



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2312

Appeal MA07-135

Toronto Police Services Board



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BACKGROUND:

The Toronto Police Services Board (the Police) received three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the same workplace construction accident. The requests were filed separately by a lawyer on behalf of two of his clients who were both involved in the accident. Both clients provided the Police with authorization for the lawyer to act on their behalf with respect to the disclosure of any of their personal information which might be responsive to their requests. One of the individuals was injured in the accident. The other was a witness.

The three requests were subsequently appealed. Appeal Number MA07-135 deals with information relating to the injured individual. Appeal Numbers MA07-102 and MA07-120 deal with information related to the witness.

This order deals specifically with Appeal Number MA07-135. Although it involves the same records as those at issue in Appeal Number MA07-120, it relates to a different client, the individual who was injured in the accident.

NATURE OF THE APPEAL:

The Police received a request under the *Act* for access to information relating to a specific workplace construction accident. Specifically, the requester sought access to the following:

[A] copy of the complete Toronto Police Services incident report, all witness statements including [named client's] statement together with a transcription of the Toronto Police Services 911 Call Report.

After contacting the requester to clarify the request, the Police located an I/CAD Event Details Report and issued a decision letter.

The Police advised that access was denied to an I/CAD Event Details Report pursuant to section 38(a), in conjunction with sections 8(1)(a) and (b) (discretion to refuse a requester's own information/law enforcement), and section 38(b) (personal privacy), taking into account the presumptions at sections 14(3)(a) and (b) of the *Act*.

The Police also advised that portions of the records are non-responsive to the request.

With respect to the 911 Call Report, the Police advised:

Please be advised that the Freedom of Information Unit is not compelled to create a record, and therefore, does not create a verbatim transcript of a 911 call.

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

During mediation, the appellant maintained that additional responsive records, particularly the statements provided to the Police by his client and other witnesses ought to exist.

The Police agreed to conduct a further search for additional records. As a result of the further search, the Police located several officers' memorandum notebooks which contain statements provided to the Police by the witnesses, personal information relating to the appellant's client, and a Sudden Death Report.

The Police issued a revised decision advising as follows:

Access cannot be provided to an incident report as such record does not exist.
However, a Sudden Death Report has been located.

With respect to the statement provided by the appellant's client, the Police advised that such record does not exist. They also advised that access was denied to the I/CAD Event Details Report pursuant to section 38(a), in conjunction with sections 8(1)(a), (b) and (l) and section 38(b) taking into account the presumptions at sections 14(3)(a) and (b) of the *Act*.

Lastly, the Police stated in their revised decision letter that some portions of the officer's memorandum books were deemed non-responsive to the request.

In response, the appellant advised that he wished to pursue access to all of the Police records pertaining to the specified accident. However, the appellant indicated that the portions of the memorandum book notes which are considered non-responsive, and the I/CAD Event Details Report which is the subject of Appeal Number MA07-102, are not at issue in this appeal.

With respect to the part of the request relating to the statement provided by the appellant's client, the appellant indicated that the search for this record is not at issue in this appeal.

No further mediation was possible and the file was transferred to the adjudication stage of the appeal process.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Police. The Police responded with representations. I then sent a copy of the Notice of Inquiry to the appellant along with a copy of the Police's non-confidential representations. The appellant did not submit representations.

RECORDS:

The following records are at issue:

- Sudden Death Report – pages 1 to 10
- Memorandum Book Notes, Police Officer #1 – pages 11 to 14
- Memorandum Book Notes, Police Officer #2 – pages 15 to 24
- Memorandum Book Notes, Police Officer #3 – pages 25 to 27
- Memorandum Book Notes, Police Officer #4 – pages 28 to 34
- Memorandum Book Notes, Police Officer #5 – pages 35 to 37

- Memorandum Book Notes, Police Officer #6 – page 38
- Memorandum Book Notes, Police Officer #7 – pages 39 to 44
- Memorandum Book Notes, Police Officer #8 – pages 45 to 48
- Memorandum Book Notes, Police Officer #9 – pages 49 to 50
- Memorandum Book Notes, Police Officer #10 – pages 51 to 52
- Memorandum Book Notes, Police Officer #11 – pages 53 to 62
- Memorandum Book Notes, Police Officer #12 – pages 63 to 64
- Memorandum Book Notes, Police Officer #13 – pages 65 to 66

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 [see Order M-352]. Where records contain the requester's own information, access to the records is addressed under Part II of the *Act* and the exemptions at section 38 may apply. Where the records contain the personal information belonging to individuals other than the appellant, access to the records is addressed under Part I of the *Act* and the exemptions found at sections 6 to 15 may apply.

