



**Information and Privacy
Commissioner/Ontario**

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

FINAL ORDER MO-1916-F

Appeals MA-040045-1 and MA-040094 to MA-040105-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received thirteen requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to specific records relating to an investigation involving the requester and his subsequent arrest. The Police located records responsive to each of the requests and denied access to them, claiming the application of the law enforcement exemptions in sections 8(1)(a), (c) and (l) and 8(2)(c), in conjunction with section 38(a) and the invasion of privacy exemptions in sections 14(1) and 38(b).

On March 3, 2005, I issued Interim Order MO-1908-I disposing of all but one of the issues in Appeals MA-040045-1 and MA-040094-1 to MA-040105-1 inclusive. Order Provisions 4 through 7 addressed the remaining outstanding issue surrounding the exercise of discretion by the Police under section 38(b). These Order Provisions stated as follows:

4. I order the Police to re-exercise its discretion under section 38(b) of the *Act*, taking into account all relevant factors and circumstances of this case, using the principles described in this order as a guide.
5. I order the Police to provide me and the appellant with representations on its exercise of discretion no later than **March 24, 2005**.
6. The appellant may submit responding representations on the exercise of discretion issue no later than **April 11, 2005**.
7. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues that may be outstanding relating to the severing of the records.

By letter dated March 21, 2005 and received in this office on March 24, 2005, the Police provided the appellant and this office with representations respecting the exercise of its discretion under section 38(b), as required by Order Provision 5. The appellant then provided me with his representations on this issue by way of a letter dated March 29, 2005 that was received in this office on April 1, 2005, pursuant to Order Provision 6.

This Final Order operates to resolve the sole outstanding issue in this appeal, whether the Police properly exercised its discretion under section 38(b) to deny the appellant access to certain records found to be exempt under that section in Interim Order MO-1908-I.

DISCUSSION:

The representations of the parties

In support of its position that it has properly exercised its discretion not to disclose certain of the records and parts of records to the appellant, the Police state:

In weighing the appellant's right of access under section 38(b), the TPS [Toronto Police Service] considered the following factors in its re-exercise of discretion:

- (a) The appellant seeks access to information.
- (b) As the appellant is before court, section 14(2)(d) is relevant to a fair determination of the appellant's rights.

In weighing the institution's right to deny access to the information under section 38(b), the TPS considered the following factors in the re-exercise of discretion:

- (c) One of the purposes of the *Act* is to protect the privacy of individuals with respect to their personal information.
- (d) Information showing an individual having contact with police is highly sensitive, section 14(2)(f) is relevant to an individual's right to protect information that is highly sensitive.
- (e) Information which describes the nature of the victimisation and the harm suffered by the victims is very personal and highly sensitive, section 14(2)(f) is relevant to an individual's right to protect information that is highly sensitive.
- (f) The public expects the TPS to protect their personal information from disclosure for a purpose other than its original collection (i.e. for the purpose of a law enforcement investigation).
- (g) Loss of this trust could result in an individual being guarded in providing information to Police for fear of its routine disclosure.
- (h) Should a member of the public fail to provide full details to police, the lack of this information could hinder the conduct of an investigation.
- (i) There is no public interest which would override an affected party's right to privacy.

The Police go on to conclude that:

Having weighed the factors [listed above], the TPS determined in its re-exercise of discretion that the balance weighs in favour of the continued non-disclosure in order to protect the privacy rights of affected parties as permitted in section 38(b).

The appellant submits that the information contained in the records that relates to other individuals was presented in open court at his recent trial. As a result, he argues that, with respect to the personal information disclosed by various witnesses and contained in the Informations sworn by two named police officers in 2001:

Subsequently and consequently their statements, names and their allegations and 'the nature of their victimization' were published widely in the press and broadcast internationally in several languages.

The appellant provided me with a number of web pages containing the personal information of some of the witnesses who testified at his trial, stating that he recovered this information using a search engine on the internet. Further, the appellant argues that the names and other personal

information of the individuals who gave evidence at his trial are contained in records that are available publicly, such as the decision of the trial judge and the trial transcripts. The appellant further argues that because the Police have assisted in the widespread dissemination of this information to the electronic and print media prior to this point in time, it is illogical for them to now claim that it ought to be protected under section 38(b).

As a result, the appellant submits that the Police have already exercised its discretion to disclose much of the information contained in the records to which the Police have applied section 38(b). He suggests that both the Police and the witnesses at his trial have “waived the right to protect information through highly public discussions with the media during the trial[s] and sentencing”. The appellant also refers to certain press announcements made by counsel representing some of the victims in a civil proceeding as a further demonstration of the waiver of the witnesses’ right to the continued protection of the personal information relating to them that is contained in the records.

Findings with respect to the exercise of discretion

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

In addition, 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 either 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)].

The appellant places a great deal of emphasis on the fact that there has been public disclosure of at least some of the personal information contained in the records either in open court or through other means. This disclosure was not made pursuant to the access provisions of the *Act*, but rather through the criminal law process or through certain media outlets reporting on the information contained in the testimony and evidence at the trial. These disclosure mechanisms operate outside those available under the *Act* and I cannot find that because certain information was disclosed in open court it ought to be disclosed through the exercise of discretion by the Police under section 38(b) (Order MO-1378).

I have carefully reviewed the considerations relied upon by the Police both for and against the disclosure of the records in its exercise of discretion under section 38(b). In my view, the Police took into account all relevant considerations and did not rely on irrelevant or improper factors when it made a determination not to disclose those records and parts of records containing the personal information of other identifiable individuals under section 38(b). In addition, I find that the Police did not exercise its discretion not to disclose the personal information of other individuals to the appellant under section 38(b) for any improper purpose or in bad faith. On the contrary, I am of the view that the Police took into account relevant factors weighing both for and against the disclosure of this information. I find that the Police came to a conclusion that is in keeping with the purposes of the *Act* as set out in section 1, being the protection of privacy and the right of access to one's own personal information.

Accordingly, I uphold the decision of the Police to exercise its discretion not to disclose the personal information of other identifiable individuals under section 38(b) and will not disturb it on appeal.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Donald Hale
Adjudicator

_____ April 7, 2005