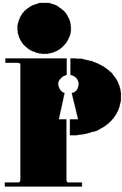
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2062

Appeal MA-050047-1

Ottawa 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 Ottawa 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 complete investigation file relating to a motor vehicle owned by the requester.

The Police identified records that were responsive to the request and issued a decision denying access to the records on the basis of the exemptions under sections 8(1)(a) and (b) (law enforcement), and sections 14(1) and 38(b) (personal privacy). The Police rely on the presumption at section 14(3)(b) (investigation into a possible violation of law) in support of their personal privacy exemption claims.

The requester, now the appellant, appealed the Police's decision.

The appeal was not resolved in mediation, and moved to the inquiry stage of the appeal process. It appeared that the records might contain the requester's personal information. Accordingly, I raised the possible application of section 38(a), taken in conjunction with sections 8(1)(a) and (b), in the Notice of Inquiry that I initially sent to the Police and affected parties. Only the Police provided representations in response. I then sent a Notice of Inquiry to the appellant, along with a complete copy of the representations of the Police. The appellant provided brief representations in response.

RECORDS:

The records and the exemptions at issue for each are as follows:

- Record 1: a 24-page general occurrence report – section 38(a) in conjunction with sections 8(1)(a) and (b) and section 38(b) in conjunction with section 14(3)(b).

- Record 2: video tape - sections 8(1)(a) and (b), and section 14(1).

DISCUSSION:

PERSONAL INFORMATION

Part 1 of the *Act* sets out exemptions for "general records" requests. Part 2 deals with requests for an individual's own personal information. As set out in Order M-352, records that do not contain the appellant's personal information will be addressed under Part 1 of the *Act* (in this case, sections 8(1)(a) and (b) and section 14(1)). Those that do contain the appellant's personal information will be addressed under Part 2 of the *Act* (in this case, section 38(a) in conjunction with sections 8(1)(a) and (b), and section 38(b)).

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,
>
> …
>
> (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, 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.)].

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 Police submit that the records at issue contain the personal information of the persons interviewed and who appear on the videotape. The Police specify that the personal information contained in the records includes the "names, dates of birth, race, origin, contact information and employment history", and that this qualifies as "personal information" under section 2 of the *Act*.

The appellant did not make any representations regarding this issue.

Analysis and Findings

Record 1

Record 1, a 24-page general occurrence report, is comprised of witness statements and other information pertaining to a police investigation regarding an incident with the appellant's motor vehicle. Following my review of the record, I find that Record 1 contains the personal information of the appellant, including his age, sex and family status, address and telephone numbers, views of other individuals about the appellant along with other personal information relating to him. The appellant's personal information as described is found on pages 1, 2, 6 – 9, 15, 17 – 19 and 21.

In addition, Record 1 contains the personal information of other identifiable individuals, specifically, those who were interviewed by the Police during the course of their investigation. This information qualifies as the personal information of these individuals as it includes information about their age, sex and family status, address and telephone numbers, along with other personal information relating to them. The personal information of other identifiable individuals is found on page 1 – 5, 7, 9, 11 – 15 and 20.

Pages 10, 16 and 22 – 24 of Record 1 do not contain the identifiable personal information of other individuals.

Accordingly, I will review whether Record 1 qualifies for exemption under the discretionary exemptions under Part 2 of the *Act* (in this case, section 38(a) in conjunction with sections 8(1)(a) and (b), and section 38(b)).

Record 2

Record 2 is a videotape. Based on my review of the videotape, I find that it does not contain the personal information of the appellant. However, I find that it does contain the personal information of other individuals because the other individuals are "identifiable" in the videotape. Therefore, I will review whether Record 2 qualifies for exemption under sections 8(1)(a) and (b) and section 14(1) of the *Act*.

I will first address Record 2 under Part 1 of the *Act*. The section 8(1)(a) and (b) and section 14(1) analysis are relevant to the discussions that will follow for Record 1 under section 38(a) and 38(b) respectively (Part 2 of the *Act*).