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]. 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], but 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].

Having reviewed the records at issue, I find that the Sudden Death Report and the Memorandum Book Notes from Police Officers #2, 3, 7, 8, 9, and 11 contain the personal information of the appellant's client, including his address and telephone number (paragraph (d)), his age (paragraph (a)), and medical information (paragraph (b)) as well as his name and other personal information relating to him (paragraph (h)). These records also contain the personal information of other identifiable individuals including their addresses and telephone numbers (paragraph (d)), their age and family or marital status (paragraph (a)), as well as their personal views and opinions (paragraph (e)) and their names along with other personal information relating to them (paragraph (h)), including statements made to the Police.

I find that the Memorandum Book Notes from Police Officers #1, 4, 5, 6, 10, 12, and 13 do not contain the personal information of the appellant's client but rather contain the personal information of other identifiable individuals as that term is defined in section 2(1) of the *Act*. This information includes their addresses and telephone numbers (paragraph (d)), their age and family or marital status (paragraph (a)), as well as their personal views and opinions (paragraph (e)), the views or opinions of another individual about them (paragraph (g)), and their names

along with other personal information relating to them (paragraph (h)), including statements made to the Police.

As noted above, 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 section 8(1)(a), (b) and (l) and/or section 14(1) [Order 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].

Accordingly, access to the records that contains the personal information of the appellant's client together with that of other identifiable individuals, the Sudden Death Report and the Memorandum Book Notes of Police Officers #2, 3, 7, 8, 9, and 11, must be determined under Part II of the *Act* in accordance with the exemptions at section 38(a) and (b).

Access to the records that contain no personal information belonging to the appellant's client but that of other identifiable individuals, the Memorandum Book Notes of Police Officers #1, 4, 5, 6, 10, 12, and 13, must be determined under Part I of the *Act*, in accordance with the exemptions at section 8(1)(a),(b) and (l) and section 14(1).

DISCRETION TO REFUSE ACCESS TO APPELLANT'S OWN PERSONAL INFORMATION / PERSONAL PRIVACY

Section 38(b) of the *Act* is the relevant personal privacy exemption under Part II of the *Act*. It 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 individual's personal privacy.

The personal privacy exemptions under the *Act* are *mandatory* at section 14(1) under Part I and *discretionary* at section 38(b) under Part II. Put another way, where a record contains 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 the exemptions at section 14(1) in Part I were applied [Order MO-1757].

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. The institution retains the discretion to deny the appellant access to information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure of the

information *would* constitute an unjustified invasion of another individual's personal privacy [Order M-1146].

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy" under either the discretionary exemption at section 38(b) or the mandatory exemption at section 14(1), the information in question must contain the personal information of an individual or individuals other than the person requesting it.

The factors and presumptions in sections 14(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met. Section 14(2) provides some criteria for the institution 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. In this case the Police rely on sections 14(3)(a) and (b).

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 the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption [See Order PO-1764].

I will now review whether the information in the Sudden Death Report and the Memorandum Book Notes of Police Officers #2, 3, 7, 8, 9, and 11, (which contain the personal information of the appellant as well as that of other individuals) qualifies for exemption under the discretionary exemption at section 38(b) and whether the information in the remaining records, the Memorandum Book Notes of Police Officers #1, 4, 5, 6, 10, 12, and 13 (which contain the personal information of other individuals but not that of the appellant) qualifies for exemption under the mandatory exemption at section 14(1).

Section 14(3)(b): identifiable as part of an investigation into a possible violation of law

The Police submit that the presumption at section 14(3)(b) applies to all of the information at issue in this appeal. 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 law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The Police submit that they have conducted their initial investigation into the occurrence but that now, the Ontario Ministry of Labour is in the process of conducting its own investigation. The Police submit:

Should the Ministry of Labour's investigation discover that the occurrence was the result of criminal intent rather than an offence under the *Occupational Health and Safety Act*, R.S.O. 1990, it would then be incumbent upon the Toronto Police Service to pursue the criminal charges concerned.

