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

ORDER MO-1877

Appeal MA-040072-2

Toronto Police Services Board

Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

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 certain information found in a specified police report made in July of 1997 and relating to an incident in which the requester was the victim of an assault. The request specified that it was for:

- the name and identity of the assailant and a copy of the statement the assailant made to the Police;
- a copy of the Police Report made by the officers who arrested the assailant;
- a copy of the Police Report made by [a named officer] and signed by the requester.

The Police responded to the request by locating the responsive records and granting access to them, in part. The Police denied access to the remaining portions of the records on the basis of the following sections of the *Act*: 8(1)(l) (facilitate commission of an unlawful act), 38(a) (discretion to refuse requester's own information), and 49(b) (invasion of privacy) in conjunction with the presumption in section 14(3)(b) (compiled as part of an investigation into a possible violation of law). The Police also identified that some of the severed portions of the records contained information that was not responsive to the request.

The requester, now the appellant, appealed the Police's decision.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Police, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the representations of the Police, to the appellant. The appellant also provided representations.

RECORDS:

The Police located 13 pages of responsive records. The records consist of the relevant portions of three officers' notebooks (comprising a total of nine pages), and 4 pages of police reports. Those portions of the officers' notebooks identified as "not responsive" to the request also remain at issue in this appeal.

DISCUSSION:

SCOPE OF THE REQUEST

The Police state that portions of some of the notebooks are not responsive to the request. They state:

> The portions of withheld records identified as "non-responsive" document other completely unrelated events in which the police are involved. These events and resulting records are of a completely different matter, and have no relevance to the original request, or this appeal.

> The withheld portions of pages 1, 3, 8, 10, 11 and 13 relate to calls otherwise assigned to the identified officer. The appellant has no involvement in these matters.

The Police also refer to Order MO-1219 in which Adjudicator Cropley made a finding that the information contained in police officers' notebooks that is unrelated to the matters for which a request has been made, 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].

In the circumstances of this appeal, the appellant's request was clear and specific, seeking access to records concerning an identified incident. The Police located the requested records and disclosed portions of them to the appellant.

The portions of the records that the Police claim are not responsive to the request are from police officers' notebooks. I have reviewed these portions of the notebook entries and am satisfied that the information severed by the Police is, in fact, not responsive to this request.

As an additional matter, the appellant identifies in his Submission #3 that he did not receive a page of the records (a page identified by him as page 22). This page is in fact page 22 of the notebook of one of the responding officers, and is identified as page 2 of the records. Access to this page was denied in full, on the basis of section 38(b), and my decision regarding access to this record is set out below.

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 request resulting in this appeal is for information concerning the appellant. I find that, because the records relate to an incident involving the appellant, they contain his personal information within the meaning of section 2(1) of the *Act*.

With respect to whether the records contain the personal information of other identifiable individuals, the Police submit:

> The records at issue contain the name, address, date of birth and telephone numbers of the accused person as well as verbal interaction between the accused and the Police. The majority of exempted information is that of the accused party within the context of a Police investigation initiated by the appellant. It is by definition "personal" in nature ….

I have reviewed the portions of the records remaining at issue, and find that, with one exception, they also contain the personal information of an identifiable individual other than the appellant, as they include his name, marital status and date of birth [paragraph (a)], address and telephone numbers [paragraph (d)] and describe his actions and indicate his views and opinions [paragraph (e)]. Portions of the records also contain the individual's name along with other personal information relating to the individual [paragraph (h)].

The one exception is one portion of page 10 of the records, which is a reference to a police "ten-code" found in one of the officer's notebooks. It does not contain the personal information of any identifiable individual other than the appellant.

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).

Section 14(3)(b)

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;

In support of their position that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, the Police review the circumstances which gave rise to the creation of the records. The Police state:

> The [Police] responded to a complaint of an assault which was called in by the appellant. An investigation was undertaken at the scene to determine if an offence under the *Criminal Code of Canada* had been committed; i.e. an assault.

The Police also identify that section 14(3)(b) applies regardless of whether or not charges were laid as a result of the investigation.

The appellant has provided substantial representations in support of his position that he is entitled to those portions of the records not provided to him. He also refers to a number of factors in section 14(2) in support of his position.

With respect to the possible application of section 14(3)(b), and appellant reviews the records at issue, and identifies that some of the records contain the notes of the police officers involved in the investigation. However, he also indicates that the incident occurred in the presence of another officer, and that this officer "directly observed" the incident or portions of the incident, and was at the scene immediately. The appellant takes the position that the officer who observed the offence was more like a witness than an officer involved in the investigation.

I do not agree with the position taken by the appellant. In my view, the difference between a situation where an officer investigates an incident, and a situation where an officer happens to be at the scene of the incident and immediately responds it and writes down his observations, is not relevant in deciding whether the information contained in the records fits within the presumption under section 14(3)(b). That section simply requires that the personal information be compiled and identifiable as part of an investigation into a possible violation of law. In the circumstances, I am satisfied that the information transcribed by the officer who observed a portion of the incident and was immediately on the scene was also compiled and is identifiable as part of an investigation into a possible violation of law for the purpose of section 14(3)(b).

Accordingly, I find that the section 14(3)(b) exemption applies to the information severed from all of the records. It is clear from an examination of the 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, regardless of whether or not charges are laid (Orders P-223, P-237, P-1225, MO-1181, MO- 1443).

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.

Absurd Result

The appellant takes the position that the "absurd result" principle applies in the circumstances of this appeal. He refers to Order M-444 in support of his position.

