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

ORDER MO-1780

Appeal MA-030298-1

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 copies of the complete police investigation file in relation to complaints made by the requester against a named individual and/or a named business since September 2001. The request was made on behalf of an automobile dealer that initiated a fraud complaint against a business associate.

The Police located the requested information and denied access to it, claiming the application of the following exemptions contained in the *Act:*

- Law enforcement – sections 8(1)(a) and (b);
- Facilitate commission of an unlawful act – section 8(1)(l);
- Relations with other governments – section 9(1)(d);
- Invasion of privacy – section 14(1) in conjunction with the presumption in section 14(3)(b) (information compiled and identifiable as part of a law enforcement investigation)

The requester, now the appellant, appealed the decision of the Police. The appellant also indicated that the Police advised that the investigation in question has concluded.

During the mediation stage of the appeal, the Police provided the appellant with an index setting out the records at issue and the exemptions claimed for each. After reviewing the index, the appellant identified a number of records that were already in its possession, including Ministry of Transportation certified records, certain affidavits, computer printouts of motor vehicle histories and certified copies of vehicle permits/ownerships. These documents (Records 23-69, 77-78, 81-108, 109-133, 152-159, 160-170, 172-179 and 182-183) were removed from the scope of this appeal.

Further mediation was not possible and the matter was moved to the adjudication stage of the appeals process. I decided to seek the representations of the Police, initially. The Police submitted representations which were then shared, in their entirety, with the appellant, along with a Notice of Inquiry. The appellant also submitted representations, which were shared with the Police who were invited to make additional submissions by way of reply. In its representations, the appellant also raises the possible application of the "public interest override" provision in section 16. The Police did not avail themselves of the opportunity to make further representations in reply.

RECORDS:

The records remaining at issue consist of the following:

- General Occurrence Report (Record 1-2, duplicated at Record 17-18)
- Letter from [appellant] dated March 1, 2003 (Record 3, duplicated at Record 19);
- Occurrence #: 2002/0057433 (Records 4-6);
- Police Officer Notebook Entries (Records 7-16);
- CPIC Messages (Records 20-22 and 144-151);

- Letters and Fax Cover Sheet from the Police (Records 70-72, duplicated at 73-75, 76 and 79-80);
- Handwritten Notes (Records 134 and 139);
- Letters and Fax Cover Sheets from the Police (Records 135-138); and
- Computer Search Results (Records 140-143, 171, 180 and 181).

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

The first question I must address is whether the records contain personal information, and if so, to whom that information relates, for the answer to this question determines which sections of the *Act* may apply. The personal privacy exemption in section 14(1) applies only to information that 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 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)].

I have reviewed the records at issue and find that they do not contain the personal information of the appellant's client, which is an incorporated entity. Accordingly, information relating to it does not qualify as "personal information" for the purposes of section 2(1).

Records 1, 5, 15 and 17 contain the personal information of an employee of the appellant, including his home address, telephone number and date of birth. I find that this information qualifies as the personal information of this individual for the purposes of section 2(1).

Records 1, 5, 13, 15, 17, 142 and 143 contain the home address and telephone number of the suspect in the fraud investigation. This information also qualifies as the personal information of this individual within the definition of that term in section 2(1).

Records 21, 145, 146, 147, 148, 149, 150, 171, 180 and 181 contain the names, addresses and, in some cases, the home telephone and drivers' license numbers of several individuals who purchased automobiles from the suspect in the investigation. Record 20 also contains the criminal conviction history of one of these individuals. I find that this information qualifies as the personal information of these persons as well.

Records 22, 144 and 151 do not contain any personal information within the meaning of section 2(1). These documents are printouts from the provincial Ministry of Transportation (the MOT) which relate to vehicles which either have no Vehicle Registration Number (VIN) registered in Canada or are registered to a corporation and not a natural person.

The records also include information provided to the Police by the appellant's employee and the suspect about the circumstances surrounding the business transaction which gave rise to the

alleged fraud. In addition, the records include the names and business addresses, telephone and FAX numbers of various employees of the Police and the MOT. In my view, this information does not qualify as personal information as that term is defined in section 2(1). This information relates solely to these individuals in their professional capacities, describing certain business arrangements entered into between the appellant and the company operated by the suspect. These records also include professional information about various contact persons with the MOT responsible for the provision of information. I find that information relating to all of these individuals does not meet the definition of personal information and cannot, therefore, be exempt from disclosure under section 14(1).

Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception that may have any application in the present circumstances is section 14(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

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 institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which 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. [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*, which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Police indicate that the records were prepared and/or collected during the course of a fraud investigation. They state that the investigation was commenced in response to a complaint from the appellant involving the disposition of a number of motor vehicles by the suspect in the investigation.

The appellant argues that several considerations listed in section 14(2) apply in the circumstances of this appeal. It submits that the disclosure of the records is relevant to a fair determination of its rights (section 14(2)(d)) and that the consideration in section 14(2)(e) (unfair exposure to pecuniary or other harm) does not apply. In addition, the appellant submits that an absurd result would flow from the non-disclosure of the information contained in the records that was provided by its employees to the Police.

In my view, the disclosure of the personal information that relates solely to the suspect and the purchasers of the vehicles contained in Records 1, 5, 13, 15, 17, 20, 21, 142, 143, 145, 146, 147, 148, 149, 150, 171, 180 and 181 would result in a presumed unjustified invasion of the personal privacy of these individuals under section 14(3)(b). The information was clearly compiled and is identifiable as part of the Police investigation into allegations of fraud brought by the appellant. As noted above, the considerations listed in section 14(2), either singly or taken together, cannot overcome the application of a presumption.

I find, however, that withholding the personal information of the appellant's employee that is contained in Records 1, 5, 15 and 17 would lead to an absurd result as this information is clearly known to the appellant. In my view, it would defy logic to deny the appellant access to information that is clearly within its knowledge. I find that the disclosure of the employee's personal information in Records 1, 5, 15 and 17 to the appellant does not constitute an unjustified invasion of the personal privacy of the employee under section 14(1)(f).

I will address the possible application of the public interest override provision in section 16 to these records below.

LAW ENFORCEMENT

The Police take the position that all of the records are exempt from disclosure under the discretionary exemptions in sections 8(1)(a) and (b) and that the "transmission access codes for the CPIC system" are exempt under section 8(1)(l). The appellant indicates that it is prepared to withdraw its appeal of the Police decision with respect to the CPIC access codes found in the records. As a result, the information to which the Police had applied section 8(1)(l) is no longer at issue in the appeal and I need not address this exemption.

Sections 8(1)(a) and (b) state:

> A head may refuse to disclose a record where 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;

General principles

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) 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)

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v.*

Ontario (Assistant Information and Privacy Commissioner) (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]

- a Coroner's investigation under the *Coroner's Act* [Order P-1117]

- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

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.)].

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", 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. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Analysis

The Police submit that the disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter or investigation, from which a "law enforcement proceeding could result". They further indicate that:

> In March of 2003, the Officer in Charge of this fraud investigation instructed that the occurrence remain active until further evidence becomes available. As such, release of the relevant records to anyone, including the appellant, would convey confidential information concerning the nature and extent of the evidence collected to date by police investigators. Also, providing access to these records could reasonably be expected to have a detrimental effect on the investigation, the eventual laying of charges, if charges are deemed to be warranted, as well as the ultimate prosecution of the arrested person(s). Should a suspected or involved party to the investigation become aware of the extend or specific contents of information already in the possession of the Toronto Police Service, the subject individual(s) could flee the jurisdiction to avoid prosecution. Additionally, premature release of records would reveal information that could enlighten involved or suspected parties as to the direction of the investigation, as well as provide an opportunity for those individuals to tamper with or destroy evidence yet to be uncovered by police investigators.

The appellant questions whether an "on-going" Police investigation still exists. The appellant suggests that the investigation is now dormant as no activity has taken place for some time to further the investigation. The appellant also takes the position that the Police have failed to demonstrate a reasonable expectation that the disclosure of the records would interfere with

either a law enforcement matter or proceeding. The appellant points out that the incident under investigation occurred between September 2001 and January 2002 and that the investigation is now "stagnant". The appellant states that "by inaction, the police have effectively discontinued the investigation."

The appellant goes on to submit that in order to "interfere with an investigation", the disclosure of the records "would frustrate or impede the carrying out of the investigation." She notes that her client already has a civil judgement against the suspect in the investigation and certainly would not be sharing any information gained as a result of this request with him. The appellant also points out that much of the information contained in the records originated with her client's own employees and that the disclosure of that information to the appellant could not reasonably be expected to result in any interference with a Police investigation.

