



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-2119**

**Appeal MA-050118-1**

**Toronto Police Services Board**



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## **NATURE OF THE APPEAL:**

The Toronto Police Services Board (the Police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act):

Recently a Police background check was commissioned by [the requester's employer] on my behalf. I was advised by my manager that I failed the background check by the Police.

Under the Freedom of Information Act could you please release the following information to me?

1. All information in the package that was sent to you by [the requester's employer].
2. All information that was gathered during the check.
3. A copy of the information that was sent back to [the requester's employer].
4. Please state the specific reasons why I failed the background check.

The Police granted partial access to the records they identified as responsive to the request and applied the exemption found in section 38(b) (discretion to refuse requester's own information) of the *Act*, read in conjunction with the exemption in section 14(1) and the presumption in section 14(3)(b) (information compiled as part of an investigation into a possible violation of law), to deny access to the remainder.

The requester, now the appellant, appealed the Police's denial of access and also appealed on the basis that the Police did not fully respond to his request.

During mediation, the appellant narrowed his request to include only Items 1, 3, and 4 of his request and advised the mediator that he no longer seeks access to the information which was originally denied. This information does not, in his view, respond to all of the elements of his request.

The Police subsequently located additional records and issued a supplementary decision in which they again granted partial access. The Police denied access to portions of the records on the basis that the exemptions found in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(l) (facilitate commission of unlawful act), 9(1)(d) (relations with other governments) and 15(a) (information published or available), section 38(b), read in conjunction with section 14(1) and the presumption in section 14(3)(b), and section 38(c) (evaluative or opinion material) of the *Act* apply.

The appellant then narrowed the scope of the request to include only information found in the records which explains why he was not recommended by the Police. This information is found in a three-page standard form document entitled "Employment Investigator's Report" (pages 2, 3, and 4 of the records). Specifically, the appellant is seeking access to the information under item "K" of that report, which is a section found at the bottom of page 3 of the record.

According to the index provided to this office by the Police, access was denied to the information sought by the appellant based on the exemptions found in section 38(a), read in conjunction with section 8(1)(l), section 38(b), read in conjunction with sections 14(1)(f) and 14(3)(b), and section 38(c) of the *Act*.

As a result of the narrowing of the appeal by the appellant, the application of section 38(a) in conjunction with sections 9(1)(d) and 15(a) is no longer at issue.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Police and received representations in return. I then sent a copy of the Notice to the appellant enclosing, for his reference, a copy of the non-confidential representations submitted by the Police. The appellant also provided representations in return.

## **RECORDS:**

The record at issue in this appeal is entitled "Employment Investigator's Report". The information that remains at issue is found under item "K" which appears at the bottom of page 3.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester (in this case, the appellant) [see Order M-352]. Where records contain the appellant's own information, access to the records is addressed under Part II of the *Act*, and the exemptions found in section 38 may apply. In this appeal, the Police rely on sections 38(a),(b) and (c).

In order to determine whether sections 38(a), 38(b) and 38(c) of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it belongs. That term is defined in section 2(1), in part, 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,

...

- (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.)].

The correct approach is to review the entire record, not only the portions remaining at issue, to determine whether it contains the requester's personal information. This record-by-record analysis is significant because it determines what exemptions that the record as a whole (rather than only certain portions of it) must be reviewed under [Order M-352].

### **Representations, analysis and findings**

The Police submit that the information at issue contains the personal information of the appellant as well as other individuals. The appellant makes no submissions on this specific issue.

Having reviewed the entire record at issue in this appeal, I find that it contains information about the appellant that satisfies the definition of "personal information" in section 2(1) of the *Act*. Specifically, I find that there is personal information about the appellant that falls within the ambit of the following paragraphs of personal information: (a) sex and family status, (b) employment history, (c) identifying number, (d) address and telephone numbers, (g) the views and opinions held by other individuals about the appellant, and (h) the appellant's name along with other personal information relating to him.

In addition, I find that the record at issue also contains the personal information of other identifiable individuals. This information qualifies as the personal information of these individuals under the following paragraphs of the definition set out above: (a) sex and family status, (b) criminal history, and (d) address and telephone numbers.

