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

RECONSIDERATION ORDER MO-1972-R

Appeal MA-040324-2

London Police Services Board

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NATURE OF THE APPEAL:

On June 30, 2005, I issued Order MO-1939 in which I reviewed a decision of the London Police Services Board (the Police) to deny access to a large number of records that were responsive to a request made under the access to information provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In that Order, I upheld the decision of the Police to deny access to the majority of the responsive records. However, I did not uphold the decision of the Police to deny access to some of the records and, in Order Provision 1 of Order MO-1939, I stated:

> I order the Police to disclose Records 36, 526, 535, 638 to 648, 649 to 655, 664 to 669, 670 to 675, 695 to 702, 717 to 725, 726 to 728, 729 to 733, 1585, 1587, 1588 to 1595, 1625 and 1626 to 1631 to the appellant by providing him with a copy by **August 8, 2005** but not before **August 2, 2005**.

Prior to the date for compliance with the order, the Police requested that I reconsider my decision in Order MO-1939. The Police argued that there was a fundamental defect in the adjudication process followed as I failed to consider the possible application of the mandatory exemption in section 9(1)(d) of the *Act* to some of the records which I ordered disclosed.

In a letter to the parties dated July 27, 2005, I determined that it was necessary for me to reconsider my decision to order the disclosure of certain of the records and invited the Police and the appellant to provide me with representations on the possible application of the mandatory exemption in section 9(1)(d) of the *Act* (relations with other governments) to Records 649 to 655, 668, 669, 674, 675, 700 to 702, 723 and 724. The Police subsequently asked that I also consider the application of the section 9(1)(d) exemption to Records 526, 535, 725, 1625 and 1626 to 1631 and I agreed to do so, owing to the mandatory nature of the exemption.

In accordance with the requirements of Order Provision 1 of Order MO-1939, the Police disclosed to the appellant the other records that are not the subject of this reconsideration request.

The Police provided me with representations with respect to the application of section 9(1)(d), as well as the discretionary exemption in section 8(1)(a), taken in conjunction with section 38(a) (discretion to refuse access to a requester's own information) of the *Act*. I did not receive any representations in response to my July 27, 2005 letter from the appellant which asked for submissions on the application of the section 9(1)(d) exemption to the records referred to above.

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether section 38(a), taken in conjunction with section 9(1)(d) and 8(1)(a), 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].

The meaning of "about" the individual

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].

The meaning of "identifiable"

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.)].

Findings

I have reviewed the contents of the records and, in accordance with the findings in Order MO-1939, conclude that:

- Record 526 (which is identical to Record 535) contains the personal information of the appellant as it includes his name and other personal information related to him, such as his occupation (section 2(1)(h));
- Records 649 to 655 and 1625 are statements made by the appellant himself to the Police and each of these are replete with his own personal information under section 2(1)(h); and
- Records 668, 669, 674, 675, 700, 701, 702, 723, 724 and 1626 to 1631 are the witness statements provided by other witnesses to the robbery and include both their own personal information and that of the appellant under section 2(1)(h).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/RELATIONS WITH OTHER GOVERNMENTS

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. [my emphasis]

In this case, the Police rely on section 38(a) in conjunction with sections 8(1)(a) and 9(1)(d). Specifically, the Police claim the application of the mandatory exemption in section 9(1)(d) to Records 526, 535, 649 to 655, 668, 669, 674, 675, 700 to 702, 723, 724, 725, 1625 and 1626 to 1631. Section 9(1) states, in part,:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c);

The Police take the position that the records outlined above were received from one of three outside institutions, the St. Thomas Police Service (Records 649 to 654, 655, 668, 669, 674, 675, 700, 701, 702, 723 and 724), the Toronto Police Service (Records 526 and 535) and the Ministry of the Attorney General, through the office of the Crown Attorney for Elgin County in St. Thomas (Records 1625 and 1626 to 1631), thereby qualifying for exemption under section 9(1)(d).

