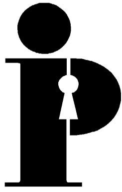


# ORDER MO-2108

## Appeal MA-060124-1

## Toronto Police Services Board

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## NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any information relating to the requester maintained in any Police database.

The Police located responsive records and granted partial access to them. Access was denied to the undisclosed portions of the responsive records pursuant to section 38(a) (discretion to refuse requester's information), in conjunction with section 8(1)(l) (law enforcement), and section 38(b) (invasion of privacy) in conjunction with section 14(3)(b) of the *Act*.

The requester (now the appellant) appealed the Police's decision

During the course of mediation, the appellant clarified that he would like to pursue access to all of the withheld information contained in the responsive records. He indicated that he did not want the mediator to seek consent to disclosure from the other identifiable individuals whose personal information was contained in the undisclosed portions of the records. Accordingly, the other identifiable individuals were not contacted and all of the records and the exemptions claimed by the Police remain at issue in this appeal.

As further mediation was not possible, the appeal was moved to the adjudication stage. I sought and received the representations of the Police, the non-confidential portions of which were shared with the appellant, along with a Notice of Inquiry. The appellant did not provide representations in response to the Notice of Inquiry.

## RECORDS:

The records at issue in this appeal represent the withheld information contained in 68 pages of records consisting of various reports and records of arrest, more particularly described in the following chart:

| Record # | Pages | Exemptions Claimed | Date and Description of Record |
|---|---|---|---|
| 1 | 1 to 26 | 38(b), 14(1)(f), 14(3)(b) | Details regarding charges against an accused where the appellant was the victim |
| 2 | 27 to 34 | 38(b), 14(1)(f), 14(3)(b) | Occurrence Report concerning the break and enter of appellant's garage |
| 3 | 35 to 37 | 38(b), 14(1)(f), 14(3)(b) | Occurrence Report concerning the theft of appellant's leased car |
| | | 38(a), 8(1)(l) for page 37 | Last page of Record 3 |
| 4 | 41 to 43 | 38(a), 8(1)(l) for page 43 | Occurrence Report concerning the theft of appellant's motorcycle |
| 5 | 44 to 55 | 38(b), 14(1)(f), 14(3)(b); 38(a), 8(1)(l) is also claimed for page 47 | Documentation concerning the March 15, 1998 arrest of the appellant<br>Pages 45, 50 and 52 released in full |

| Record # | Pages | Exemptions Claimed | Date and Description of Record |
|---|---|---|---|
| 6 | 56 to 58 | 38(b), 14(1)(f), 14(3)(b) | Documentation concerning the March 14, 1998 arrest where appellant was the victim |
| 7 | 59 to 63 | 38(b), 14(1)(f), 14(3)(b) | Documentation concerning the May 4, 1997 arrest where appellant was the victim |
| 8 | 64 to 68 | 38(b), 14(1)(f), 14(3)(b); 38(a), 8(1)(l) is also claimed for page 65 | Documentation concerning the May 4, 1997 incident where appellant was arrested<br>Page 67 released in full |

## DISCUSSION:

### PERSONAL INFORMATION

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 if 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 where 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.)].

**Representations of the Police**

The Police submit that the records contain personal information about individuals other than the appellant. This information consists of these individuals' sex (paragraph (a)), an identifying number (license plate) (paragraph(c)), telephone number (paragraph (d)) and a name which appears with other personal information or where the disclosure of the name would reveal other personal information about the individual (paragraph (h)).

The Police state in their representations that:

> The majority of the records at issue include the personal information pertaining to other individuals (pages 6-20 [part of Record 1]) victims and accused - names, address, telephone numbers plus the nature of the specific crimes perpetrated against them and their personal property. The majority of the exempted information in the file refers to specific persons involved in various allegations to wit, the appellant has been the victim or the accused. It would be reasonable to expect that the involved individuals (particularly on pages 46, 47, 48, 49, 51, 53, 54, 55, [pages 46 to 55 are part of Record 5] 64, 65 and 66 [part of Record 8]) would be readily identified if their personal information were disclosed.

**Findings**

I find that all of the records contain the personal information of the appellant and other identifiable individuals. The personal information of the appellant and the other identifiable individuals in the records includes their names along with other personal information about them (paragraph (h) of the definition), their addresses and telephone numbers (paragraph (d)), their sex and ages (paragraph (a)), identifying numbers (license plate numbers and arrest numbers) (paragraph (c)) and their education and employment history (paragraph (b)).