Therefore, I find that the record at issue, considered in its entirety, contains the personal information of the appellant, along with the personal information of other identifiable individuals.

Previous orders have established that if a record does not contain the personal information of the appellant but contains either the personal information of individuals other than the appellant or no personal information at all, a decision regarding access must be made in accordance with the exemptions in Part I of the *Act*. For example, in this appeal the relevant sections would be sections 14(1) or 8(1)(l) [Orders M-352 and MO-1757-I]. However, in circumstances where a record contains both the personal information of the appellant and another individual, the request falls under Part II of the *Act* and the decision regarding access must be made in accordance with the exemptions at section 38 [Order M-353].

As I have found that the record in this appeal contains the personal information of both the appellant and other individuals, the decision regarding access to the information at issue must be made under Part II, in accordance with the exemptions at section 38, as correctly claimed by the Police.

#### **DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION**

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. In circumstances where a record contains both the personal information of the appellant and another individual, the request falls under Part II of the *Act* and the relevant exemptions are found at section 38. In this appeal, as noted above, the Police claim that the exemptions at sections 38(a), (b) and (c) apply.

Section 38(a) provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

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. [emphasis added]

Even if the information at issue falls under one of the listed exemptions, the institution must still exercise its discretion in deciding whether or not to disclose the information to the requester. The exercise of discretion by the Police in this appeal will be reviewed under a separate heading in this order.

The Police have severed the information at issue from the record, specifically, item "K" which appears at the bottom of page 3 of the "Employment Investigator's Report", under section 38(a) because they take the position that the information in that part of the record falls within section 8(1)(l) of the *Act*.

## LAW ENFORCEMENT

Section 8(1)(l) provides:

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.

To establish the application of sections 8(1)(l), 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.)].

### Representations, analysis and findings

Much of the Police’s representations on the application of section 8(1)(l) have been withheld from the appellant for confidentiality reasons. However, the Police submit generally that “[r]eleasing the information to the requester is the same as releasing information to the public generally. Once the requester is in possession of this information, he is free to do with it as he pleases”.

In their confidential representations, the Police have provided detailed and convincing evidence that, in my view, establishes that there is a reasonable expectation that disclosure of a small portion of the information at issue would facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that section 8(1)(l) applies specifically and exclusively to the second half of the third sentence of paragraph 2 under item “K”. As a result, this portion of the record is exempt from disclosure under section 38(a).

With respect to the remaining information under item “K” I find that the Police have not established through their representations that disclosure of that specific information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. The confidential representations do not refer either explicitly or implicitly to the other portions of information contained under the heading item “K”, let alone provide detailed and convincing evidence that disclosure of that information could reasonably be expected to give rise to the harms in section 8(1)(l).

As I have found that section 8(1)(l) applies to the second half of the third sentence of paragraph 2 under item “K”, subject to my discussion on the Police’s exercise of discretion, this information qualifies for exemption and should not be disclosed to the appellant.

As I have found that section 8(1)(l) does not apply to the remaining information, I will continue with my analysis and go on to determine whether it qualifies for exemption under either of sections 38(b) or (c).

## **PERSONAL PRIVACY**

Section 38(b) is the relevant personal privacy exemption under Part II of the *Act*. Section 38(b) provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another's personal privacy.

The personal privacy exemptions under the *Act* are mandatory at section 14(1) under Part I but discretionary at section 38(b) under Part II.

Put another way, where a record contains "mixed" personal information (the personal information of both the appellant and another individual), section 38(b) in Part II of the *Act* permits an institution to disclose information that it could not disclose if Part I were applied (Order MO-1757-I), while retaining the discretion to deny the appellant access to that information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy.

Section 38(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. On appeal, I must be satisfied that disclosure of the information **would** constitute an unjustified invasion of another individuals' personal privacy [see Order M-1146].