The Police rely on a number of previous orders to support their argument that the two police services may properly be characterized as "an agency of a government referred to in clause (a), (b) or (c)" and that the Ministry of the Attorney General qualifies as part of the Government of Ontario. Specifically, I note that it relies on Order M-202, stating that it represents a situation where "information provided to a police service from other police services" was found to be exempt under section 9(1)(d). I have examined Order M-202, the relevant portion of which states:

> In my view, all of the pages of the record for which this exemption was claimed contain information originating from various agencies of the Government of Canada, the Government of Ontario and the Government of the United States. In particular, these agencies are the Royal Canadian Mounted Police, the Federal Department of External Affairs and the Department of Justice, the Ministries of the Solicitor General and the Attorney General in Ontario and United States police agencies.
>
> In their representations, the Police confirm that the information in the record was received from the aforementioned agencies and state that it was received in confidence.
>
> Having reviewed the record and the submissions of the Police, I find that the disclosure of 950 pages of the record could reasonably be expected to reveal information received by the Police in confidence from another government or its agencies, and therefore, qualify for exemption under section 9(1)(d) of the *Act*.

In that case, the documents had been received from agencies of the governments of Canada, Ontario and the United States. The records to which the Police have applied section 9(1)(d) in the present appeal did not originate with the government agencies described in section 9(1).

Rather, in the present appeal, the Police received copies of Records 649 to 654, 655, 668, 669, 674, 675, 700, 701, 702, 723 and 724 from the St. Thomas Police Service and copies of Records 526 and 535 from the Toronto Police Service. In my view, neither of these agencies represent "an agency of a government referred to in clause (a), (b) or (c)" for the purposes of section 9(1)(d). As such, I find that section 9(1)(d) has no application to these records and they are not, therefore, exempt under section 38(a).

The Police submit that Records 1625 and 1626 to 1631, which are narrative versions of the statements given by witnesses to a robbery, including that of the appellant, were provided to the Police by the office of the Crown Attorney of Elgin County. It submits that these documents were supplied to the Police with an expectation of confidentiality.

In Reconsideration Order MO-1968-R, I recently examined the application of the mandatory section 9(1)(d) exemption to records passing between the Ministry of the Attorney General's office and a local police service. In that decision, I quoted extensively from the decision of Adjudicator Liang in Order MO-1581 in which she also was faced with a similar question. I stated that:

> In Order MO-1581, Adjudicator Sherry Liang reviewed the manner in which the section 9(1)(d) exemption has been applied by this office in previous orders and provided some useful guidance as to how it might be applied in the future. She wrote that:
>
> > . . . [In previous orders of this office] it has been said that in order for section 9(1) to apply, the institution must demonstrate that the disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section **and** that the information was received by the institution in confidence.
> >
> > . . .
> >
> > In my view, the approach taken in the above orders, in essentially seeking to determine the basis on which information was shared between governments, is in keeping with the rationale for the section 9(1)/15(b) exemption, as discussed in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission), at pages 306-7:
> >
> > > ... It is our view that an Ontario freedom of information law should expressly exempt from access material or information obtained on this basis from another government. Failure to do so

> might result in the unwillingness of other governments to supply information that would be of assistance to the government of Ontario in the conduct of public affairs. An illustration may be useful. It is possible to conceive of a situation in which environmental studies (conducted by a neighbouring province) would be of significant interest to the government of Ontario. If the government of the neighbouring province had, for reasons of its own, determined that it would not release the information to the public, it might be unwilling to share this information with the Ontario government unless it could be assured that access to the document could not be secured under the provisions of Ontario's freedom of information law. A study of this kind would not be protected under any of the other exemptions ... and accordingly, could only be protected on the basis of *an exemption permitting the government of Ontario to honour such understandings of confidentiality*. ... [emphasis added]

I adopted and applied the reasoning of Adjudicator Liang in Order MO-1968-R and will do so in the present appeal as well. With respect to the records received from the Ministry of the Attorney General, I find that the disclosure of the contents of Records 1625 and 1626 to 1631 would reveal information received by the London Police Service from the Elgin County Crown Attorney's office in confidence. The nature of the relationship between the Crown Attorney's office and the Police, as one of several investigating police services, gives rise to a reasonable expectation of confidentiality in the circumstances surrounding the sharing of this information. Accordingly, I am satisfied that Records 1625 and 1626 to 1631 qualify for exemption under section 9(1)(d).

