



**Information and Privacy
Commissioner/Ontario**

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

FINAL ORDER MO-1988-F

Appeal MA-040181-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

This is a final order to dispose of the issue of the re-exercise of discretion by the Toronto Police Services Board (the Police) pursuant to my previously issued Order MO-1927.

Prior to the filing of this appeal, the appellant submitted a request to the Police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the “police report” relating to three separate incidents involving his three sons. The appellant also requested a copy of photographs in the police file relating to one of those incidents. The appellant had been involved in family law proceedings with his ex-wife which led to Minutes of Settlement, the terms of which were ultimately incorporated in a Divorce Judgment terminating the marriage of the appellant and his wife. In both the minutes and the judgment, the appellant’s ex-wife was granted custody of their three sons and the children were given a right of access to their father.

In response to the appellant’s request, the Police issued a decision providing partial access to the records and applied the exemptions found at section 38(a), in conjunction with sections 8(1)(l) and 8(2)(a), 38(b) in conjunction with section 14(3)(b), and section 14(1) in conjunction with section 14(2)(f) and 14(3)(b). The appellant appealed this decision.

After conducting an inquiry I issued Order MO-1927, in which I ordered disclosure of some parts of the records that had been withheld by the Police, and as noted, I also ordered the Police to re-exercise their discretion regarding their decision to withhold parts of Records 1, 2 and 3 under the discretionary exemption found at section 38(b) of the *Act* (personal privacy). My decision to order a re-exercise of discretion by the Police arose from the divorce judgment, which had been provided to me by the appellant with his representations. The Police had not been aware of either the Minutes of Settlement or the Divorce Judgment when they made their initial decision.

The following paragraph in the Divorce Judgment is particularly relevant:

The Father shall have full rights as a parent to make inquiries and be given information about the health, education and welfare of the children, including the right to request and receive information from third parties such as the children’s school or doctor.

The relevant order provisions state:

2. I order the Police to disclose the information I have found not to be exempt in Records 1, 2 and 3, which appears on pages **1 and 2 (Record 1), page 8 (Record 2), and page 12 (Record 3)**, by **June 30, 2005**. For greater certainty, I have provided copies of these pages to the Police with this order, highlighted to show the exempt information, which is not to be disclosed.
3. I order the Police to re-exercise their discretion regarding the application of section 38(b) to the remainder of Records 1, 2 and 3, and in particular, to consider

the Divorce Judgment in the re-exercise. I order the Police to communicate the results of their re-exercise of discretion to the appellant, and to me, not later than **June 30, 2005**.

4. I remain seized of this matter to provide any necessary directions to the parties in connection with order provision 3, and for the purpose of deciding whether the Police have re-exercised discretion appropriately.

Subsequent to Order MO-1927 being issued, the Police wrote to the appellant on June 24, 2005, disclosing portions of the pertinent records and outlining their re-exercise of discretion, which resulted in the disclosure of some information in the records beyond what was required in my order. Based on my review of what the Police disclosed, however, I note that some portions I ordered to be disclosed continue to be withheld. I will address this concern in the order provisions found below.

In July, I attempted to seek representations from the appellant on the re-exercise of discretion by the Police. I was informed that the appellant had not received the Police's June 24 letter. As a result of inquiries directed to the Police, I learned that the appellant had not received the letter because it had been sent to an outdated address. The package sent to the outdated address was subsequently returned to the Police unopened.

Arrangements were made for the Police to re-send the decision letter and this was done on August 11, 2005. Upon confirmation of the appellant's receipt of the letter from the Police, I invited the appellant to provide representations, which he did.

This final order resolves the sole outstanding issue in this appeal as to whether the Police properly exercised their discretion under section 38(b) to deny the appellant access to certain information found to be exempt under that section in Order MO-1927.

DISCUSSION:

Representations of the parties

The Police maintain that their re-exercise of discretion under section 38(b) of the *Act* in response to my direction in Order MO-1927, which led to the disclosure of additional information to the appellant, was appropriate. The Police state that they weighed the following factors in re-exercising their discretion:

- the appellant had made a request for the information under the *Act*;
- the appellant may have already been aware of some of the information;
- there was an emotional component to the request in that the appellant was the father of several of the affected parties;
- the terms of the Minutes of Settlement and the Divorce Judgement, which they had been unaware of at the time of their initial decision;
- a portion of the information was provided by other individuals;
- the records relate to a very sensitive domestic matter;

- the records refer to allegations of violence against *another* individual; and
- the expectation of privacy for individuals who provide their personal information in the context of a law enforcement investigation.

The appellant's representations convey his frustration with the amount of information that continues to be withheld. He states that the newly disclosed information is of no value to him because it does not address his concerns about the incidents involving his three sons and his oldest son in particular.

The crux of the appellant's argument as regards the re-exercise of discretion is that the Police have demonstrated bad faith and have considered irrelevant factors, including another criminal investigation in which he is said to be involved, in denying access to the withheld information. In fact, based on their representations, it is evident that the Police did *not* consider the latter in their re-exercise of discretion. I disagree with the appellant on this point.

The appellant makes specific reference to Record 3 (an occurrence report) and contends that the Police have withheld information that directly relates to him in this document. This information is, in fact, information I had already ordered disclosed, as referred to earlier in this order. As noted, I will deal with this in the order provisions below. Otherwise, the withheld information in Record 3 is not the appellant's personal information.