Under section 38(b), sections 14(1) to (4) provide guidance in determining whether the threshold for an unjustified invasion of personal privacy under section 38(b) is met. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

Section 14(3) lists a number of presumptions against disclosure. The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), 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 (*John Doe*)) though it 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 disclosure of the

record in which the personal information is contained that clearly outweighs the purpose of the exemption [see Order PO-1794].

I must now review whether the information at issue that I have found does not qualify for exemption under section 38(a) in conjunction with section 8(1)(l), qualifies for exemption under the discretionary exemption at section 38(b) of Part II of the *Act*. As previously noted, I will consider the exercise of discretion by the Police at the end of this order.

### **Section 14(3)(b)**

The Police submit that the presumption at section 14(3)(b) applies to exempt all of the information at issue from disclosure. Section 14(3)(b) provides:

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 the law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

### **Representations**

Addressing how section 14(3)(b) specifically applies to the information at issue, the Police submit:

The Toronto Police Employment Unit conducts a routine research and analysis for those applying for Special Constable Status. This would include accessing information gathered during law enforcement investigations where the potential exists, or existed, that criminal charges may result from the investigation.

...

Section 14(3)(b) only requires that there be an investigation into a possible violation of law...

Linking the application of section 14(3)(b) to the discretionary exemption at section 38(b), the Police also submit:

...Item K contains the personal information of the appellant as well as other individuals for whom consideration must be given to their right to privacy.

The appellant does not make any specific submissions on the application of section 38(b) and/or section 14(3)(b).



## **Analysis and findings**

Based on my review of the information at issue, I find that some of the information under item “K”, was compiled and is identifiable as part of an investigation into possible violations of law, namely breaches of the *Criminal Code*.

In particular, I find that the presumed unjustified invasion of personal privacy at section 14(3)(b) applies to all of the information in paragraph 2 under item “K”. In my view, the information in paragraph 2 is information that was originally compiled for the purpose of a police investigation and is identifiable as part of that investigation. Although I have previously found that section 38(a) applies in conjunction with section 8(1)(l) to exempt the second half of the last sentence in that paragraph and do not need to include it in the present analysis, for the sake of completeness, my finding here applies to all of the information contained in paragraph 2, including the second half of the last sentence. Section 14(4) has no application to this information and the appellant has not raised the application of section 16 to the information in paragraph 2. Accordingly, subject to my review of the Police’s exercise of discretion below, I find that disclosure of all of the information contained in paragraph 2 under the item “K” would constitute a presumed unjustified invasion of personal privacy under section 14(3)(b) and it qualifies for exemption under section 38(b).

With respect to the first sentence under item “K” of the record, which makes up the first paragraph of the information at issue, I do not agree that section 14(3)(b) applies. In my view, the information in this sentence, in and of itself, was not compiled and is not identifiable as part of an investigation into a possible violation of law but rather was compiled as part of investigation to determine suitability for employment. I do not accept that an investigation into suitability of employment necessarily amounts to an investigation into a possible violation of law. In any event, in my view, this sentence itself does not reveal any information that can be seen as having been compiled as part of an investigation into a possible violation of law. Accordingly, I find that the first sentence, which makes up the first paragraph under item “K” of the record does not fall within the presumption in section 14(3)(b) and is not exempt from disclosure under section 38(b).

With respect to the third and last paragraph under item “K” of the record I am also not convinced that the information in that paragraph, in and of itself, was compiled as part of an investigation into a possible violation of law. Rather I conclude that it was compiled as part of an investigation to determine suitability of employment. However, as a result of my finding below based on the application of the absurd result principle it is not necessary for me to make a conclusive finding on whether the presumption in section 14(3)(b) applies to the paragraph 3 under Item “K” and whether it is exempt under section 38(b).

## **Absurd result**

Whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, 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 [Order 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 [Order M-444, P1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO 1679, MO-1755].

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

My review of the information that remains at issue under item "K" (paragraph 1 and paragraph 3) clearly indicates that all of the information in paragraph 3 was supplied to the Police by the appellant or is clearly within his knowledge. The information in paragraph 3 consists of statements made by the appellant in which he refers to other individuals and includes a response given by the appellant when posed a specific question by the investigating officer.