Under both sections 8(1)(a) and (b), the law enforcement matter or investigation in question must be a specific, ongoing matter. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

In my view, the evidence tendered by the Police in support of their contention that the information in the records is exempt from disclosure under sections 8(1)(a) and (b) falls short of being "detailed and convincing." 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.

In conclusion, I find that sections 8(1)(a) and (b) have no application to the information at issue.

RELATIONS WITH OTHER GOVERNMENTS

Because I have found the personal information in Records 21, 145, 146, 147, 148, 149, 150, 171, 180 and 181 to be exempt under section 14(1), it is not necessary for me to consider the possible application of section 9(1)(d) to this information. I will review whether this mandatory exemption applies to Records 21-22 and 144 to 151.

General principles

Section 9(1)(d) states:

> 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,

an agency of a government referred to in clause (a), (b) or (c);

The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" [Order M-912].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result.

Analysis

The Police have applied the mandatory exemption in section 9(1)(d) to the information contained in Records 22, 144 and 151, which represent printouts of information about certain motor vehicles received by the Police in response to inquiries made of the MOT. As noted above in my discussion of "personal information", these records relate only to specific vehicles which are either not registered or are registered to a corporation.

The Police argue that these records were generated as a result of searches of the Police Automatic Registration Information System (PARIS), an ancillary database available through the CPIC system. They submit that the information was retrieved from the database in confidence during the course of their law enforcement investigation. The records themselves confirm the identities of the vehicles' registrants, where known. The Police argue that the CPIC system is operated by the Royal Canadian Mounted Police (the RCMP) and its own access to the system is governed by certain protocols. This access is intended to be used by law enforcement agencies only as an investigative tool and the information gained through making inquiries of the system is to be treated confidentially. The Police also note that the information contained in the CPIC database is "supplied in confidence by the originating agency", in the present case, the MOT.

The appellant submits that the PARIS system is operated by the provincial MOT and it is unclear whether the confidentiality surrounding the CPIC electronic database extends to this "subordinate" system. The appellant also points out that the information contained in the PARIS database is already publicly available as a result of certain searches it has conducted of the MOT vehicle database. As a result, it argues that the disclosure of the information in Records 22, 144 and 151 would not result in the harm contemplated by section 9(1)(d).

In my view, the Police have provided me with sufficiently detailed evidence to substantiate a finding that the information in Records 22, 144 and 151 was received by the Police from the provincial MOT in confidence. The Police indicated that the PARIS system operates as a confidential source of information to assist law enforcement agencies in the conduct of their investigations. I accept the position of the Police that this information was provided in confidence by the MOT. In my view, the disclosure of the information in Records 22, 144 and 151 could reasonably be expected to reveal information received by the Police in confidence from the provincial MOT, an agency of the Government of Ontario. As a result, I find that this information is exempt under section 9(1)(d).

PUBLIC INTEREST OVERRIDE

The appellant submits that there exists a compelling public interest, as contemplated by section 16, in the disclosure of the information contained in the withheld records that operates to "override" the application of the exemptions claimed. Section 16 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 be a compelling public interest in 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.)].

Compelling public interest

In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the 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 [Order P-984].

A public interest will be found not to exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439].

In the present case, the appellant obtained a default judgement against the suspect in the investigation following the conclusion of an undefended civil action against this individual for damages. The appellant then commenced an action against its' own insurer for indemnity of its losses as a result of the alleged fraud of the suspect. The appellant argues that there exists a public interest in the disclosure of the information and suggests that the disclosure of the records will assist in its pursuit of an action against its' insurer for the recovery of certain losses incurred as a result of its' dealings with the suspect in the investigation. The appellant argues that it requires the records in order to establish the "evidentiary record" required to further its action against the insurer.

I find that there does not exist any "public interest" in the disclosure of the information in the records. Rather, the only interest being advanced by the disclosure of the records is a private one relating to the appellant's clients. As a result, I find that section 16 has no application in this appeal.

ORDER:

1. I uphold the decision of the Police to deny access to Records 13, 20, 21, 22, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 171, 180 and 181.

2. I order the Police to disclose to the appellant Records 1, 2, 3, 4, 5, 6, 7-12, 14-16, 17, 18, 19, 70-76, 79, 80, 134, 135, 136, 137, 138, 139, 140 and 141 by providing its representative with copies by **May 13, 2004**.

3. In order to verify compliance with this order I reserve the right to require the Police to provide me with copies of the records disclosed to the appellant pursuant to Order Provision 2.

Original Signed By: April 22, 2004
Donald Hale
Adjudicator