



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

INTERIM ORDER MO-1908-I

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

Toronto Police Services Board



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NATURE OF THE APPEALS:

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).

The requester, now the appellant, appealed the decisions of the Police to deny access to the requested records and took the position that additional records responsive to many of the requests ought to exist.

The parties were unable to effect a mediated settlement of the appeals and they were, accordingly, moved to the adjudication stage of the appeals process.

I decided to seek the representations of the Police initially through the issuance of a single Notice of Inquiry. Because the exemptions claimed and the record types extant in each appeal were similar in nature, I felt it would be appropriate to seek the submissions of the Police for all thirteen appeals in this fashion. The Police provided me with representations in response to the Notice of Inquiry, which were then shared, in their entirety, with the appellant who also provided me with representations.

The appellant argues that the records identified by the Police as responsive to these requests comprise only a portion of the documents made available to his counsel through the disclosure mechanisms of the criminal justice system. He argues that additional records relating to the information sought in Appeals MA-040094-1(Request 32306), MA-040096-1(Request 32308), MA-040100-1(Request 32314), MA-040101-1(Request 32315), MA-040102-1(Request 32316), MA-040103-1(Request 32317), MA-040104-1(Request 32319) and MA-040105-1(Request 32320) ought to exist but does not provide any specific reasons for that belief.

The records responsive to Appeals MA-040045-1 and MA-0400097-1 are identical, consisting of 632 pages of notes, occurrence reports and other assorted documents relating to the investigation undertaken by specified members of the Police Sexual Assault Squad. Many of the records identified as responsive to each individual request are duplicated in one or more of the other files. The Police investigation was conducted by a number of investigating officers, each of whom are enumerated in the appellant's requests. Often, the same records appear in the record-holdings of the individually enumerated Police officers and are, therefore, responsive to one or more of the appellant's requests.

The following table describes in greater detail the information requested in each of the requests and subsequent appeals, the exemptions claimed and the issues remaining outstanding for each, including whether the Police conducted a reasonable search for records responsive to each of the requests.

| Appeal/Request Number | Description of Responsive Records | Exemptions Claimed | Reasonable Search |
|------------------------------|--|-------------------------------------|--------------------------|
| MA-040045-1/32657 | 632 pages of records as described in Feb 6/04 List of Records | 8(1)(a), 14(1), 38(a) and (b) | No |
| MA-040094-1/32306 | 15 pages of notes taken on an identified date and records of arrest on two specified dates | 8(1)(a) and (l), 38(a) and (b) | Yes |
| MA-040095-1/32307 | 25 pages of e-mails, correspondence, minutes, notes, records relating to "Red Notice" | 8(1)(a), (c) and (l), 38(a) and (b) | No |
| MA-040096-1/32308 | 4-page occurrence report | 8(1)(a), 38(a) and (b) | Yes |
| MA-040097-1/32309 | 632 pages of records as described in Feb 13/04 List of Records, these are the same records as those described in MA-040045-1 | 8(1)(a) and (l), 38(a) and (b) | No |
| MA-040098-1/32310 | 142 pages of transcripts, notes, witness statements, a record of arrest and occurrence reports | 8(1)(a), 14(1), 38(a) and (b) | No |
| MA-040099-1/32311 | 3262 pages of investigation records | 8(1)(a), (c) and (l), 38(a) and (b) | No |
| MA-040100-1/32314 | 15 pages of notes and Records of Arrest | 8(1)(a), 38(a) and (b) | Yes |
| MA-040101-1/32315 | One page of notes and a 7-page occurrence report | 8(1)(a), 38(a) and (b) | Yes |
| MA-040102-1/32316 | One page of notes | 8(1)(a), 38(a) and (b) | Yes |
| MA-040103-1/32317 | 11 pages of notes, a news release, wire copy, newspaper articles | 8(1)(a), 8(2)(c), 38(a) and (b) | Yes |
| MA-040104-1/32319 | 15 pages of notes and records of arrest | 8(1)(a), 38(a) and (b) | Yes |
| MA-040105-1/32320 | 11 pages of notes, a news release, newspaper articles, wire copy, these are the same records as those described in MA-040103-1 | 8(1)(a), 8(2)(c), 38(a) and (b) | Yes |