I cannot agree that in the circumstances of this appeal, where the appellant actually supplied certain information to Police, the disclosure of this specific information would result in an unjustified invasion of another individual's personal privacy under section 38(b), whether or not any of the presumptions at section 14(3) apply. Rather, in my view, to decline to grant access to this information, under the circumstances, would lead to an absurd result [Orders MO-1196, PO-1679, MO-1755]. Therefore, I find that all of the information in paragraph 3 of item "K" should be disclosed to the appellant.

With respect to the information that remains at issue, in paragraph 1, it was clearly not supplied by the appellant and I am not satisfied that he is otherwise aware of it. Accordingly, I do not find that the absurd result principle applies to exempt that information.

As I have found that, subject to the Police's exercise of discretion, the information contained in paragraph 2 is exempt under section 38(b) (some of which I have also found exempt under section 38(a) in conjunction with section 8(1)(l)) and that the information in paragraph 3 should be disclosed based on the application of the absurd result principle, the only information that remains at issue is the one sentence that makes up the first paragraph of item "K" of the record. I will now determine whether section 38(c) applies to exempt paragraph 1 from disclosure.

## EVALUATIVE OR OPINION MATERIAL

Section 38(c) provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably be assumed that the identity of the source would be held in confidence.

For a record to qualify for exemption under section 38(c), the Police must satisfy each part of the following three-part test:

1. the personal information itself must be evaluative or opinion material;
2. the personal information must be compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits;
3. disclosure of the personal information would reveal the identity of a source who furnished information to the Police.

[Order 157]

The Police submit that item “K” of the Employment Investigator’s Report is “the evaluation and opinion of the investigating officer”. The Police submit:

The information compiled for the Employment Investigator’s Report was solely for the suitability of the candidate for employment as a Special Constable with the Toronto Community Housing Corporation (TCHC). The appellant filled out and signed the following form: “Toronto Community Housing Corporation (TCHC) Special Constable Program, Personal History Form”. This form outlines that, “Pursuant to Section 29 of the *Municipal Freedom of Information and Privacy Act*, you are hereby notified that the personal information requested on this form is being collected during the selection process. The information is collected for the purpose of assessing your suitability for participation in the TCHC Special Constable Program.”

The release of the information in Item "K" would identify the source of information compiled and furnished to the [Police] during the assessment of the appellant's suitability for employment as a Special Constable with the TCHC.

...

Further it is reasonable to assume that any person who has contact with law enforcement agencies would expect that personal information which they provide to police, or is obtained by police, during a law enforcement matter would be held in confidence and not disseminated for any purpose other than law enforcement...

The appellant submits he does not seek any information as to who supplied information to the Police, just information about why his application was denied.

I have reviewed the records and the circumstances of this appeal, and am satisfied that the first two parts of the above test have been met. The very heading of item "K", reveals that the information contained in that section is opinion material. It also reveals the fact that the information is contained within the larger context of a standard form document entitled "Employment Unit Background Investigation" demonstrates not only that the information was evaluative in nature, but that it was compiled solely for the purpose of determining the appellant's suitability for employment, in this case as a Special Constable with the TCHC.

In my view, in order for the third part of the test to more clearly address the complex wording found in section 38(c), it should be divided into two components. That is to say, the Police must establish that:

- (a) The information was supplied to the Police in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence; **and**
- (b) The disclosure of the record would reveal the identity of the source of the information.

[Order M-132]

Reviewing the information in the first paragraph under item "K", I find that in the circumstances of the Police's assessment of the appellant's suitability for employment the information was clearly supplied in circumstances where the individual who supplied the information might have reasonably assumed that their identity would be held in confidence. Additionally, it is clear from my review of the record that the nature and content of the information is such that, were it disclosed, the identity of the source would be unmistakable to the appellant. Accordingly, the third part of the test has been met.

As all three parts of the test enunciated for section 38(c) have been satisfied, I find that, subject to my review of the Police's exercise of discretion, the information that remains at issue, paragraph 1 (the first sentence) under Item "K" is exempt from disclosure under section 38(c).