This office has applied the "absurd result" principle in situations where the basis for a finding that information qualifies for exemption under section 14(1) would be absurd and inconsistent with the purpose of the exemption. The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]

- the requester was present when the information was provided to the institution [Orders P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO- 1755]

In my view, the "absurd result" principle does not apply in the circumstances of this appeal. In this appeal, the appellant has been granted access to much of the information in the records, including information relating to his own statements and information which is clearly within his knowledge. As identified above, all of the severed information concerning the incident contains the name, address, date of birth and telephone numbers of the accused person as well as verbal interaction between the accused and the Police, and other personal information of the accused. In my view, the "absurd result" principle does not apply to the severed information.

EXERCISE OF DISCRETION UNDER SECTION 38(b)

As indicated, section 38(b) is a discretionary exemption. Therefore, once it is determined that information qualifies for exemption under this section, the institution must exercise its discretion in deciding whether or not to disclose the information. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

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

The Police provided representations outlining the reasons behind their decision not to disclose the severed portions of the records to the appellant. They identify the basis of their decision not to disclose these portions to the appellant. They also state that the incident in question took place approximately seven years ago, and that it has been concluded in court. Furthermore, they submit that:

> The [Police] must be able to maintain the confidence of the public and protect the personal information obtained during law enforcement investigations, of parties on both sides. This not only includes 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 appellant has provided substantial representations in support of his position that the Police did not properly exercise their discretion. He refers to past instances where, in the appellant's view, the Police failed to properly exercise their discretion. In his representations he also

indicates why he requires this information. He also submits that since the information does qualify as his personal information, he is entitled to know the name and identity of the assailant, and the reason why he was assaulted.

The appellant also argues that the Police should have been given the opportunity to consider the impact of the survey (referred to below) which the appellant provided to me in support of his position that there exists a public interest in the disclosure of the records.

After reviewing the representations of the parties, 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 also do not agree with the position of the appellant that the Police should have had reference to the survey in exercising their discretion in the circumstances. 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 an identifiable individual other then the appellant.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/FACILITATE COMMISSION OF AN UNLAWFUL ACT

As set out above, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

The Police have relied on section 38(a) to deny access to one portion of page 10 of the records. Under section 38(a), an institution has the discretion to deny access to an individual's own personal information in instances where the exemption in section 8 would apply to the disclosure of that personal information.

The Police claim that section 8(1)(l) applies to the "ten-code" in the officer's notebook. Section 8(1)(l) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

The Police state that the use of "ten-codes" by law enforcement agencies is an effective and efficient means of conveying a specific message without publicly identifying its true meaning. The Police submit that the release of "ten-codes" would compromise the effectiveness of police communications and could result in risk of harm to either police personnel or others. The Police also refer to previous orders of this office which have upheld the application of section 8(1)(l) or its provincial equivalent to "ten-codes", including Orders M-757 and PO-1877.

The appellant takes the position that a victim should be entitled to access all of his personal information, including "coded" information.

Having reviewed the Police's representations and the previous orders, I find that the "ten-code" at issue is properly exempt under section 8(1)(l). As Adjudicator Cropley stated in Order PO-1665:

> ... disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

Therefore, I find that the Police have properly applied section 8(1)(l) to the "ten-code". I am also satisfied that the Police have not erred in the exercise of their discretion not to disclose this portion of the record under section 38(a) of the *Act*.

PUBLIC INTEREST OVERRIDE

The appellant has taken the position that the "public interest override" at section 16 of the *Act* applies in the circumstances. Section 16 reads:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where 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 exist a compelling public interest in the 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.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a 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.

If a compelling public interest is established, it must be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in

access to information. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [See Order P-1398]

The Appellant's Submissions

The appellant has provided substantial representations in support of his position, relying heavily on a survey which he conducted and which he argues supports his position that there is a public interest in the disclosure of the records. Although the appellant has provided this office with a copy of the survey, I note that the appellant has not provided me with the actual completed surveys, but has simply provided what he describes as "the cumulative response scores". The appellant also provided a sheet with the initials of the survey respondents identified by the appellant. The appellant indicates that 40 individuals of an identified community completed the survey.

The survey prepared by the appellant and distributed by him consists of a series of 37 questions to which respondents can answer true or false. A number of the questions in the survey ask the respondents to identify their views of the appellant. Some of the questions refer to the respondent's views of the incident referred to in the request. Other questions ask the respondents to answer questions regarding the actions of the affected party referred to in the records, or the Police in responding to the request. Finally, some of the questions ask the respondents to indicate whether, in their view, the information at issue should be disclosed, and whether they consider that a public interest exists in the information.

Findings

The portions of records which I have found to be exempt from disclosure consist of the severed portions of the records that contain the personal information of an identifiable individual other than the appellant. I have found that the disclosure of these portions of the records is presumed to constitute an unjustified invasion of privacy, because these records were compiled and are identifiable as part of an investigation into a possible violation of law.

Based on the information provided to me, I am not persuaded that the evidence provided supports a finding that a public interest exists in the information at issue. With respect to the survey results, it appears that the survey was distributed by the appellant to a limited number of individuals, all of whom, based on the survey results, are personally acquainted with the appellant. Even if I were to accept that "the cumulative response scores" provided by the appellant reflected the views of 40 individual survey respondents, I would not be persuaded that I have been provided with sufficient evidence to establish that a "compelling public interest" exists in the disclosure of the records at issue.

In my view, disclosure of the severed portions of personal information in the records would not "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". Rather, the appellant seeks access to the severed portions of the records relating to the affected party in order to pursue his own interests,

including possibly determining whether his rights have been violated. In my view, the interest in the disclosure of these records is in the nature of a private rather than a public interest. As a result, I am not persuaded that there is a compelling public interest in the disclosure of these records.

Therefore, section 16 does not apply.

ORDER:

I uphold the decision of the Police

Original Signed By: November 30, 2004
Frank DeVries
Adjudicator