With respect to the license plate and arrest numbers, I find that these numbers qualify as "identifying numbers" pursuant to paragraph (c) of the definition. Although license plate numbers are associated with vehicles, Orders MO-1173 and MO-1314 confirm that a license plate number qualifies as an "identifying number" assigned to an individual and, thereby, constitutes the personal information of the owner of the vehicle.

With respect to the arrest numbers in the records, I find that they are "identifying numbers" assigned to an individual, and qualify as recorded information about the involved individual. Accordingly, I find that arrest numbers qualify as the personal information of the person to whom it relates (Order M-116).

Subject to the records claimed to be exempt from disclosure due to the law enforcement exemption, the Police have disclosed the personal information of the appellant. The Police have not disclosed the personal information of the other identifiable individuals in the records.

**Right of Access to One's Own Personal Information/Law Enforcement Exemption**

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.

In this case, the institution relies on section 38(a) in conjunction with section 8(1)(l).

Section 8(1)(l) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

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 section 8(1)(l) 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*].

The Police have claimed the application of section 8(1)(l) to the police codes and descriptive information concerning these codes contained in the records.

As section 8(1)(l) uses the words "could reasonably be expected to", the Police 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. *Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), Ontario (*Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

As stated by Adjudicator Steve Faughnan in Order PO-2409:

> In my view, the finding of the Divisional Court in *Ontario (Attorney General)* v. *Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) that the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context, is applicable here. Saying that nothing has happened so far misses the point, since the test is whether harm could reasonably be expected to result from disclosing the operational codes (including the "ten" codes). In that vein, and without commenting on the accuracy or inaccuracy of the codes the appellant asserts are on a specific website, the fact that they might be publicly available does not mean that the Ministry's submission's on the reasonable expectation of harm resulting from their release are to be ignored. A long line of orders (for example M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, and PO-2339) have found that police codes qualify for exemption under section 14(1)(l) [section 8(1)(l) in the municipal *Act*], because of the reasonable expectation of harm from their release. In the circumstances of this appeal, I am also satisfied that the police have provided sufficient evidence to establish that disclosure of the operational codes (including the "ten" codes) that were withheld could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.
>
> I therefore find that the section 49(a) exemption [section 38(a) in the municipal *Act*] applies to these operational codes.

I agree with and adopt the findings of Adjudicator Faughnan in Order PO-2409 that disclosure of the police codes and descriptive information concerning these codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

Therefore, I uphold the decision of the Police to deny access to the undisclosed information from Records 3, 4, 5 and 8 (pages 37, 43, 47 and 67) that contain police codes and descriptive information concerning these codes pursuant to section 8(1)(l).

## INVASION OF PRIVACY

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.

### Representations of the Police

The Police submit that:

> The Toronto Police Service responded to a complaint of an assault. An investigation was undertaken at the scene to determine if an offence under the Criminal Code of Canada was committed. As stated above, regardless of whether criminal charges were laid does not negate the applicability of this section. Section 14(3)(b) only requires that there be an investigation into a possible violation of law.
>
> In Order MO-1389, Adjudicator, Irena Pascoe states:
>
> > The personal information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law, specifically the Criminal Code. Therefore, the section 14(3)(b) presumption of an unjustified invasion of personal privacy applies to the information that was withheld by the Police…
>
> This section applies where the personal information of the requester is intertwined with information concerning other identifiable [individuals]. As the original request did not ask for any third party process, nor that the identities of any other individual be disclosed and in compliance with the *Act*, the information was withheld using Section 38(b).

**Findings**

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

In particular, if any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under sections 38(b) and 14. In the circumstances, the presumption at paragraph (b) applies to all of the records. Section 14(3)(b) states:

> 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;

Even though criminal proceedings were not commenced against certain individuals in the records, section 14(3)(b) still applies. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

I find that the personal information in all of the records was compiled and is identifiable as part of various investigations into possible violations of law pursuant to the *Criminal Code of Canada*. As a result of my finding that the presumption in section 14(3)(b) applies to the personal information at issue, I conclude that its disclosure is presumed to constitute an unjustified invasion of the personal privacy of the identifiable individuals in the records. Therefore, subject to my discussion below of Absurd Result and Exercise of Discretion, I conclude that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellant in the records and qualifies for exemption under section 38(b).