LAW ENFORCEMENT

Section 8(1)(a) and (b) state:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

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 municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]

- a Coroner's investigation under the *Coroner's Act* [Order P-1117]

- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

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.)].

Where sections 8(1)(a) and (b) use 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* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

The law enforcement matter/investigation in question must be a specific, ongoing matter/investigation. The exemptions do not apply where the matter/investigation is completed, or where the alleged interference is with "potential" law enforcement matters/investigations [Orders PO-2085, MO-1578].

The institution holding the records need not be the institution conducting the law enforcement matter/investigation for the exemptions to apply [Order PO-2085].

The Police make no clear representations regarding the application of sections 8(1)(a) and (b) to the record.

I find that Record 2 clearly relates to a "law enforcement" investigation/matter.

However, based on the record and the evidence before me, I have concluded that there is no ongoing law enforcement investigation by the Police, which could result in a law enforcement proceeding, or from which a law enforcement proceeding is "likely to result". The evidence and the Police's submissions state that the investigation is closed. The Police broadly state that charges can be laid after an investigation has been closed. However, they did not provide me with evidence that this is anticipated in the case before me and the evidence they did provide is not sufficient on a balance of probabilities. Nor do I find that any harm under section 8(1)(a) and (b) is "self-evident" from the record.

As noted, for section 8(1)(a) and (b) to apply, the law enforcement matter must be "ongoing", and here it is not. The rationale for this requirement is that it is impossible to "interfere with" a matter or investigation that is closed. Therefore, Record 2 does not qualify for exemption under either section. I now turn to the question of whether Record 1 is exempt under section 38(a) in conjunction with sections 8(1)(a) and (b).

REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution and section 38 provides a number of exemptions from this right. Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if sections 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

I have found that Record 1 (the occurrence report) contains the appellant's personal information (as well as that of other individuals). I will therefore consider whether this record is exempt under section 38(a), in conjunction with section 8(1)(a) and (b).

Because section 38(a) is a discretionary exemption, even if the information falls within the scope of one of the listed exemptions, the institution must nevertheless consider whether to disclose the information to the requester.

In order to determine whether Record 1 is exempt under section 38(a), I will consider whether it qualifies for exemption under sections 8(1)(a) and (b).

Under the same analysis used for Record 2, I find that Record 1 is not exempt under section 38(a) because sections 8(1)(a) and (b) do not apply. As previously concluded, for sections 8(1)(a) and (b) to apply, the law enforcement matter must be "ongoing", and here it is not.

PERSONAL PRIVACY

Having determined that Record 2 contains the personal information of individuals other than the appellant, the mandatory exemption at section 14(1) requires that the Police refuse to disclose this information unless one of the exceptions to the exemption at sections 14(1)(a) through (f) applies. In my view, the only exception which could have any application in the present appeal is set out in section 14(1)(f), which 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.

Regarding Record 1, 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.

Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy within the meaning of sections 14(1)(f) and 38(b). Section 14(2) provides criteria to consider in making this determination, section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure in section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue falls within the ambit of section 14(4) or if the "compelling public interest" override provision at section 14 applies [*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The Police appear to take the position that disclosure of the information in the records is presumed to constitute an unjustified invasion of privacy under the presumption in section 14(3)(b) of the *Act*, which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> is 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.

The Police state the records at issue in this appeal were compiled and are identifiable as part of an investigation into a possible violation of law, specifically charges of arson.

The appellant does not offer representations that address the application of the section 14(3)(b) presumption.

Based on my review of Records 1 and 2 and the Police's representations on the application of section 14(3)(b), I am satisfied that the Police compiled all of the information at issue in the records as part of an investigation into a possible violation of law.

Having found that the section 14(3)(b) presumption applies, I am precluded from considering any of the factors weighing for or against disclosure under section 14(2), because of the *John Doe* decision.

