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

INTERIM ORDER MO-2325-I

Appeal MA07-92

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 the following information relating to a criminal investigation:

> … a copy of the witness statements, officer notes and any other documents and photographs that the police have on file.

By way of background, the requester attempted to stop an individual from stealing his car. The thief successfully drove off with the car at a high speed, but the requester managed to grab one of its doors. The car thief subsequently lost control of the vehicle and crashed it into a wall. The requester, who was dragged along as he hung on to the car, suffered serious injuries. The Police arrested and charged the thief.

The Police located 10 pages of responsive records, which consist of a record of arrest, several supplementary records of arrest, and a witness list. The Police then issued a decision letter to the requester that denied him access to these records pursuant to discretionary exemptions in sections 8(1)(a) (law enforcement matter) and 8(1)(f) (right to a fair trial) of the *Act*, and the mandatory exemption in section 14(1) (personal privacy), read in conjunction with the presumption in section 14(3)(b) (investigation into violation of law) of the *Act*.

The requester (now the appellant) appealed the Police's decision to this office, which assigned a mediator to assist the parties in resolving the issues in this appeal. The Police advised the mediator that their search for responsive records did not include photographs or Motor Vehicle Accident reports, because these documents could be purchased from the Police's Records Management Section. The appellant agreed that these records are not at issue in this appeal.

In addition, the mediator noted that the records at issue appear to contain the personal information of the appellant. Consequently, the discretionary exemptions in sections 38(a) (right of access to one's own personal information) and 38(b) (personal privacy) of the *Act* are at issue.

This appeal was not settled in mediation and was moved to the adjudication stage of the appeal process, in which an adjudicator may conduct an inquiry under the *Act*. I started my inquiry by issuing a Notice of Inquiry to the Police. In response, the Police submitted representations to this office.

I then issued a Notice of Inquiry to the appellant, along with the non-confidential representations of the Police. In response, the appellant submitted representations to this office.

Finally, I sent a complete copy of the appellant's representations to the Police and invited them to submit reply representations. The Police submitted representations by way of reply.

Subsequently, the appellant sent correspondence to this office stating that the individual who stole his car was found guilty in criminal court and sentenced.

After reviewing the parties' representations and the records at issue, I issued a letter to the appellant that invited him to provide supplementary representations on two issues. First, based on his representations, it was not clear to me whether the appellant knows the identity of the convicted car thief and other information relating to her (which is contained in the records at issue). Consequently, I asked him to specify whether he is aware of the name of this individual, the charges she faced, and any other information relating to her. The appellant submitted supplementary representations that identified the convicted individual by name, one of the charges she faced under the *Criminal Code*, and other information relating to her.

Second, although the appellant asked for "a copy of the witness statements, officer notes and any other documents … " in his request, the only responsive records for which the Police issued an access decision are a record of arrest, supplementary records of arrest, and a witness list. The Police did not issue an access decision on any witness statements, officers' notes or any other documents responsive to the request. Consequently, I asked the appellant to indicate to me whether the Police had already provided him with access to these records, and if not, whether he was continuing to pursue access to them. In his supplementary representations, the appellant stated that he had not received any such records from the Police and was continuing to pursue access to them.

RECORDS:

The 10 pages of records that are at issue in this appeal are summarized in the following chart:

Record	**Page numbers**	**Police's decision**	**Exemptions claimed**
Record of arrest	1	Withheld in full	Section 38(a), in conjunction with sections 8(1)(a) and (f) Section 38(b), in conjunction with section 14(3)(b)
Supplementary record of arrest (synopsis for a guilty plea)	4-5	Withheld in full	Section 38(a), in conjunction with sections 8(1)(a) and (f) Section 38(b), in conjunction with section 14(3)(b)

Supplementary record of arrest (show cause)	6-9	Withheld in full	Section 38(a), in conjunction with sections 8(1)(a) and (f) Section 38(b), in conjunction with section 14(3)(b)
Police witness list	10	Withheld in full	Section 38(a), in conjunction with sections 8(1)(a) and (f) Section 38(b), in conjunction with section 14(3)(b)

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 where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The Police submit that the records at issue include the personal information of both the appellant and the accused. In particular, they state that the records include the accused's name, telephone number and address. The appellant's representations do not specifically address whether the records contain personal information.

I have carefully reviewed the records at issue and find that they contain the personal information of the appellant, the accused, and two witnesses. In particular, they contain the appellant's name, address, telephone number and other personal information. They also contain the accused's name, address, telephone number, criminal history and other personal information. In addition, the Police witness list contains the surnames of two witnesses to the incident.

The records also contain information relating to the police officers who investigated the incident that led to the appellant's injuries. For example, the Police witness list includes the names, badge numbers, ranks, units and platoons of several police officers.

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]. However, 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].

