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

ORDER MO-2527

Appeal MA09-99

Toronto Police Services Board

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NATURE OF THE APPEAL:

This appeal concerns a request submitted to the Toronto Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "the names of 23 arrested drug traffickers arrested by the Metropolitan Toronto Police Drug Squad on October 25, 2006" at a specified address. The requester provided the name of an individual that he believes was one of the 23 people arrested.

With respect to the individual specifically named in the requester's request, the Police advised that the existence of records containing this individual's name cannot be confirmed or denied, in accordance with section 14(5) of the *Act*.

With respect to the names of other individuals, the Police advised that access to records containing their names is denied pursuant to 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 decision of the Police to this office.

The parties were unable to resolve the appeal through mediation and the file was transferred to the adjudication stage of the appeal process for an inquiry, in which an adjudicator seeks written representations from the parties on the issues in dispute before issuing a decision.

I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the Police. The Police responded with representations.

I then sought representations from the appellant and enclosed with my Notice of Inquiry a severed version of the Police's representations. Portions of the Police's representations were severed due to confidentiality concerns. The appellant submitted representations in response. In addition to commenting generally on the application of the section 14 exemption, the appellant also suggested that there is a public interest in the disclosure of the information at issue.

RECORDS:

There are 15 records at issue, comprised of Records of Arrest, to which the Police have denied access pursuant to the mandatory exemption in section 14(1).

DISCUSSION:

PERSONAL INFORMATION

What constitutes "personal information"?

In order to determine whether section 14 of the *Act* applies, it is necessary to decide whether the records contain "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,
>
> …
>
> (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;

To qualify as personal information, the information must be about the individual in a personal capacity. Previous decisions of this office have held that information "about" an individual in his or her professional or employment capacity does not constitute that individual's personal information [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

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 parties' representations

The Police state that the records contain the names, addresses, dates of birth, drivers licences and telephone numbers of various identifiable individuals, as well as information pertaining to their criminal history, along with various other personal information pertaining to their occupation and place of employment.

The appellant did not provide representations that directly address this issue. However, I note that the appellant has expressed in his representations a particular interest in obtaining the names of the individuals identified in the records at issue. The appellant adds that he is not interested in any other information in the records about these individuals.

Analysis and findings

Having reviewed the Police's representations and the contents of the records at issue, I find that the records contain the personal information of those individuals that were arrested by the Police pursuant to an investigation. In most cases, this information consists of the names, addresses, skin colour, dates of birth, marital status, criminal history, and other personal information about these identifiable individuals, including their grooming and clothing. In some cases, the individual's name is not revealed; however, in those cases other personal identifying information is contained in the records, including distinct characteristics about the individual's appearance, as well as information about their occupation and place of employment.

None of the records contain the personal information of the appellant.

While I acknowledge the appellant's stated interest in obtaining only the names of the individuals contained in the records, the fact remains that all of the records contain the personal information of identifiable individuals other than the appellant within the meaning of section 2(1) of the *Act*.

I also note that some of the records at issue contain information relating to the involvement of several police officers' in the arrest of individuals named in the records. This information includes their names and badge numbers. The Police have not identified the information relating to these police officers as their personal information. In my view, this information qualifies as information "about" these police officers in their professional or employment capacity and does not constitute their personal information, as contemplated by section 2(2.1).

INVASION OF PRIVACY

Operation of section 14

Having determined that the records contain the personal information of individuals other than the appellant, the mandatory exemption at section 14(1) requires that the Police refuse to disclose this information, unless one of the exceptions to the exemption at sections 14(1)(a) through (f) applies. In my view, the only exception which could have any application in the present appeal is set out in section 14(1)(f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy within the meaning of section 14(1)(f). Section 14(2) provides criteria 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.

The Divisional Court has stated that once a presumption against disclosure in section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue falls within the ambit of section 14(4) or if the "compelling public interest" override provision at section 16 applies [*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The Police take the position that disclosure of the information in the records is presumed to constitute an unjustified invasion of privacy under the presumption in section 14(3)(b) of the *Act*, which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > is 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 parties' representations

The representations submitted by the Police are brief. The Police state that they are a law enforcement agency that has the duty under section 42 of the *Police Services Act* to enforce the *Criminal Code* of Canada, Ontario Provincial Statutes and Municipal By-laws. The Police submit that the personal information at issue was "compiled as part of an investigation into a possible violation of law."

