjudicator Hale found that the Police's evidence fell short of being "detailed and convincing". In reaching his finding, Adjudicator Hale states:

I find that the Police have failed to make the necessary evidentiary link between the disclosure of the records and the harm prescribed by either of these sections. Rather, the Police have not demonstrated how the disclosure of the records could reasonably be expected to give rise to the harms contemplated by sections 8(1)(a) and (b). I accept the appellant's contention that it would appear that the investigation itself is no longer "ongoing". The Police did not provide me with additional evidence to indicate that the investigation remains currently active beyond the statement from the investigating officer made in March of 2003 that is referred to in the Police representations.

I find the facts in that case distinguishable from those in this one. In Order MO-1780 the Police investigation occurred in September 2001 and January 2002. The appellant in that case suggests that by March 2003 there was evidence that the investigation had become stagnant.

In this case the investigation documented in the report occurred in October and November 2003 and as of May 11, 2004, the date of the their representations, the Police assert that the matter is ongoing and provided a basis for making that statement. The appellant does not offer any representations to counter the Police's position.

As stated above, due to confidentiality constraints imposed by the Police I cannot reveal the status of the investigation. However, I am satisfied that, in the circumstances of this case, the Police have provided "detailed and convincing" evidence that the matter is ongoing and established a "reasonable expectation of harm" should the contents of the report be disclosed to

the appellant. Based on the Police's investigation, I am satisfied that premature disclosure could interfere with a law enforcement matter. Therefore, I find that sections 8(1)(a) and (b) apply to the record with the following notable exception.

Portions of the record contain information that is non-personal in nature, comprised of administrative information. In addition, three discrete portions of the record contain information that is the personal information of the appellant alone, specifically his name, address, telephone number and date of birth, background information about the appellant, as well as a synopsis of his contact with the Police and medical condition and treatment. In my view, revealing these portions of the record to the appellant would have no impact on the outcome of the Police investigation. This information does not qualify for exemption under section 8(1)(a) or (b) and I, therefore, find that it is not exempt under section 38(a).

As the Police also rely on section 38(b), I will now consider whether that section applies to the information I have found not exempt under section 38(a).

#### **Have the Police properly exercised their discretion under section 38(a)?**

Having found that sections 8(1)(a) and (b) apply to the record, I must now consider whether the Police have properly exercised their discretion by denying access to the entire record.

The section 38(a) exemption is discretionary, and permits the Police to disclose information, despite the fact that they could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

The Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

In this case, the Police have stated that they have withheld the record due to the circumstances surrounding this investigation. The Police submit that the premature release of the record "could reasonably be expected to have a detrimental effect on the investigation..." The Police also state:

In balancing the access rights of the [appellant] against possible obstruction of justice for any or all concerning [...] the matter, we have opted to deny access to the record at this time.

The appellant's counsel submits that the appellant has an application for compensation before the Criminal Injuries Compensation Board (the Board) in regard to this incident. The appellant's counsel states that in view of the fact that the Board will have access to the report, he does not understand the reluctance of the Police to disclose the report to the appellant.

I acknowledge the comments provided by the appellant. Often information being sought through the *Act* is available through another process, for example, through Crown disclosure in criminal law prosecutions and examination for discovery in regard to civil litigation matters. However, the fact that it can be obtained through another process does not mean it is available under the *Act*.

I am satisfied that the Police have considered relevant factors, and not considered irrelevant ones, in exercising their discretion. Accordingly, I find that the Police have not erred in the exercise of their discretion to deny the appellant access to the exempt information.

**DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(b), IN CONJUNCTION WITH SECTIONS 14(1)(f) AND 14(1)(b), APPLY TO THE REMAINING INFORMATION?**

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

In this case, I have found that section 38(a), in conjunction with sections 8(1)(a) and (b), does not apply to the parts of the record that contain administrative information and the discrete personal information of the appellant.

Due to the nature of this information, and the fact that these portions of the record do not contain the personal information of anyone other than the appellant, I also find that disclosure of this information could not constitute an unjustified invasion of personal privacy. Accordingly, I find that section 38(b) does not apply to this information.

**ORDER:**

1. I order the Police to disclose portions of the record no later than **September 7, 2004** but not before **September 2, 2004**, in accordance with the highlighted version of the record included with the Police's copy of this order. To be clear, the Police should not disclose the highlighted portions of this record.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Police to provide me with a copy of the record it discloses to the appellant.

Original signed by: \_\_\_\_\_

Bernard Morrow

Adjudicator

July 30, 2004 \_\_\_\_\_