The appellant makes no specific submissions on the application of the presumption at section 14(3)(b) or whether the exemptions at either section 38(b) or 14(1) apply.

Analysis and Findings

Based on careful review of the personal information at issue, I find that the nature and content of the records demonstrate that they were compiled and are identifiable as part of a police investigation into a workplace accident that resulted in the sudden death of an individual and bodily injury to another. As a result, I find that the records were compiled by the Police and is identifiable as part of their investigation, the purpose of which is, in part, to determine whether there has been a possible violation of law under either the *Criminal Code* or the *Occupational Health and Safety Act*. Accordingly, I find that the presumption at section 14(3)(b) applies.

In my view, section 14(4) does not apply to any of the records information. Also, the appellant did not raise the possible application of the public interest override at section 16 of the *Act*. Accordingly, I find that subject to the possible application of the absurd result principle and my review of the Police's exercise of discretion, I conclude that the discretionary exemption at section 38(b) applies to the Sudden Death Report and the Memorandum Book Notes of Police Officers #2, 3, 7, 8, 9, and 11.

As for the remaining records that do not contain the personal information of the appellant but rather, only that of other individuals, the Memorandum Book Notes of Police Officers #1, 4, 5, 6, 10, 12, and 13, I find that, subject to the possible application of the absurd result principle, the mandatory exemption at section 14(1) applies to exempt them from disclosure.

As I have found that the presumption at section 14(3)(b) applies to all of the information at issue, it is not necessary for me to determine whether the presumption at section 14(3)(a) applies.

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 either section 38(b) or section 14(1), 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]

My review of the following pages of the records indicate that they contain information that was supplied by the appellant or is clearly within his knowledge, including his name, address, telephone number, his opinion or views, and medical information that relates to him:

- Sudden Death Report - pages 1, 2, 5, 6, 9
- Memorandum Notes, Police Officer #2 – page 23
- Memorandum Notes, Police Officer #3 – page 26
- Memorandum Notes, Police Officer #8 – pages 46 , 47 and 48
- Memorandum Notes, Police Officer #9 – pages 49 and 50

Accordingly, I cannot agree that in the circumstances of this appeal, the disclosure of the above-referenced information to the appellant would result in an unjustified invasion of another individuals' personal privacy under section 38(b), whether or not any of the presumptions in section 14(3) apply. Rather, I find that to decline to grant access to this information, under the circumstances, would lead to an absurd result [Order MO-1196, PO-1679, MO-1755].

I am not satisfied that the balance of the withheld information was supplied by the appellant or that he is otherwise aware of it, so as to lead to an absurd result if it was withheld.

I have found that the absurd result principle applies to the information that relates to the appellant's client as listed above. As a result, I will now continue my analysis to determine whether the discretionary exemption at section 38(a), in conjunction with sections 8(1)(a), (c) or (l) applies to exempt those portions of the records from disclosure.

DISCRETION TO REFUSE APPELLANT'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38(a) provides a number of exemptions from this right. It 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]

The Police take the position that the information is exempt from disclosure under section 38(a) because the information falls within the exemptions at sections 8(1)(a), (b), and (l) of the *Act*. Those sections provide:

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;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

The term “law enforcement” is used in several parts of section 8, and is defined in section 2(1) of the *Act* 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).

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.)].

For the purposes of each of sections 8(1)(a), (b) and (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. 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*].

Section 8(1)(a): law enforcement matter

Under section 8(1)(a) the law enforcement matter in question must be a specific, ongoing matter. The exemption does not apply where the matter is completed, or where the alleged interference is with “potential” law enforcement matters [Orders PO-2085 and MO-1578].

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

The Police submit that an investigation into this construction accident is currently being conducted by the Ministry of Labour and that disclosure of the information at issue prior to the conclusion of the investigation could jeopardize the investigation itself, as well as any charges that are laid in this matter.

