



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2443

Appeal MA07-335

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*) from the father of a murder victim. The request stated, in part:

I want any copies I can get of his file. My son was murdered at [a specified location] at a robbery at 5:15 pm on 10 July 2003. I need [a] copy of [the] initial report, [a] copy for the discharge of his belongings and the 911 call.

The Police located records responsive to the request. They then issued a decision letter to the requester, denying him access to these records pursuant to the discretionary exemptions in sections 8(1)(a) (law enforcement matter) and 8(1)(b) (law enforcement investigation) 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 Police's decision letter further advised the requester that his son's death was still under investigation, and that he could re-submit his request once the investigation and any matters before the courts were concluded. In addition, it informed him that he could contact the "cold case" section of the homicide squad for further information.

The requester (now the appellant) appealed the Police's decision to this office. The appeal was filed by the appellant's daughter, who is acting as his representative. This office assigned a mediator to assist the parties in resolving the issues in this appeal.

The Police provided this office with a copy of some of the records at issue, including a homicide/sudden death report, a supplementary report, and an I/CAD event details report. However, the Police advised the mediator that they were unable to locate the "property discharge" form requested by the appellant.

In her discussions with the mediator, the appellant's representative stated that her father's request was made for compassionate reasons. Consequently, the application of section 14(4)(c) of the *Act* may be an issue in this appeal. Under section 14(4)(c), a disclosure does not constitute an unjustified invasion of personal privacy if it discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

The appellant's representative further advised the mediator that the "property discharge" form should exist because her father signed this document at the time the Police provided him with his son's possessions and \$10,000 in cash that was in his son's pocket. In response, the Police's freedom of information analyst asked an officer to conduct a further search for this record. This officer was unable to locate it.

The appellant's representative also advised the mediator that witness statements must exist. In response, the Police confirmed that it had located approximately 20 witness statements relating to the case but was denying the appellant access to these records pursuant to the same exemptions that it claimed for the other records at issue. The Police did not send this office a

copy of the witness statements but indicated that the adjudicator could come to their office to review these records.

The appellant's representative indicated that her father wishes to pursue access to all of the responsive records located by the Police, including the witness statements. In addition, she stated that her father does not believe that the Police have conducted a reasonable search for the "property discharge" form that he signed.

This file was not resolved in mediation and was moved to the adjudication stage of the appeal process for an inquiry. I started my inquiry by sending a Notice of Inquiry, setting out the facts and issues in this appeal, to the Police, who submitted representations in response. I then sent the same Notice of Inquiry to the appellant, along with the non-confidential representations of the Police. Portions of the Police's representations were withheld from the appellant because they fall within this office's confidentiality criteria on the sharing of representations. In response, the appellant submitted representations to this office.

I also made a site visit to the office of the Police's homicide squad (cold case section) to review the remaining records relating to the murder investigation. These records, which are contained in three banker's boxes ("case boxes"), include not only witness statements, but other records relating to the investigation, such as occurrence reports, video tapes, audio tapes, officers' notes, neighbourhood canvas interview cards, photos, news releases, and forensic evidence. In addition, I reviewed a binder containing the notes of the detective sergeant who is handling the case.

RECORDS:

I have summarized the records at issue in the following chart:

Title/description of record	Page numbers	Police's decision	Exemptions claimed
Homicide and sudden death report	1	Withheld in full	Sections 8(1)(a) and (b) Section 14(1), read in conjunction with presumption in section 14(3)
First supplementary report	2	Withheld in full	Sections 8(1)(a) and (b) Section 14(1), read in conjunction with presumption in section 14(3)

Second supplementary report	3	Withheld in full	Sections 8(1)(a) and (b) Section 14(1), read in conjunction with presumption in section 14(3)
I/CAD event details report	4 to 56	Withheld in full	Sections 8(1)(a) and (b) Section 14(1), read in conjunction with presumption in section 14(3)
Three banker's boxes of other records relating to investigation	N/A	Withheld in full	Sections 8(1)(a) and (b) Section 14(1), read in conjunction with presumption in section 14(3)
Binder containing notes of detective sergeant who is handling case	N/A	Withheld in full	Sections 8(1)(a) and (b) Section 14(1), read in conjunction with presumption in section 14(3)

DISCUSSION:

LAW ENFORCEMENT

General principles

The Police submit that the records at issue are exempt from disclosure under sections 8(1)(a) and (b) of the *Act*. These provisions read:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a

law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The term “matter” in section 8(1)(a) 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.)]. This 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].

To satisfy section 8(1)(b), 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]. The investigation in question must be ongoing or in existence [Order PO-2657].

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.)].

Generally, the section 8 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.)].

Analysis and findings

In their representations, the Police state that although the unsolved murder to which the records relate can be characterized as a “cold case,” they are continuing to investigate the murder and have been re-interviewing witnesses and other involved parties. They submit that the premature release of the records could reasonably be expected to have a detrimental effect on the ongoing investigation, the ultimate laying of charges and the eventual prosecution of any arrested persons:

Releasing information to a requester is the same as releasing information to the public generally. Once the requester is in possession of this information, he/she is free to do with it as he pleases.

....