### **EXERCISE OF DISCRETION**

As already discussed at several points in this order, the Police have the discretion under sections 38(a), (b) and (c) of the *Act* to disclose the information contained in the records even if those exemptions apply. I have upheld the Police's decision to apply section 38(c) to paragraph 1, section 38(b) to paragraph 2, as well as section 38(a) in conjunction with section 8(1)(l) for the second half of the last sentence of that paragraph to exempt the information from disclosure. I must now review the Police's exercise of discretion in determining not to release that information.

On appeal, an adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. I may find that the Police erred in exercising their discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. In these cases, I may send the matter back to the Police for an exercise of discretion based on proper considerations (Order MO-1573). However, I may not substitute my own discretion for that of the Police.

The Police describe the factors considered in exercising their discretion not to release information to the appellant based on the application of each exemption. The Police state that in withholding the information under each exemption they considered both the fact that the appellant made a request for the information and the fact that he had expressed a need to understand the reasons for his failure to obtain Special Constable status. They state that they also considered the nature of the record and the information at issue, the purpose for which the information was gathered, the impact that disclosure of the information would have, as well as the privacy rights of and/or expectation of privacy by the individuals other than the appellant whose information is contained in the records.

Balancing the appellant's right to his own personal information with the needs of the institution to guard against the facilitation of the commission of an unlawful act and the control of crime (section 38(a) with section 8(1)(l)), against the privacy rights of other individuals (section 38(b)), and against the needs of the institution to protect the information and the source of the information (section 38(c)), the Police submit that they found that the factors weighing in favour of non-disclosure were more compelling than those favouring disclosure.

The appellant submits his request for information arises out of his attempt to establish why he was turned down for the position as Special Constable. He submits that as a result of not obtaining this position he fears he will continue to be over looked for advancement and that his employment is threatened. He submits that because of this, his need to know the reasons why he was denied the position outweighs the Police's need for secrecy in this matter. He explains that

he is not attempting to infringe upon any other person's personal privacy but that he simply wishes to obtain information that will indicate to him whether it is possible to do anything to make a successful application for appointment as Special Constable in the future.

I acknowledge that the appellant simply wishes to obtain information that would assist him in comprehending why he was not successful in his application for the position of Special Constable and I understand his frustration in not being able to obtain what he views as a satisfactory answer. However, in the record at issue, the information which the appellant is seeking falls within the parameters of the discretionary exemptions claimed by the Police. As stated above, my jurisdiction in reviewing an institution's decision is limited in that I cannot substitute my own opinion, but can only determine whether the Police erred in their exercise of discretion by finding, for example, that they have exercised their discretion in bad faith, for an improper purpose, by taking into account irrelevant consideration or by failing to take into account relevant considerations.

I have reviewed the representations of the Police and the appellant and, in light of the circumstances of this appeal and the nature of the information that I have not ordered disclosed, I am satisfied that the Police have taken appropriate factors into consideration in exercising their discretion. In my view, the Police have not erred in exercising their discretion to withhold the information in paragraphs 1 and 2 of item "K" of the record under sections 38(a), (b), and (c) of the *Act* and accordingly, there is no basis upon which to interfere with their exercise of discretion. I therefore find that, given the circumstances and the nature of the information, the exercise of discretion by the Police in withholding the information at issue was appropriate.

### **ORDER:**

1. I uphold the decision of the Police to deny access to paragraphs 1 and 2 under item "K" of the record entitled "Employment Investigator's Report". For greater certainty, I have highlighted this information in **green**. The highlighted information is **not** to be disclosed.
2. I order the Police to disclose to the appellant paragraph 3 under item "K" of the record entitled "Employment Investigator's Report" by **December 21, 2006** but not before **December 15, 2006**.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Police to provide me with a copy of the records as disclosed to the appellant, upon request,

Original signed by: \_\_\_\_\_

Catherine Corban  
Adjudicator

\_\_\_\_\_  
November 16, 2006