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

ORDER MO-1843

Appeal MA-040026-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*). The request stated:

> I am seeking any and all internal documents regarding communications and records held by **The Public Safety and Security Bureau** regarding the arrest and detention at the Toronto Jail ["the Don Jail"] in the case of [a named individual, a specific date of birth, and a specific case reference]. (emphasis added by the appellant)

The Ministry provided a decision on access to most of the requested records, but indicated that because pages 25 to 36 of the records were prepared by the Toronto Police Services Board (the Police), it would not be making a decision on access to them. The Ministry advised the appellant to make a new request directly to the Police for this information.

The appellant made a new request directly to the Police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the nine pages of records referred to by the Ministry.

In response to the appellant's request, the Police granted partial access to the records. Access to other portions of the records was denied pursuant to section 38(a) (discretion to refuse requester's own information), in conjunction with the discretionary exemptions in sections 8(1)(a) (law enforcement) and (8)(1)(f) (right to a fair trial); along with sections 14(1) and 38(b) (invasion of privacy), in conjunction with the presumption in section 14(3)(b) of the *Act*.

The appellant appealed the decision of the Police. No issues were resolved through mediation. Accordingly, the file was transferred to the adjudication stage of the appeals process. I sought the representations of the Police, initially. The Police indicated that they do not intend to submit representations in response to the Notice of Inquiry provided to them. I also solicited the representations of the appellant with respect to one issue and received submissions from him.

RECORDS:

The nine pages of records remaining at issue consist of a one-page Record of Arrest, a three-page Supplementary Record of Arrest and five pages of various Canadian Police Information Centre (CPIC) Queries.

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which Part of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe,* [2002] O.J. No. 4300 (C.A.)].

I have reviewed the contents of the records in order to determine whether they contain personal information and if so, to whom the information relates. The one-page Record of Arrest dated August 15, 2001 (page 3) contains the sex, age, race, marital status, height, weight, hair and eye colour, address, telephone number of the appellant and the name and address and family status of another individual which was provided by the appellant to the Police. The three-page Supplementary Record of Arrest dated August 16, 2001 (pages 4, 5 and 6) contains a list of the charges brought against the appellant by the Police. The top half of page 8 of the five-page CPIC printout (pages 8-12) contains the date and place of birth, age, sex, race, height, weight, hair and eye colour, address and criminal history of the appellant.

Following my review of the records, I make the following findings:

- All of the information in pages 3 to 7 and the top half of page 8 qualify as the personal information of the appellant. Portions of page 3 also contain the personal information of another identifiable individual;

- The bottom half of page 8 and pages 9 through 12 of the CPIC printout contain information that relates solely to other identifiable individuals whose names are similar to that of the appellant. This information consists of their dates of birth, criminal record histories, age, sex, height, weight and addresses of these individuals. I find that the information in the bottom half of page 8 and pages 9 through 12 qualify as the personal information of these other individuals.

DISSCRETION TO REFUSE TO DISCLOSE REQUESTER'S OWN INFORMATION/ LAW ENFORCEMENT

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.

In this case, the Police rely on section 38(a) in conjunction with sections 8(1)(a) and (f), which read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication

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.)].

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* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Section 8(1)(a): law enforcement matter

The law enforcement matter 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 the present case, the Police have not provided me with any representations in support of their position that the records fall within the ambit of the section 8(1)(a) exemption. I note that in order for section 8(1)(a) to have any application, the law enforcement matter described in the record must be ongoing. In the present case, as of the date of the writing of this decision, the appellant's trial on the charges outlined in the record is currently underway. As a result, I cannot find that the disclosure of the contents of the records could reasonably be expected to interfere with a law enforcement matter as that term has been interpreted in past orders. The contents of the records themselves does not lead me to make such a finding either.

In my view, section 8(1)(a) has no application to the information at issue in this appeal.

Section 8(1)(f): right to a fair trial

The institution must show that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. The exemption is not available as a protection against remote and speculative dangers. [Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.)].

As noted above, the appellant's trial is currently under way. The Police have not provided me with any evidence in support of its contention that the disclosure of the information could reasonably be expected to result in interference with the appellant's trial. Based on my review of the contents of the records, I also conclude that section 8(1)(f) has no application to the information in the records.

Because I have found that sections 8(1)(a) and (f) do not apply to the information, it is not exempt from disclosure under section 38(a).

INVASION OF PRIVACY

I have found above that pages 3 and 8 contain the personal information of individuals other than the appellant, as well as the appellant himself. I will now determine whether the invasion of privacy exemption in section 38(b) applies to this information. In addition, pages 9 through 12 contain only the personal information of individuals other than the appellant. I will decide whether this information is properly exempt from disclosure under section 14(1).

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.

Under section 14, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of privacy".

In both these situations, sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure is an unjustified invasion of privacy under section 38(b) and 14 [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In their decision letter, the Police take the position that the presumption in section 14(3)(b) applies to the information in the records. This section states:

> 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;

Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086].

In the present appeal, the records were prepared at the time of the appellant's arrest and after the completion of the investigation stage of his prosecution. I find that the presumption in section 14(3)(b) does not apply to these records as they were not compiled and are not identifiable as part of the *investigation* by the Police into a possible violation of law by the appellant.

In my view, however, several of the considerations listed in section 14(2) are applicable to the personal information contained in the bottom half of page 8 and pages 9 through 12. This information consists of the criminal histories of various individuals whose names are similar to the appellant. I find that the considerations in sections 14(2)(f) (highly sensitive information) and (i) (the disclosure may unfairly damage the reputation of the person) are significant factors weighing in favour of privacy protection.

The appellant's representations simply indicate that the CPIC records should include information about himself but do not address the application of section 38(b) to the personal information of any other individuals which might appear in these records.

The personal information contained in page 3 was supplied to the Police by the appellant himself and it relates to a close family member. I cannot agree that the disclosure of this information to the appellant would result in an unjustified invasion of the family member's personal privacy under section 38(b). Rather, to decline to grant access to this information, under the circumstances, would lead to an absurd result [Orders MO-1196, PO-1679, MO-1755]. Accordingly, I will order the disclosure of all of page 3 of the record to the appellant.

By way of summary, I find that the bottom half of page 8 is exempt from disclosure under section 38(b) and pages 9 through 12 are exempt under section 14(1). The exceptions in section 14(4) have no application in this appeal and the appellant has not raised the possible application of section 16.

I find that the exemptions in sections 8(1)(a) and (f), 14(1) and 38(a) and (b) have no application to pages 3, 4, 5, 6, 7 and the top half of page 8. I will, accordingly, order that this information be disclosed.

ORDER:

1. I uphold the decision of the Police to deny access to the bottom half of page 8 and pages 9 through 12.

2. I order the Police to disclose pages 3 to 7 and the top half of page 8 to the appellant by providing him with a copy by **November 5, 2004** but not before **October 29, 2004**.

3. In order to verify compliance with Order Provision 2, I reserve the right to require the Police to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: October 1, 2004
Donald Hale
Adjudicator