**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]

- the requester was present when the information was provided to the institution [Orders M-444, 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 within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

**Findings**

The records consist of the following:

- Documentation concerning charges against an accused where the appellant was the victim in one of the incidents described therein
- Occurrence Report concerning the break and enter of appellant's garage
- Occurrence Report concerning the theft of appellant's leased car
- Occurrence Report concerning the theft of appellant's motorcycle
- Documentation concerning the March 15, 1998 arrest of the appellant
- Documentation concerning the March 14, 1998 arrest where appellant was the victim
- Documentation concerning the May 4, 1997 arrest where appellant was the victim
- Documentation concerning the May 4, 1997 incident where appellant was arrested

Although the appellant was present or involved in the incidents detailed in the records, except for the other break and enter incidents involving the same accused who broke into the appellant's garage, I find that not all the information in the records is clearly within the appellant's knowledge. With respect to the information that the appellant may already be aware of, that information is also about identifiable individuals other than the appellant. In the particular circumstances of this case, I agree with the findings of Adjudicator Laurel Cropley in Order MO-1524-1, where she stated that:

> The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights

> of individuals other than the requester weighed against the application of the absurd result principle.

I also adopt the findings of Adjudicator Frank DeVries in Order PO-2440, where he stated:

> I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, the unusual circumstances of this appeal, and the nature of the allegations brought against the police officer and others. I also note that the Ministry has, in the course of this appeal, disclosed certain records to the appellant. I find that, in these circumstances, there is particular sensitivity inherent in the personal information contained in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act* identified by Senior Adjudicator Goodis in Order MO-1378 (namely, the protection of privacy of individuals, and the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

The undisclosed portions of the records contain the personal information of identifiable individuals other than the appellant. These records contain the personal information of victims or witnesses of crimes. I find that the sensitivity of this personal information constitutes a compelling reason for not applying the "absurd result" principle. Disclosure of this personal information would be inconsistent with the purpose of the exemption, which must include the protection of the personal privacy of individuals in the law enforcement context.

Therefore, I find that the absurd result principle is inapplicable in this case and that it would not be absurd to withhold the information found to be exempt under section 38(b).

**EXERCISE OF DISCRETION**

Section 38 states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;
>
> (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

The section 38 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it 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 54(2)].

Relevant considerations 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

**Representations of the Police**

The Police submit that:

> In assessing the value of protecting the privacy interests of an individual (i.e. affected parties) one needs to consider the nature of the institution, which in great part entails gathering and recording information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by he police. A law enforcement institution's records are not simple business transaction records in which disclosure of another individual's personal information may not, on balance, be offensive.
>
> Once the law enforcement institution has fulfilled its mandate, and the criminal court theirs, does it then use its records to act punitively towards the affected parties becomes a valuable question when considering the disclosure of personal information.
>
> In summary, this appeal boils down to these issues: Whether the access rights of the appellant/victim requesting information prevails over the privacy rights of the victim…, the other victims of theft…, and the accused party…
>
> This institution weighed the requester's right of access with that of the affected party's right to privacy. As stated previously, the issues within this appeal are in fact, in majority, the personal information of others. This institution is not to defend the reason why the appellant was denied specific personal information as such specific information was never requested. What this institution is defending, is the protection of those identified parties, noted within the appellants' personal records held by the TPS (Toronto Police Services Board). In a conversation between the Analyst and the requester (now appellant), in an attempt to clarify what he was looking for, he explained be had requested a pardon and wanted to ensure the charge of assault was no longer on his record. This is not a situation where the information requested was germane to his attempt to gain a pardon (granted in 2004) but an attempt to review information that does not a) pertain to him b) is protected under the *Act*. Though the institution commiserates with the appellant's desire to know what has been removed from his personal records, it is satisfied that the relevant factors in this appeal weigh in favour of privacy protection

**Findings**

All of the undisclosed portions of the records, except for the police codes and descriptive information, contain the personal information of identifiable individuals other than the appellant. I find that the Police disclosed as much of each of the responsive records as could reasonably be severed without disclosing material which is exempt. In denying access to the undisclosed portions of the records, I find that the Police exercised its discretion under section 38 in a proper manner, taking into account all relevant factors and not taking into account any irrelevant factors. I find that the Police applied the claimed exemptions in the *Act* appropriately to the withheld portions of the records at issue. Any additional disclosure of information would constitute an unjustified invasion of the personal privacy of the identifiable individuals in the records other than the appellant, or in the case of the police codes and descriptive information, would facilitate the commission of an unlawful act or hamper the control of crime.

## ORDER:

I uphold the Police's decision to withhold access to the undisclosed portions of the records.

Original signed by: October 25, 2006
Diane Smith
Adjudicator