



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1853

Appeal MA-040016-2

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 information relating to an incident in which the requester was involved.

The Police located the requested information and granted the requester access to portions of the responsive records. They denied the requester access to the remaining information on the basis that it was exempt under section 38(b) of the Act (invasion of privacy) in conjunction with section 14(3)(b) (compiled as part of a law enforcement investigation). The Police also indicated that portions of the police officer memorandum books contained information that did not respond to the request as they were concerned only with matters unrelated to the requester. The requester, now the appellant, appealed the decision of the Police.

During the mediation stage of the appeal, the Police disclosed some of the information contained in page 18 of the records at issue. No other issues were resolved and the matter was moved to the adjudication stage of the process. This office initially sought and received the representations of the Police, the non-confidential portions of which were shared with the appellant, along with a Notice of Inquiry. The appellant did not provide representations in response to the Notice that was sent to him.

RECORDS:

The records remaining at issue consist of the undisclosed portions of pages 1, 3, 4, 5, 7, 8, 9, 10, 11, 12, 15, 17, 18, 19 and 20, which are various notebook entries made by police officers relating to a particular incident involving the appellant.

DISCUSSION:

SCOPE OF THE REQUEST

The Police take the position that the undisclosed portions of pages 1, 7, 8, 12, 15 and 20 relate to matters involving the investigating officers on the date in question that do not relate to the incident involving appellant in any way. As a result, the Police submit that these portions of the records are not responsive to the request.

Previous orders of the Commissioner have established that in order to be responsive, a record must be “reasonably related” to the request:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, “relevancy” must mean “responsiveness”. That is, by asking whether information is “relevant” to a request, one is really asking whether it is “responsive” to a request. While it is admittedly difficult to provide a precise

definition of “relevancy” or “responsiveness”, I believe that the term describes anything that is reasonably related to the request [Order P-880; see also Order P-1051].

The appellant’s request was clear and specific, seeking access to a 911 telephone message and the notebook entries or other information retained by “the officers on the scene”. The Police located the requested records and disclosed the tape and those portions of the notebook entries that are not exempt from disclosure under section 38(b) to the appellant. I have reviewed those portions of the notebook entries that the Police claim to be not responsive and am satisfied that the information severed by the Police is, in fact, not responsive to this request and is accordingly not at issue in this appeal. I will now determine whether the remaining portions of the records are exempt from disclosure.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. Under section 2(1), personal information is defined, in part, to mean recorded information about an identifiable individual, including the age, sex and marital status of an individual [paragraph (a)], the address or telephone number of the individual [paragraph (d)], the personal opinions or views of the individual [paragraph (e)], the views or opinions of another individual about the individual [paragraph (g)] or the individual's name where it appears with other personal information relating to the individual [paragraph (h)].

The Police submit that the records contain names, addresses, telephone numbers, dates of birth and personal comments of those individuals who provided statements to the investigating officers. I agree with this position and find that the undisclosed information in the records includes information that qualifies as the personal information of these individuals. Upon my review of the records, I am satisfied that they also contain the personal information of the appellant, as they include his name and describe his actions [paragraph (h)] and indicate his views and opinions [paragraph (e)] along with the views and opinions of other individuals about the appellant [paragraph (g)].

RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

General principles

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 exemptions from this right.

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.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. Thus, I will first consider whether section 38(b) applies and then whether the Police properly exercised their discretion under this section.

Sections 14(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 38(b). Section 14(2) provides some criteria for determining whether the personal privacy exemption applies. Section 14(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has ruled that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue is caught by section 14(4) or if the "compelling public interest" override at section 16 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

The Police rely on the operation of the presumption in section 14(3)(b), 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;

As noted above, the appellant has not made any submissions in response to the Notice of Inquiry provided to him and his letter of appeal does not address the application of the exemption in section 38(b).

Findings

I find that the section 14(3)(b) exemption applies to the information in the records at issue.

It is evident from an examination of these records and the circumstances of this appeal that the Police compiled this information during the course of their investigation into the incident involving the appellant. The investigation concerned whether possible violations of the *Criminal Code* had occurred. Where a record contains personal information and that information was compiled during the course of an investigation and is identifiable as such, the presumption at

14(3)(b) applies even where charges are not laid (Orders P-223, P-237, P-1225, MO-1181, MO-1443), as is the case here.

As indicated above, the section 14(3)(b) presumption cannot be overcome by any factors, listed or unlisted, under section 14(2). In addition, I find that no exceptions under section 14(4) apply. The application of the “public interest override” at section 16 of the *Act* was not raised, and I find that it has no application in the circumstances of this appeal.

All of the records, therefore, qualify for exemption under section 38(b).

EXERCISE OF DISCRETION UNDER SECTION 38(b)

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

I 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 either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573].

Because of the nature of the events outlined in the records, the Police have provided me with confidential representations outlining the reasons behind their decision not to disclose the complete unsevered records to the appellant. In addition, they submit that:

The Toronto Police Service must be able to maintain the confidence of the public and protect the personal information obtained during law enforcement investigations. This includes not only members of the public who provide information to the Police concerning investigations, but those who have come under suspicion or have allegations levied against them. The information gathering process would be critically compromised if members of the public felt compelled to give information in a guarded manner (i.e. by withholding essential facts such as the complete details of what they viewed, or their names and addresses) . . .

Having considered their representations, I am satisfied that the Police did not err in the exercise of their discretion by taking into account irrelevant considerations, failing to take into account relevant considerations, or in any other respect. I am persuaded that the Police bore in mind the

purposes of the *Act* by disclosing as much information as possible, exempting only portions of the information in order to protect the personal privacy of other identifiable individuals.

ORDER:

I uphold the decision of the Police

Donald Hale
Adjudicator

October 13, 2004