Section 14(4) and the "public interest override" at section 16 are not applicable in the circumstances of this case.

Accordingly, I find the personal information in Record 2 exempt under section 14(1) of the *Act*, since disclosure of it would be an unjustified invasion of personal privacy and the exception to the exemption at section 14(1)(f) therefore does not apply. Similarly, I find that the personal information of individuals other than the appellant in Record 1 is exempt under section 38(b) of the *Act*. As noted, however, I have also found that Record 1 contains personal information of the appellant. Disclosure of this information cannot be an unjustified invasion of personal privacy and it is, therefore, not exempt under section 38(b). As no other exemptions have been claimed for this information, I will order it disclosed.

ABSURD RESULT

In some instances, where the requester originally supplied the information, or 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].

I have considered whether this principle has any application in the present case. The appellant's representative states that the appellant "provided a copy of [Record 2] to the police. It seems troubling that at this point in time [it would] not be returned to him or made available for inspection". The appellant did not provide representations regarding Record 1 in this regard.

Prior orders have found that non-disclosure of personal information which was originally provided to the institution by a requester, or personal information of other individuals which

would clearly have been known to a requester, would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. In these orders, it has been found that a denial of access in these circumstances would constitute, according to the rules of statutory interpretation, an "absurd" result. Accordingly, disclosure has been ordered where an absurd result is found.

This principle has been applied so as to support access to information which might otherwise be exempt from disclosure under section 8(1)(a) of the *Act*, however, on the facts of this case, I find that the principle of "absurd result" is not applicable. Notwithstanding the representations of the appellant's representative, Record 1 makes it clear that the Police obtained Record 2 (the videotape) from an affected party, and not from the appellant.

Therefore, in the circumstances of this appeal, I do not find that withholding Record 2, or the information I found exempt in Record 1, would be an "absurd" result.

Summary

To conclude, I find that:

- Record 2 is exempt from disclosure.
- The portions of Record 1 that contain the personal information of the appellant is not exempt from disclosure.
- The portions of Record 1 that contain the personal information of other identifiable individuals is exempt from disclosure.

EXERCISE OF DISCRETION

The section 38(a) and (b) exemptions are discretionary and permit the Police to disclose information, despite the fact that it could be withheld. The Police must exercise their discretion. On appeal, this office may review the Police's decision in order to determine whether they exercised their discretion and, if so, to determine whether they erred in doing so (Orders PO-2129-F and MO-1629).

I am not satisfied that the Police exercised any discretion regarding the information withheld under section 38(a) in conjunction with section 8(1)(a) and (b). However, because of my findings that this information is not exempt, it is not necessary for me to refer this matter back to the Police.

Under section 38(b), the exercise of discretion involves a balancing principle. The Police must weigh the appellant's right of access to records containing his own personal information against the other individuals' right to the protection of their privacy.

My review of the Police's exercise of discretion is done to determine whether or not the Police have erred in exercising their discretion, not to substitute my own discretion for that of the Police (see section 43(2)). If I were to find that the Police's exercise of discretion took into account an irrelevant consideration, I could send the matter back to the institution for a re-exercise of discretion. However, I am satisfied that the Police took into account relevant factors and did not take into account irrelevant factors in exercising their discretion under section 38(b) in this appeal.

ORDER:

1. I uphold the decision of the Police to deny access to Record 2 (the videotape).

2. I uphold the decision of the Police to deny access to those portions of Record 1 which I have highlighted on the copies provided to its Freedom of Information and Protection of Privacy Co-ordinator.

3. I order the Police to give the appellant access to the portions of Record 1 which are not highlighted by sending copies to them by **August 2, 2006** but not before **July 28, 2006**.

4. In order to verify compliance with Provision 2, I reserve the right to require the Police to provide me with copies of the records that are disclosed to the appellant.

Original signed by: June 27, 2006
Beverley Caddigan
Adjudicator