The [Police] investigation has been undertaken with a view to a future law enforcement proceeding as it is clear that a violation of law has been identified. Release of the requested records to the appellant and other individuals with whom the records may be shared has the potential to reveal detailed operational

information relating to the investigation that could frustrate the ability of the [Police] to continue the investigation and resolve the matter of the individual's death. Knowledge of the extent and nature of the information received and used by the [Police] could lead to investigative harms such as the suppression and/or destruction of potential investigative evidence.

In her representations, the appellant's representative does not directly address whether the section 8(1)(a) or (b) exemptions apply to the records at issue. Instead, she submits that her father would be satisfied if the Police disclosed the records at issue but removed any identifying information, such as the names, addresses and telephone numbers of individuals. She further submits that, "On compassionate grounds, my parents need to know exactly what transpired particularly since the investigation has gone cold and there does not appear to be a resolution in sight."

This office has found in previous orders that records similar to the ones at issue in this appeal qualify for exemption under sections 8(1)(a) and (b) of the *Act* if an ongoing investigation is taking place. For example, in Order MO-1171, the appellant was seeking records relating to the Police's investigation of an arson attack on an abortion clinic that had taken place eight years earlier. The Police located 311 pages of responsive records. Adjudicator Laurel Cropley found that these records qualified for exemption in their entirety under sections 8(1)(a) and (b) for the following reasons:

The Police express the concern that premature disclosure of the information concerning the current investigation could, either intentionally or inadvertently, cause an obstruction of justice insofar as it could reasonably be expected to tip an involved party or suspect as to the direction of the investigation, provide an opportunity for individuals involved to tamper with evidence which the police may uncover at a later time and effectively cover their tracks and evade charges.

The records relate to an event which occurred approximately eight years ago. However, based on the representations and my review of the records, I am satisfied that they contain information which relates to an ongoing law enforcement investigation and/or matter, and that disclosure of this information could reasonably be expected to interfere with the investigation and/or matter. Therefore, I find that the records are properly exempt under sections 8(1)(a) and (b) of the *Act*.

In my view, similar circumstances exist in the appeal before me. The murder of the appellant's son, which took place six years ago, remains unsolved and is therefore characterized as a "cold case." However, it is evident, based on the Police's representations, that there is an ongoing investigation taking place. The officer in charge has been re-interviewing witnesses and other involved persons, and the Police do not consider this law enforcement matter or the investigation to be completed.

Moreover, I have had an opportunity to review the records at issue in detail, including the records in the three case boxes and the lead investigator's notebook, which are stored in the office of the Police's homicide squad (cold case section). Based on my review, I accept the Police's submission that disclosing these records could reasonably be expected to interfere with a law enforcement matter [section 8(1)(a)] or interfere with an investigation undertaken with a view to a law enforcement proceeding [section 8(1)(b)].

In short, I find that the records at issue qualify for exemption under sections 8(1)(a) and (b) of the *Act*, with one exception. In Casebox #3, there is a file (MCMS26), which contains news releases issued by the Police relating to the murder investigation. In my view, disclosing these news releases to the appellant could not reasonably be expected to lead to the harms contemplated by any of the exemptions in the *Act*, including sections 8(1)(a) or (b). These news releases were publically available at some point, and I find that disclosing them could not reasonably be expected to interfere with a law enforcement matter or interfere with an investigation undertaken with a view to a law enforcement proceeding.

Although the appellant claims that her father and family have "compassionate grounds" for seeking access to the records at issue, section 14(4)(c) of the *Act* is only triggered if the mandatory exemption in section 14(1) is at issue. Given that I found the records at issue (except for the news releases) qualify for exemption under sections 8(1)(a) and (b) of the *Act*, it is not necessary to determine whether they also qualify under section 14(1). Consequently, section 14(4)(c) has no application in this appeal.

REASONABLE SEARCH

The appellant's representative submits that a "property discharge" form should exist because her father signed this document at the time the Police provided him with his son's possessions and \$10,000 in cash that was in his son's pocket. In response, the Police's freedom of information analyst asked an officer to conduct a further search for this record. This officer was unable to locate it.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act* [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

As noted above, I made a site visit to the office of the Police's homicide squad (cold case section) to review the remaining records relating to the murder investigation. During my review of these records, I located the property discharge form that is being sought by the appellant. This record is found in File MCMS36 (Victim – Moneys) in Case Box #3. The serial number on this record is NO73569. Consequently, whether the Police have conducted a reasonable search for this record is no longer at issue, and I will order the Police to issue an access decision to the appellant with respect to this record.

ORDER:

1. I order the Police to disclose the news releases relating to the murder investigation, which are found in File MCMS26 in Case Box #3. These news releases must be disclosed to the appellant by **September 1, 2009**.
2. I uphold the Police's decision to withhold the remaining records under sections 8(1)(a) and (b) of the *Act*.
3. I order the Police to issue an access decision to the appellant with respect to the property discharge form, which is found in File MCMS36 (Victim – Moneys) in Case Box #3. This access decision must be issued in accordance with sections 19, 20, 21 and 22 of the *Act*, treating the date of this order as the date of the request.
4. I remain seized of any compliance issues that may arise from this order.

Original signed by:
Colin Bhattacharjee
Adjudicator

July 29, 2009