DISCUSSION:

PERSONAL INFORMATION

General principles

The exemptions in sections 38(a) and (b) apply only to information that qualifies as “personal information”. In order to determine whether these sections 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 if 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, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

All of the information contained in the responsive records qualifies as the personal information of the appellant as it relates directly to a detailed and lengthy investigation of criminal wrongdoing on his part. I further find that the records contain information about the appellant's age, sex, sexual orientation and family or marital status (section 2(1)(a)), his education and employment history (section 2(1)(b)), his address and telephone number (section 2(1)(d)), the views or opinions of other individuals about the appellant (section 2(1)(g)) and the appellant's name along with other personal information about him (section 2(1)(h)).

Similarly, the records also contain information that qualifies as the personal information of other identifiable individuals, particularly those individuals who have made allegations of criminal wrongdoing against the appellant. This information falls within the ambit of the definition of personal information as described in sections 2(1)(a), (b), (d), (f), (g) and (h).

The 11 pages of press releases, newspaper articles and wire copy which comprise a portion of the records at issue in Appeals MA-040103-1 and MA-040105-1 as well as Records 27, 41 and 43 (Pages 1065 to 1088) of Appeal Number MA-040099-1 contain only the personal information of the appellant.

In addition, Record 6 (Pages 185 to 210) consisting of a statement taken from the appellant by the Police, Records 13 (Pages 575 to 600) and 16 (Pages 683 to 749), consisting of a search warrant, charge sheets, an exhibit list and a Recognizance of Bail also contain only the personal information of the appellant. Record 18 (Pages 790 to 844) of Appeal Number MA-040099-1 consist of the appellant's record of arrest, warrants, driver's licence and various financial records belonging to him. Record 46 (Pages 1726 to 1738), consists of the appellant's resume. Record 63 (Pages 2620 to 2625) is an excerpt from a published book that includes a reference to the appellant. All of this information constitutes only the personal information of the appellant.

Because I have found that much of the information in the records qualifies as the personal information of the appellant and other identifiable individuals, I will first determine whether it qualifies under the discretionary exemption in section 38(b), taken in conjunction with section 14.

INVASION OF PRIVACY

Introduction

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 exercise its discretion to refuse to disclose that information to the requester. The determination of whether disclosure would constitute an unjustified invasion of personal privacy under section 38(b) 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. Sections 14(1) to (4) provide guidance in determining whether the “unjustified invasion of personal privacy” threshold under section 38(b) is met. If one of the presumptions in section 14(3) apply, the information is exempt under section 14 [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. The only way such a presumption can be overcome is if the personal information falls under section 14(4) or where a finding is made that the public interest override provision in section 16 applies to it.

The section 14(3)(b) presumption

Section 14(3) sets out information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. In the circumstances, it appears that the presumption at paragraph (b) could apply. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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;

I have carefully reviewed all of the information identified by the Police as responsive to each of the requests filed by the appellant. I conclude that all of the records relate exclusively to the investigation undertaken by the Police into a possible violation of law by the appellant. The records reflect a very lengthy and detailed process whereby complaints against the appellant were received some years after the occurrence of the events that gave rise to them. The Police then invested a great deal of time and resources in building a case against the appellant. The records identified as responsive to the requests reflect this effort.

The majority of the records contain the personal information of the appellant and other identifiable individuals and were compiled and are identifiable as part of the Police investigation into the allegations of criminal wrongdoing made against the appellant within the meaning of the presumption in section 14(3)(b). Accordingly, the disclosure of this information is presumed to constitute an unjustified invasion of the personal privacy of individuals other than the appellant and the information is exempt under the discretionary exemption in section 38(b). Further, I find that the exceptions in section 14(4) do not apply to the information in the records and the appellant has not raised the possible application of the "public interest override" provision in section 16.

However, as noted in my discussion above, the 11 pages of press releases, newspaper articles and wire copy from Appeals MA-040103-1 and MA-040105-1, as well as Records 6 (Pages 185 to 210), 13 (Pages 575 to 600), 16 (Pages 683 to 749), 18 (Pages 790 to 844), 27, 41 and 43 (Pages 1065 to 1088), 46 (Pages 1726 to 1738) and 63 (Pages 2620 to 2625) from Appeal Number MA-040099-1 contain only the personal information of the appellant. The disclosure of this information cannot, therefore, result in an unjustified invasion of personal privacy under section 38(b).

