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

ORDER MO-1939

Appeal MA-040324-2

London Police Services Board

Tribunal Services 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 London Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

1. Police report regarding a robbery that took place on a specified day;
2. A copy of the requester's own statement to the Police;
3. Transcripts of or notes taken at a meeting the requester attended with the Police and other identified individuals relating to the robbery; and
4. Any notes or transcripts relating to a press conference held on a specified day.

Following the requester's initiation of a "deemed refusal appeal" with this office, the Police located the responsive records and issued a decision letter to him. In that decision, the Police granted access to the requester's own witness statement, which was responsive to Part 2 of the request. Access to 1868 pages of records responsive to Part 1 of the request was denied pursuant to the discretionary exemptions in sections 8(1)(a) to (h) and (l) and 8(2)(a)(law enforcement), as well as sections 38(a) (discretion to refuse requester's own information) and (b) (invasion of privacy) of the *Act*. The Police also indicated that records responsive to Parts 3 and 4 of the request do not exist.

The requester, now the appellant, appealed this decision. During mediation, the Police conducted a further search for records responsive to Parts 3 and 4 of the request and advised the appellant that such records do not exist. The appellant indicated that he wished to pursue his appeal with respect to access to the records responsive to Part 1 of the request and maintains that records responsive to Part 3 of the request ought to exist.

I initially sought and received representations from the Police through the issuance of a Notice of Inquiry. I shared the non-confidential portions of the Police representations with the appellant, along with a copy of the Notice. The appellant also provided me with representations.

RECORDS:

The records at issue consist of 1868 pages of police officer notebook entries, occurrence and supplementary occurrence reports along with other documents relating to the Police investigation of a robbery in 1995 in which the appellant was a victim.

DISCUSSION:

REASONABLENESS OF SEARCH

General Principles

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.

Representations of the parties

The Police submit that, upon receiving the appellant's request, they undertook a search of their record-holdings for responsive records, identifying six boxes of records. The Police Freedom of Information and Protection of Privacy Co-ordinator (the Co-ordinator) states that these records represent the paper created during the course of a seven-month investigation involving the London Police and a number of other police services in Ontario into a "string of armed robberies". The Police also indicate that they conducted a further search of the six boxes of records for those records which are responsive to the specific information sought in the appellant's request and narrowed the scope of the records to 1868 pages of documents.

The Police initially advised the appellant that the subject matter of the records involved the conviction of an individual which had been overturned and that a new trial had been ordered by the Court of Appeal. As a result, the Police advised the appellant that it could not grant access to the responsive records but would provide him with a copy of the statement he provided to the Police at the time of the robbery in which he was involved.

The Police submitted that the following searches were undertaken for responsive records:

- The Central Records of the London Police and the Criminal Investigation Division evidence room, following the receipt of the initial request. Six boxes of records located;
- Six police officers who were involved in the investigation were contacted and requested to provide any records responsive to Part 3 of the request to the Coordinator;
- The record-holdings maintained by the secretary to the Chief of Police were searched;
- Three separate searches of the six boxes of records were undertaken by the Co-ordinator for records responsive to Part 3 of the request.

The Police conclude this portion of their representations by adding that they are unable to determine whether records responsive to Part 3 of the request exist, particularly in light of the fact that the meeting which is the subject matter of Part 3 of the request took place following the conclusion of the investigation and did not form part of it. The Police also point out that the meeting took place in 1995 and that the appellant is unable to identify the name of the London Police officer with whom he met, making it even more difficult to identify and locate any records that might be responsive to that part of the request.

The appellant argues that the arrests of suspects in this matter in March of 1995 was sufficiently important to the London Police Service that a news conference was called at which time the Chief of Police spoke to the media in detail about the investigation. He suggests that the arrests were a "big deal" and questions why records pertaining to a meeting held shortly thereafter with another police service, victims and the victims' employer do not exist. The appellant also identified several officers who were involved in the investigation and may have also taken part in the meeting that is the subject of Part 3 of the request.

In my view, the Police have conducted an adequate search for records responsive to Part 3 of the request. The Police located the records which they have maintained relating to their investigation of the robberies and have, in my view, conducted a reasonable search of them for information relating to this particular aspect of the post-investigation activities of the officers involved. The Police are not required to demonstrate to an absolute degree of certainty that responsive records do not exist; rather, the *Act* requires that the searches undertaken for the records be reasonable in their scope.