In my view, the information in the records relating to the police officers does not reveal something of a personal nature about these individuals. These officers investigated the incident that led to the appellant's injuries while carrying out their employment or professional duties. Consequently, I find that the information relating to these officers is their professional rather than their personal information.

The personal privacy exemptions in the *Act* can only apply to information that qualifies as "personal information." Accordingly, sections 38(a) or (b) cannot apply to the information relating to these officers. As the Police have not claimed any other exemptions for this information, it must be disclosed to the appellant.

I will now consider whether the remaining portions of the records that the Police have withheld qualify for exemption under sections 38(a) and (b) of the *Act*.

RIGHT OF ACCESS TO ONE'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 reads:

> 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 Police have denied the appellant access to the records at issue pursuant to the discretionary exemption in section 38(a), in conjunction with sections 8(1)(a) and (f) of the *Act*.

I have concluded that the section 38(a) exemption does not apply to the information in the records at issue, for the reasons that follow.

Sections 8(1)(a) and (f) state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

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 purpose of both sections 8(1)(a) and (f), 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* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

The Police submit that sections 8(1)(a) and (f) apply to the records at issue because "it is obvious that dissemination of the requested information prior to the pending trial could jeopardize both the Crown's mandate, and the rights of the individual who has been charged in this matter." Consequently, they state that they have opted to deny the appellant access to any information in the records at issue "at this time."

However, the appellant sent correspondence to this office stating that the individual who stole his car was found guilty in criminal court and sentenced.

Under section 8(1)(a), "matter" may extend beyond a specific investigation or proceeding. [*Ontario* (*Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.)].

The section 8(1)(a) 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 individual who stole the appellant's car was charged under the *Criminal Code* with both theft and dangerous driving causing bodily harm. At the time the Police submitted their representations to this office, the proceedings against the accused were not yet complete. However, the accused has subsequently been found guilty and sentenced in criminal court. In short, the proceedings under the *Criminal Code* have been completed. Consequently, I am not satisfied that disclosing the information in the records at issue could reasonably be expected to interfere with a law enforcement matter. I find, therefore, that the section 8(1)(a) exemption does not apply to the information in the records at issue.

To obtain the protection of the section 8(1)(f) exemption, the institution must show that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. The exemption is not available as a protection against remote and speculative dangers. [Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

As noted above, the proceedings against the accused under the *Criminal Code* have been completed. Consequently, I am not satisfied that disclosing the information in the records at issue could reasonably be expected to lead to a "real and substantial risk" of interference with the accused's right to a fair trial. I find, therefore, that the section 8(1)(f) exemption does not apply to the information in the records at issue.

In short, I find that the section 38(a) exemption does not apply to the information in the records at issue.

PERSONAL PRIVACY

General principles

Under section 38(b), where a record contains the 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.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold 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 from disclosure under section 38(b).

Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. If paragraph (a), (b) or (c) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. 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 section 38(b).

The Divisional Court has stated that once a presumed unjustified invasion of personal privacy is established under section 14(3), it can only be overcome if section 14(4) or the "public interest override" at section 16 applies. It cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b) [Order P-239]. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99].

Section 38(b) is a discretionary, not a mandatory exemption. If the personal information at issue 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.

Analysis and findings

I have reviewed the records at issue, which contain the personal information of the appellant, the accused (now convicted) and two witnesses. The Police have withheld this information from the appellant in its entirety.

Section 14(3)(b) presumption

The Police claim that the presumption in section 14(3)(b) of the *Act* applies to this information. This provision 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;

The Police submit that the personal information in the records at issue was compiled and is identifiable as part of an investigation into possible violations of the *Criminal Code*. The appellant did not provide representations as to whether the presumption in section 14(3)(b) applies to the personal information in the records at issue.

I accept that the Police were called to investigate the incident which gave rise to the creation of the records at issue. In my view, the personal information of the appellant, the accused and the two witnesses was compiled by the Police and is identifiable as part of their investigation into possible violations of the *Criminal Code*. Consequently, I find that the section 14(3)(b) presumption applies to this personal information.

As noted above, the Divisional Court stated in *John Doe* that once a presumed unjustified invasion of personal privacy is established under section 14(3), it can only be overcome if section 14(4) or the "public interest override" at section 16 applies. I have considered the exceptions in section 14(4) of the *Act* and find that the personal information remaining at issue does not fall within the ambit of this section. Moreover, in my view, the "public interest override" in section 16 does not apply, because the appellant has a private, not a public interest, in seeking access to the records at issue, and he has not raised the application of this provision.

Subject to my discussion below on the issue of absurd result, I find that disclosure of the personal information in the records at issue is presumed to constitute an unjustified invasion of personal privacy.

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not to be 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 principle 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].

The appellant submits that the absurd result principle applies to his own personal information, which he provided to the Police. In addition, I asked the appellant to specify whether he is aware of the name of the accused (now convicted), the charges she faced, and any other information relating to her. The appellant submitted supplementary representations that identified the convicted individual by name, one of the charges she faced under the *Criminal Code*, and other information relating to her.