In my view, the Police have not provided me with sufficiently detailed evidence to support the application of the section 8(1)(a) exemption. While they have submitted disclosure of the information could reasonably be expected to jeopardize an ongoing proceeding, I am aware that the Ministry of Labour investigation referred to is now complete. The Ministry itself advised me in their representations in a related appeal, Appeal Number PA07-124, of this fact.

As a result, I am not satisfied that the Police have established that disclosing the information that remains at issue could reasonably be expected to interfere with an ongoing law enforcement matter. I find, therefore, that that information does not fit within the ambit of the exemption at section 8(1)(a).

Section 8(1)(b): law enforcement investigation

The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with “potential” law enforcement investigations [Order PO-2085].

As with section 8(1)(a), the institution holding the records need not be the institution conducting the law enforcement investigation for the exemption at section 8(1)(b) to apply [Order PO-2085].

Again, the Police’s representations submit that disclosure of the information at issue could reasonably be expected to interfere with an active, ongoing investigation into the workplace accident by the Ministry of Labour.

As discussed above, the Ministry of Labour’s investigation has concluded and I have not been provided with any evidence that there are any other ongoing proceedings with respect to this matter. As a result, the Police have not provided sufficient evidence to demonstrate that releasing the information that remains at issue could reasonably be expected to interfere with an ongoing

law enforcement investigation. I find, therefore, that the information does not fit within the ambit of the exemption at section 8(1)(b).

Section 8(1)(l): commission of an unlawful act or hamper the control of crime

The Police's representations on this issue focus primarily on the Toronto Police Service "10" codes from police officer's memorandum books. As mentioned above, the only information that remains at issue is the information that falls under the absurd result principle discussed above. I have carefully reviewed that information and find that there are no "10" codes that appear in those portions of the records. Additionally, having considered the nature and content of that information, I do not accept that disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

Therefore, I find that section 8(1)(l) does not apply to exempt the information that remains at issue as outlined above in my discussion on the absurd result principle above.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. On appeal, this office 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.

Because section 38(b) is a discretionary exemption and I have found that the Police have properly applied it to exempt the portions of the Sudden Death Report and the Memorandum Book Notes from Police Officers #2, 3, 8, 9, and 11 that are not subject to disclosure under the absurd result principle, I must review the Police's exercise of discretion in deciding to deny access to portions of those records.

I may find that the Police erred in exercising their discretion where, for example:

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations

In either case this office may send the matter back to the Police for an exercise of discretion based on proper considerations [Order MO-1573].

The Police list several factors that they considered when exercising their discretion not to release the information for which I found section 38(b) applied. Generally, the Police state that since the collection of the personal information of the individuals other than the requester was made as a result of the police investigation of a workplace accident, the balance between the right of access

and the protection of privacy must weigh in favour of protecting the privacy of individuals. The Police submit that due to the sensitive nature of recorded information held by a law enforcement institution they carry a greater responsibility in safeguarding the privacy interests of individuals whose information has been collected in the course of a law enforcement matter.

I have reviewed the information in the Sudden Death Report and the Memorandum Book Notes from Police Officers #2, 3, 7, 8, 9, and 11 for which section 38(b) applies. In the circumstances of this appeal and given the nature and sensitivity of the information, I conclude that the Police's exercise of discretion to withhold the information that I have not ordered disclosed was appropriate.

ORDER:

1. I uphold the decision of the Police to deny access to the Memorandum Notes of Police Officers # 1, 4, 5, 6, 7, 10, 11, 12 and 13, in their entirety, as well as the portions the Sudden Death Report and the Memorandum Notes of Police Officers # 2, 3, 8, and 9 that I have not ordered disclosed below.
2. I order the Police to disclose to the appellant, by **July 4, 2008** but not before **June 30, 2008**, the portions of the following pages that are clearly within the appellant's knowledge:
 - Sudden Death Report - pages 1, 2, 5, 6, 9
 - Memorandum Notes, Police Officer #2 – page 23
 - Memorandum Notes, Police Officer #3 – page 26
 - Memorandum Notes, Police Officer #8 – pages 46 , 47 and 48
 - Memorandum Notes, Police Officer #9 – pages 49 and 50

For greater certainty, I have enclosed a copy of those pages where the information that is to be disclosed has been highlighted.

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

May 29, 2008