Furthermore, I have reviewed the representations of the Police with respect to the manner in which they exercised their discretion under section 38(a) to deny access to Records 1625 and 1626 to 1631. I am satisfied, based on those submissions, that the Police have properly exercised their discretion not to disclose Records 1625 and 1626 to 1631 to the appellant. As a result, I find that these records qualify for exemption under section 9(1)(d) and are exempt from disclosure under section 38(a).

However, as stated earlier, I find that Records 526, 535, 649 to 654, 655, 668, 669, 674, 675, 700, 701, 702, 723 and 724 do not qualify for exemption under section 9(1)(d) and are not, therefore, exempt under section 38(a).

LAW ENFORCEMENT

The Police claim that Records 526, 535, 649 to 654, 655, 668, 669, 674, 675, 700, 701, 702, 723 and 724, which were received from two other municipal police services by the London Police, qualify for exemption under section 8(1)(a) and, because they may contain the personal information of the appellant, are exempt under section 38(a). I note that the Police have only just raised the possible application of this discretionary exemption to these records at this late point in the adjudication of this appeal. I would normally not consider the application of a discretionary exemption for the first time at the reconsideration stage of an appeal. However, in light of my finding, I have decided to proceed with an analysis of its possible application regardless of the fact that it was only raised at this point in the adjudication process.

Section 8(1)(a) – general principles

Section 8(1)(a) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;

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.)].

With respect to the application of section 8(1)(a) specifically, 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]. The institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply [Order PO-2085].

The submissions of the Police

The Police submit that the records were created as part of a Police investigation into a series of robberies. They go on to add that:

> The records currently form part of records that are before the courts today, more specifically, they are similar fact evidence in a murder trial. Therefore, the continued understanding of confidentiality remains of utmost importance to the proper administration of justice and so as not to jeopardize the Crown's mandate. Forcing the London Police Service to release these documents would have a

> detrimental effect on a Murder trial. It is our view that the gravity of a Murder trial outweighs the rights of the appellant to see this information.

The Police rely on the following quotation from the Divisional Court in its judicial review of Order M-534:

> 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.)].

The Police have also provided me with confidential submissions with respect to the nature of the information contained in the records and the current status of the criminal proceedings in which these records are to be relied upon. As a result of their confidential nature, I am unable to refer to them in greater detail in this decision.

Findings

Based on the representations of the Police and my review of the contents of Records 526, 535, 649 to 654, 655, 668, 669, 674, 675, 700, 701, 702, 723 and 724, I cannot agree that their disclosure could reasonably be expected to result in the harm contemplated by section 8(1)(a). While a murder trial is pending in which some of the information contained in some of the other responsive records (which are not the subject of this reconsideration) may be referred to, the Police have failed to draw the necessary evidentiary link between the disclosure of *these* particular records and the harm in section 8(1)(a).

In my view, I have not been provided with sufficient evidence to connect the disclosure of Records 526, 535, 649 to 654, 655, 668, 669, 674, 675, 700, 701, 702, 723 and 724 to the harm contemplated by section 8(1)(a). Nor is such a connection evident on an examination of the records themselves. As a result, I find that Records 526, 535, 649 to 654, 655, 668, 669, 674, 675, 700, 701, 702, 723 and 724 do not qualify for exemption under section 8(1)(a). Because no other or any mandatory exemptions apply to these documents, I will order that they be disclosed to the appellant.

RECONSIDERATION ORDER:

1. I order the Police to disclose Records 526, 535, 649 to 654, 655, 668, 669, 674, 675, 700, 701, 702, 723 and 724 to the appellant by providing him with a copy by **November 4, 2005** but not before **October 28, 2005**.

2. I uphold the decision of the Police to deny access to Records 1625 and 1626 to 1631.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the Police to provide me with a copy of the records that are disclosed to the appellant.

September 29, 2005

Donald Hale
Adjudicator