Addressing those records that contain the personal information of the appellant along with other identifiable individuals, I find that it is not reasonably possible to sever some of them, specifically the transcribed interviews and notes taken during the interviews conducted by the Police with various witnesses and victims. Similarly, those records containing a detailed description of the events giving rise to the charges as related by the victims and witnesses, such as the Appearance Notices that appear at Pages 19 to 24 of Appeal Number MA-040094-1, also cannot reasonably be severed. Accordingly, I find that those records which contain a recitation of the allegations from the witnesses and victims are exempt in their entirety under section 38(b) because the personal information of the appellant and the other individuals contained in these records are too closely intertwined to allow for severance.

Other records, however, such as the many occurrence reports, records of arrest, Informations and other forms that comprise a large portion of the records in all of the appeals are more readily severable. I will, accordingly, order the Police to disclose those portions of these records that contain only the personal information of the appellant, as this information is not exempt under section 38(b). However, the personal information contained in these records that relates solely to individuals other than the appellant qualifies for exemption under section 38(b) and ought not to be disclosed. This information consists of the name, age, address, date of birth, telephone number, education, medical and employment history and family status of individuals other than the appellant. I further find that personal information contained in these records that links the events described therein, consisting mainly of police occurrence reports, records of arrest, Information and other forms, to individuals other than the appellant is also exempt under section 38(b) and ought not to be disclosed to the appellant.

Because of the voluminous nature of these records, I will allow the Police additional time to complete this severing exercise and disclose the records, and parts of records to the appellant.

Exercise of discretion

However, that does not end the matter. The section 38(b) exemption is discretionary, and permits the Police to disclose information, despite the fact that they could withhold it. The Police are required to exercise their discretion. In this appeal, I am charged with determining whether the Police failed to do so.

In addition, I must also make a determination as to whether the Police erred in exercising their discretion. This finding may be made where, for example, an institution,

- does so in bad faith or for an improper purpose
- takes into account irrelevant considerations
- 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)].

Relevant considerations that enter into an institution's reasoning when exercising its discretion may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Police have not provided me with any representations with respect to the manner in which they exercised their discretion not to disclose the records to the appellant. In addition, the decision letters provided to the appellant do not provide any insight into how this determination was made by the Police. In my view, I have not been provided with sufficient information to enable me to make a determination as to the appropriateness of the Police decision to exercise their discretion in favour of not disclosing the information to the appellant. As a result, I am remitting the matter back to the Police for a proper exercise of discretion, based on the principles delineated above and taking into account all of the circumstances present in this case.

DISCRETION TO DISCLOSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

Because of the manner in which I addressed the application of section 38(b) to those portions of the records containing only the personal information of individuals other than the appellant, it is not necessary for me to also consider whether they qualify for exemption under section 38(a), taken in conjunction with sections 8(1)(a), (c) or (l) or 8(2)(c).

The Police indicated in their decision letters that they relied on the discretionary exemption in section 38(a), taken in conjunction with the law enforcement exemptions in sections 8(1)(a), (c) and (l) and 8(2)(c), to exempt some or all of the records. However, the Police provided me with the following representations respecting the application of the section 8 exemptions to the records:

It is the position of the TPS [the Police] that, for matters before the courts, police records which form part of a Crown Brief must be disclosed in accordance with s. 603 of the *Criminal Code*, R.S.C. 1985, c. C-46 and the case *R v. Stinchcombe*, [1991] 3 S.C.R. 326. The Crown is required to produce to the defence all relevant information whether or not the Crown intends to introduce it into evidence and whether it is inculpatory or exculpatory. This production is reviewable by the trial judge who is guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence. *With respect*

to these appeals, the decision to refuse disclosure of the requested records pursuant to paragraphs 8(1)(a), 8(1)(b) and particularly 8(1)(f) of MFIPPA was made with the knowledge that the requester did have access to information, any decisions made by the Crown to refuse disclosure were circumscribed by law, and a review of the trial judge was available. Thus, the purposes set out in section 1 of MFIPPA were achieved in accordance with rules and procedures designed specifically to address the unique concerns raised in the criminal law context.
[my emphasis]

I note that the representations refer to sections 8(1)(b) and (f) for the first time in the processing of the appeals.