The Police submit that they did not disclose the appellant's own personal information to him because his legal counsel (who submitted the access request) did not provide the Police with a written authorization from his client. The Police submit that, "The argument of 'absurd result' is, in itself, absurd when the individual requesting the information was neither involved nor has the authorization from such a party."

I appreciate the caution that the Police have exercised in approaching this issue. However, I am satisfied that the appellant's legal counsel represents him in this appeal. The personal information of the appellant that appears in the record at issue was provided to the Police by the appellant himself. I find that not disclosing this information to the appellant would produce an absurd result. Consequently, this information is not exempt from disclosure under section 38(b), and I will order that it disclosed to the appellant.

There is also personal information in the records at issue relating to the accused that is clearly within the appellant's knowledge, including her name, the charges she faced under the *Criminal Code*, and the circumstances that led to the accident. I find that withholding this information from the appellant would produce an absurd result. Consequently, this information is not exempt from disclosure under section 38(b), and I will order that it be disclosed to the appellant.

There is no evidence before me to indicate that the appellant has any knowledge of the remaining personal information of the accused or the two witnesses that appears in the records at issue. I find that the absurd result principle does not apply to this information. Consequently, this information is exempt from disclosure under section 38(b) of the *Act*.

EXERCISE OF DISCRETION

The section 38(b) 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 43(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

I have found that some of the personal information of the accused and the two witnesses is exempt from disclosure under section 38(b) of the *Act*. Consequently, I will now assess whether the Police exercised their discretion properly in applying section 38(b) to this information.

The Police submit that they exercised their discretion under section 38(b) in a manner that balanced the appellant's access rights with the privacy rights of other individuals.

The appellant submits that he was advised that no motor vehicle accident report exists, which means that he has been deprived of the information that would normally be made available in such a report. He submits that the Police should have taken this factor into account in exercising its discretion.

In response, the Police submit that:

> Insofar as the appellant having been told that the motor vehicle accident report did not exist, the decision letter from the Freedom of Information Unit contains no such statement nor would the appellant have been advised of this verbally by FOI as the dissemination of Accident Reports and/or Field Notes does not fall within the purview of this Unit.
>
> Further, the [Police] are not the sole source of access to Accident Reports – such reports are also available, for a fee, through the Ministry of Transportation.

In my view, the Police exercised their discretion based on proper considerations. In reaching their decision to withhold some of the personal information of the accused and the two witnesses, they weighed the requester's right of access to his own personal information against the privacy rights of other individuals.

I am not persuaded by the appellant's submission that the Police should have taken the absence of a motor vehicle accident report into account in applying the section 38(b) exemption. I find, therefore, that their exercise of discretion was proper.

RESPONSIVENESS OF RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

As noted above, although the appellant asked for "a copy of the witness statements, officer notes and any other documents … " in his request, the only responsive records for which the Police issued an access decision are a record of arrest, supplementary records of arrest, and a witness list. The Police did not issue an access decision on any witness statements, officers' notes or any other documents responsive to the request.

Consequently, I asked the appellant to indicate to me whether the Police had already provided him with access to these records, and if not, whether he was continuing to pursue access to them. In his supplementary representations, the appellant stated that he had not received any such records from the Police and was continuing to pursue access to them.

It is evident, based on the records at issue in this appeal, that other records likely exist that "reasonably relate" to the appellant's request for which the Police have not yet issued an access decision. This would include witness statements, the notes of police officers and other records relating to the incident that led to the appellant's injuries. Consequently, I will order the Police to locate such records and issue an access decision to the appellant. The appellant has the right to appeal the Police's access decision to this office. In accordance with section 39(2) of the *Act*, the appellant must file his appeal within 30 days after receiving notice of the Police's access decision.

ORDER:

1. I order the Police to disclose those portions of the records that I have found are not exempt under sections 38(a) or (b) of the *Act*.

2. I uphold the Police's decision to withhold the remaining portions of the records at issue.

3. I am providing the Police with a copy of the records at issue and have highlighted in green those portions that must not be disclosed to the appellant because they are exempt. To be clear, the portions that I have not highlighted in green must be disclosed to the appellant.

4. I order the Police to provide the appellant with a copy of these records by **August 1, 2008**.

5. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the records that they disclose to the appellant under Order Provision 4.

6. I order the Police to locate and issue an access decision, in accordance with the provisions of the *Act*, for the witness statements, the notes of police officers and other records that "reasonably relate" to the appellant's request, treating the date of this order as the date of the request.

7. I remain seized of any outstanding issues arising from this decision, including any appeal that may result from Order Provision 6.

Original Signed by: June 27, 2008
Colin Bhattacharjee
Adjudicator