The appellant also refers to Record 4, the photographs of one of his sons, and "demands an un-tampered copy" of them. I am only able to order the Police to re-exercise their discretion with respect to *discretionary* exemptions such as section 38(b). In order to be exempt under the *discretionary* exemption at section 38(b), the record must contain the personal information of the appellant, as well as that of another individual or individuals. I did not order the Police to re-exercise their discretion with respect to Record 4, because I found it exempt under the *mandatory* exemption at section 14(1), which can apply where a record contains no personal information of the requester (in this case, the appellant), and does contain the personal information of another individual or individuals. As stated in Order MO-1927, Record 4 contains no personal information of the appellant, only of his son, and for this reason, the mandatory exemption at section 14(1) applies. Because section 14(1) is a *mandatory* exemption, there is no discretion for the Police to exercise in claiming it, nor any re-exercise of discretion for me to order. Accordingly, I am not in a position to make any further order concerning Record 4.

In a letter accompanying his representations, and in his representations themselves, the appellant also makes a series of allegations about me, this office, and members of the Police. These allegations are entirely without foundation. He also makes comments and asks a number of questions about the conduct of the Police, in connection with himself and his children, which are beyond the scope of this appeal. In addition, he makes arguments about the nature of Canada's constitutional arrangements, as well as a *Charter* argument. These arguments are without foundation. I will not make any further reference to these matters in this order.

Analysis

As noted, the exemption found at section 38(b) of the *Act* is discretionary. Unlike mandatory exemptions, which *require* institutions to withhold exempt information, a discretionary exemption such as section 38(b) leaves room for the Police to disclose information despite the fact that they could withhold it. The institution must exercise its discretion and on appeal, the Commissioner may determine whether or not the institution did so.

The Commissioner may also find that the institution erred in exercising its discretion where, for example, it takes into account irrelevant considerations or fails to consider relevant ones.

When the Commissioner finds that an institution either failed to exercise its discretion or erred in exercising its discretion, this office may remit the matter to the institution for an exercise, or re-exercise, of discretion. Section 43(2) of the *Act* provides that “[i]f the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.” This section means that, to the extent that I have found that the exemption at section 38(b) applies, I may not substitute my own discretion for that of the Police and order them to disclose the exempt information.

In considering the re-exercise of discretion according to the scope of my authority, I reviewed the records, comparing what was disclosed to the appellant under order provision two (information I found not to be exempt in Records 1, 2 and 3, which appeared on pages 1 and 2 (Record 1), page 8 (Record 2), and page 12 (Record 3)), with what had been disclosed to the appellant under order provision three, above.

As noted, the appellant makes specific reference to Record 3, contending that the Police have withheld information that directly relates to him. As discussed above, the Police have failed to disclose the remaining personal information in this record that pertains to the appellant, although I ordered them to do so, and I will deal with this in the order provisions below. The other undisclosed information in Record 3 pertains to individuals other than the appellant. This is also the case in relation to the information not disclosed in Records 1 and 2.

Having reviewed the representations of the parties and conducted a further review of the records, I find that the Police did consider the appellant’s position and circumstances in exercising their discretion not to disclose the information severed from Records 1, 2 and 3. I also find that the Police did not act in bad faith, nor did they take irrelevant considerations into account.

I will therefore uphold the Police’s re-exercise of discretion in this case.

Record 4

I have indicated that I am not in a position to make any further order with respect to Record 4 (photographs of the appellant’s son) for the reasons outlined above. Nevertheless, the appellant could attempt to obtain this record (and, for that matter, other withheld parts of the records) outside of the access process provided by the *Act*, on the basis of the Divorce Judgment.

In MO-1927, I stated:

... it is significant, in my view, that the Divorce Judgment issued by the Superior Court of Justice contains an express provision granting the appellant "full rights as a parent to make inquiries and to be given information about the health, education and welfare of the children, including the right to request and receive information from third parties such as the children's school or doctor." There is no provision in the *Act* expressly authorizing the disclosure of personal information pursuant to a court order, which would be subject to the Court's own enforcement procedures.

CONCLUSION:

Based on the appellant's representations, and despite the fact that he will now receive all of his personal information in Record 3, I expect that my decision in this order will be frustrating for him. However, in the case of Record 4, he must recognize that where a mandatory exemption such as section 14(1) applies in the context of an access request under the *Act*, the Commissioner *must* uphold the application of the exemption and the institution *must not* disclose the exempt record. In the case of the withheld portions of Records 1, 2 and 3, to which the discretionary exemption at section 38(b) applies, the Commissioner *may not* substitute her discretion for that of the Police and order disclosure (see section 43(2), referred to above).

Accordingly, and without prejudice to any further remedies that may be available to the appellant *outside* the access process under the *Act*, whether based on the wording of the Divorce Judgment or otherwise, this office deals only with access under the *Act*. There are no further avenues for this office to follow in this appeal.

ORDER:

1. I order the Police to re-disclose Record 3 to the appellant in accordance with Order MO-1927 and with their own re-exercise of discretion by sending a copy to the appellant on or before **November 10, 2005**. For greater certainty, with the Police's copy of this order I am enclosing a copy of Record 3 in which the exempt information the Police have decided not to disclose is highlighted. The highlighted information is not required to be disclosed.
2. I uphold the Police's re-exercise of discretion.

Original signed by: _____
John Higgins
Senior Adjudicator

November 3, 2005