In my view, following a review of the records themselves and based on the representations of the Police, I find that they conducted a reasonable search for the responsive records. I find that any records pertaining to a meeting with the appellant and his employers that took place after the robbery would not have been created as part of the investigation and would not, accordingly, form part of the disclosure process in the criminal trials of the accused persons. It is not, therefore, surprising that records responsive to this part of the request were not located, particularly as these events occurred over ten years ago.

I find that the searches undertaken by the Police for records responsive to Part 3 of the request were reasonable in the circumstances of this appeal and I dismiss that part of the appeal.

PERSONAL INFORMATION

General principles

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. 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 Police submit that in the course of their investigation of the robberies that form the subject matter of the records, individuals were interviewed and provided their personal information to the investigators. In addition, they submit that the personal information of the robbery suspects is also included in a large number of the records.

The appellant takes the position that because the records responsive to Part 1 of the request pertain to the robbery in which he was involved as a victim, they must contain his personal information. He also acknowledges that the records likely contain the personal information of the other victims of the robbery and has provided executed consent forms from four of these individuals, authorizing the disclosure of their personal information to the appellant.

I carefully reviewed each of the records at issue in this appeal and have reached the following conclusions:

- Records 526 and 535 contain references to the appellant and his occupation, thereby qualifying as his personal information under section 2(1)(h);
- Records 36, 1585, 1587 and 1588 to 1595 contain the personal information of the appellant, describing the return to him of the proceeds of the robbery;
- Records 638 to 648, 649 to 655 and 1625, the appellant's own statements to the Police following the robbery, contain the personal information of the appellant;
- Records 729 to 733, the appellant's victim impact statement, contains the personal information of the appellant;
- Similarly, Records 726 to 728 is the victim impact statement taken by the Police from one of the individuals who has consented to the disclosure of his personal information to the appellant. This record clearly contains the personal information of this individual;
- Records 664 to 669, 670 to 675, 695 to 702, 717 to 725 and 1626 to 1631 represent the witness statements of the individuals who have consented to the disclosure of their personal information to the appellant and contain their personal information;
- Records 656 to 663, 676 to 682, 683, 684, 685, 686, 688 to 694, 703 to 710 and 711 to 716 are witness statements provided by the other individuals who were present at the robbery involving the appellant and contain their personal information;
- The remaining records relate directly to the investigation of criminal charges against three individuals, including information relating to their race, national or ethnic origin, colour, age, sex, family status (section 2(1)(a)), criminal and financial histories (section 2(1)(b)), their addresses, telephone numbers, fingerprints and blood types (section 2(1)(d)), the views or opinions of another individual about the suspects (section 2(1)(g) and their names along with other personal information (section 2(1)(h)), and qualifies as the personal information of these individuals within the meaning of section 2(1); and
- A number of the remaining records also contain the personal information of other individuals who were interviewed by the Police in the course of their investigation, including information about their marital or family status (section 2(1)(a)), their own criminal histories (section 2(1)(b)), their addresses and telephone numbers (section 2(1)(d)) and their names along with other personal information relating to them (section 2(1)(h)).

INVASION OF PRIVACY

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. Under section 14, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of privacy". In both these situations, sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of privacy under section 38(b) or 14.

Application of section 14(1)(a)

The appellant submits that the exception in section 14(1)(a) applies to those records containing the personal information of those individuals who have consented to the disclosure of this information to him. This section states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

Based on my review of the records containing the personal information of these individuals, their consents and the representations of the appellant, I find that the consenting individuals are entitled to have access to these records as they provided the information to the Police. As they have unequivocally consented to the disclosure of their personal information to the appellant, I will order that the statements in Records 664 to 669, 670 to 675, 695 to 702, 717 to 725, 726 to 728 and 1626 to 1631 be disclosed to him as they qualify under the exception in section 14(1)(a) to the general prohibition against disclosure in the preamble to section 14(1) and their disclosure would not constitute an unjustified invasion of the personal privacy of these individuals.

Application of section 14(1)(f)

Section 14(1)(f) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the personal information contained in the record is presumed to constitute an unjustified invasion of privacy under section 38(b) and 14 [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b) or 14 [Order P-239]. The list of factors under section 14(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2) [Order P-99].

The Divisional Court has stated that once a presumption against disclosure under section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [Order PO-1764]

In the circumstances of the present appeal, it appears that the presumption in section 14(3)(b) may apply. This section states that:

> 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;

Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086] I have reviewed the contents of Records 1850 to 1855 and find that it represents a sort of "*post mortem*" on the robbery investigation itself, which took place after the investigation was completed. In my view, this record was not compiled, nor is it identifiable, as part of the investigation by the Police into a possible violation of law. As such, it does not fall within the ambit of the section 14(3)(b) presumption. I will, however, address the possible application of section 8(1) to it below.