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. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (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* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*, 19 O.R. (3d) 197 (Div.Ct.), leave to appeal refused (September 12, 1994, Docs. M13824 and M13829 (C.A.))]. The extent of the disclosure made pursuant to the decision in *Stinchcombe* is not determinative to my analysis of the application of the section 8 exemptions as the criminal disclosure procedure is separate and distinct and is guided by different principles from any disclosure made pursuant to a request under the *Act*.

In the present appeals, the Police have failed to provide anything approaching the kind of “detailed and convincing” evidence required to uphold a finding that those records containing only the personal information of the appellant described above qualify for exemption under any of the subsections of section 8 or section 38(a). In the absence of cogent representations demonstrating the application of these exemptions, I find that they have no application to the records relating solely to the appellant.

REASONABLENESS OF SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution’s decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In their decision letters, the Police indicate that they have undertaken searches for records responsive to the requests and have identified certain records relating to each.

The appellant contends that additional records relating to Appeals MA-040094-1(Request 32306), MA-040096-1(Request 32308), MA-040100-1(Request 32314), MA-040101-1(Request 32315), MA-040102-1(Request 32316), MA-040103-1(Request 32317), MA-04-104-1(Request 32319) and MA-040105-1(Request 32320) ought to exist. These files relate to records documenting the involvement of a number of named police officers in the investigation into criminal allegations against the appellant. I note that the involvement of all of the officers identified in these requests and appeals is peripheral to the conduct of the actual investigation work performed by those lead officers designated as being charged with the responsibility for its completion. In each of the appeals described above, the involvement of these officers was limited to specific, discrete actions such as the taking of a single witness statement, assisting in the arrest of the appellant or disseminating a press release relating to the appellant's case. The records identified as relating to these officers generally describe only that involvement and may also include the arrest report, witness statement or press release that refers to the officer. I come to this conclusion based on the submissions of the Police, the information contained in their decision letters and, more importantly, my own review of the records identified as responsive to each request.

Accordingly, based on my review of the records and taking into account all of the circumstances surrounding this investigation, I am satisfied that the Police conducted a reasonable search for those records responsive to each of the requests enumerated above. The appellant has not provided me with sufficient information to substantiate his belief that there are additional records relating to these enumerated requests. Therefore, I cannot agree with the appellant that additional records relating to these requests ought to exist. In my view, owing to the very limited involvement of these particular officers in the totality of the investigation, it is not surprising that there are no additional records describing their roles in the investigation. Because their involvement in the investigation was limited to single events, I find that it is reasonable that records relating to their contacts with the investigation are similarly limited to documents created at the time of these single transactions.

INTERIM ORDER:

1. I find that the searches undertaken by the Police for records responsive to Appeals MA-040094-1(Request 32306), MA-040096-1(Request 32308), MA-040100-

1(Request 32314), MA-040101-1(Request 32315), MA-040102-1(Request 32316), MA-040103-1(Request 32317), MA-040104-1(Request 32319) and MA-040105-1(Request 32320) were reasonable and I dismiss that part of the appeals.

2. I order the Police to disclose to the appellant:

- (a) copies of the press releases, newspaper articles and wire copy which comprise a portion of the records at issue in Appeals MA-040103-1 and MA-040105-1;
- (b) Records 6 (Pages 185 to 210), 13 (Pages 575 to 600), 16 (Pages 683 to 749), 18 (Pages 790 to 844), 27 (Pages 1065 to 1088), 41, 43, 46 (Pages 1726 to 1738) and 63 (Pages 2620 to 2625) in Appeal Number MA-040099-1, in their entirety; and
- (c) those portions of the remaining records that contain only the personal information of the appellant in accordance with the instructions set out in page 6 of this order.

by **April 18, 2005**, but not before **April 4, 2005**.

3. I uphold the decision of the Police that section 38(b) of the *Act* applies to those records that contain the personal information of individuals other than the appellant, subject to the re-exercise of discretion referred to below.
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.

Original signed by: _____
Donald Hale
Adjudicator

March 3, 2005