The Police submit that all of the remaining records responsive to the request were compiled as a result of its investigation into the robbery involving the business where the appellant was employed. Accordingly, the Police submit that the disclosure of all of the records would constitute a presumed invasion of the personal privacy of the individuals whose personal information is included therein.

The appellant appears to agree that the records were compiled as part of an investigation into the possible violation of a number of laws. He also refers to several factors listed under section 14(2)(a) and (d) which favour the disclosure of the personal information contained in the records. These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

However, as noted above, where a presumption under section 14(3) is found to apply, it can **only** be rebutted by a finding that the records qualify under section 14(4) or the "public interest override" in section 16 is found to apply.

I find that the records at issue in this appeal, with the exception of Records 1850 to 1855, were compiled and are identifiable as part of the law enforcement investigation by the Police into a possible violation of the *Criminal Code* provisions relating to armed robbery and a number of other offences. As such, they fall within the ambit of the presumption in section 14(3)(b) and their disclosure is presumed to constitute an unjustified invasion of the personal privacy of the individuals referred to in the records. Accordingly, I find that the records which do not contain the personal information of the appellant qualify for exemption under section 14(1), while those records containing the appellant's personal information, along with that of other identifiable individuals, are exempt under section 38(b).

Public interest in disclosure under section 16

The appellant argues that the public interest in disclosure in section 16 ought to apply in the circumstances of this case because he has made the request on his own behalf, as well as on behalf of some of the other victims of the robbery. Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if 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 be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the 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 [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The appellant suggests that there exists some public interest in the disclosure of the information in the records which may lead to an examination into possible police wrongdoing in the manner in which they conducted their investigation. The appellant presents very compelling evidence in support of his contention that the robbery had serious and debilitating repercussions for him and that the disclosure of the records may assist in his recovery, and that of the other victims.

Based on my review of the contents of the records, I cannot agree that there exists a public interest in their disclosure within the meaning of section 16. The interest put forward by the appellant is essentially his own and there does not exist a sufficiently compelling **public** interest in their disclosure. I have not been provided with sufficient evidence for me to make a finding that there exists the necessary public interest in the disclosure of the personal information in these particular records. Accordingly, I find that section 16 has no application in the present appeal.

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

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 [Order P-1414]

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

If disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

In my view, the absurd result principle applies to the information contained in the records that was provided to the Police by the appellant or information that is clearly within the knowledge of the appellant. The Police indicate that certain records were disclosed to him, but do not specifically identify which were disclosed. I will, accordingly, order the Police to disclose to the appellant all of Records 36, 526, 535, 638 to 648, 649 to 655, 729 to 733, 1585, 1587, 1588 to 1595 and 1625. I conclude that each of these records contain either information provided directly by the appellant to the Police or information which is clearly within his knowledge and to withhold this information from the appellant would be absurd and inconsistent with the purpose of the section 38(b) exemption.

LAW ENFORCEMENT

I will now address the application of various law enforcement exemptions in section 8 to Records 1850 to 1855, consisting of a "Robbery Analysis" and other similar documents relating to the conclusion of the investigation by the Police. I note that the record does not contain any personal information relating to the appellant.

In this case, the Police rely on sections 8(1)(a) to (h), 8(1)(l) and 8(2)(a). I will first address the application of section 8(1)(c) to Records 1850 to 1855.

Section 8(1)(c): investigative techniques and procedures

Section 8(1)(c) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply in the following circumstances:

- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]

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.)].

Except in the case of section 8(1)(e), 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.)].

In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487].

The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

The Police have provided me with confidential representations with respect to the application of this exemption to the records at issue in this appeal generally. The appellant argues that because the records are now more than ten years old, it is less likely that the technique or procedure would be unknown to the public. The appellant also urges me to consider section 1(a)(ii) of the *Act*, which sets out that one of the purposes of the *Act* is the provision of a right of access to information where the "necessary exemptions from the right of access should be limited and specific".

Based on my review of Records 1850 to 1855, I am satisfied that the disclosure of the information which they contain could reasonably be expected to reveal certain investigative techniques and procedures which were in use at the time the investigation was undertaken, as well as others which were contemplated as a result of the review by the Police of the investigation. I am also satisfied that, due to the unique circumstances of this investigation, the fact that it occurred ten years ago does not impact this finding. I conclude that section 8(1)(c) applies to Records 1850 to 1855 and they should not be disclosed.

ORDER:

1. 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**.

2. I uphold the decision by the Police to withhold access to the remaining records.

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.

Original signed by: June 30, 2005
Donald Hale
Adjudicator