The appellant's representations do not specifically address the application of the section 14(3)(b) presumption to the circumstances of this case.

Analysis and findings

Based on my review of the records and the Police's representations on the application of section 14(3)(b), I am satisfied that the Police compiled all of the information at issue in the records as part of an investigation into a possible violation of law under the *Criminal Code*.

Having found that the section 14(3)(b) presumption applies, I am precluded from considering any of the factors weighing for or against disclosure under section 14(2), because of the *John Doe* decision.

The section 14(4) exceptions are not applicable in the circumstances of this case.

To conclude, I find the personal information in the records at issue exempt under section 14(1) of the *Act* since its disclosure would constitute an unjustified invasion of personal privacy.

Therefore, the exception to the exemption at section 14(1)(f) does not apply. However, as indicated above, the appellant has raised the application of the "public interest override" at section 16, which I will address below.

As identified above, the names and badge numbers of the police officers involved in the arrests do not constitute the personal information of these officers. Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material that is exempt. The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information.

In the circumstances of this case, it is possible to sever the names and badge numbers of the police officers involved in this matter, and to disclose this information to the appellant without disclosing the personal information of any other identifiable individuals. However, in this case, the appellant has indicated that he is only interested in the names of the individuals who were arrested. The appellant has expressed no interest in obtaining information relating to the police officers involved in this matter. Accordingly, I see no reason to order the disclosure of the names and badge numbers of the police officers despite the fact that it could be disclosed since it is not exempt information.

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

As stated above, in his request the appellant provided the name of an individual that he believes is one of 23 individuals arrested as part of a Police investigation. In response, the Police advised that the existence of records containing this individual's name cannot be confirmed or denied, in accordance with section 14(5) of the *Act*.

Section 14(5) reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339].

Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; **and**

> 2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.
>
> [Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802]

Part one: disclosure of the record (if it exists)

Under part one of the section 14(5) test, the Police must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy.

Definition of personal information

An unjustified invasion of personal privacy can only result from the disclosure of "personal information." That term is defined in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (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,

Neither party has offered submissions that are particularly helpful in my analysis of this issue. However, I am satisfied that a record responsive to the appellant's request, if it exists, would contain information which qualifies as the personal information of an individual other than the appellant. I find that the information contained in such a record would clearly fall within paragraphs (a), (b), (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*, as the record would contain the individual's name, sex, age, skin colour, marital status, criminal history, address and telephone number as well as other information relating to the individual, as was the case with the records analyzed above in my discussion of section 14(1).

Unjustified invasion of personal privacy

It is evident from both the appellant's request and my findings above that if a responsive record does exist it would contain only the personal information of another individual and not the personal information of the appellant. At this point, the same section 14(1) analysis that was conducted above must be completed.

As above, the Police have raised the application of the section 14(3)(b) presumption.

In their very brief representations, the Police assert that in the event a record does exist the information contained in it would have also been compiled as part of the same Police investigation into a possible violation of law that is the subject of the records at issue in this appeal.

The appellant's representations do not address this issue.

Turning to my analysis, I am satisfied that in the event responsive records about the named individual exist the information contained in them would have been complied as part of a Police investigation into a possible violation of law under the *Criminal Code*. Accordingly, I find that the section 14(3)(b) presumption applies and I am precluded from considering any of the factors weighing for or against disclosure under section 14(2). Therefore, in the event records exist I would find, as I did above, the personal information in them exempt under section 14(1) of the *Act* since disclosure of it would be an unjustified invasion of personal privacy.

Once again, the section 14(4) exceptions are not applicable in this case and so the exception to the section 14(1) exemption in section 14(1)(f) does not apply. The appellant has, however, raised the application of the section 16 "public interest override". Therefore, I must determine whether the presumption at section 14(3)(b) can be overcome by a compelling public interest that outweighs the purpose of the exemption at section 14(1).

Part two: disclosure of the fact that the record exists (or does not exist)

Under part two of the section 14(5) test, the Police must demonstrate that disclosure of the fact that a record exists, or does not exist, would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The parties have not provided me with representations that address this issue.

For the same reasons given above under part one, I am satisfied that disclosing the existence or non-existence of the fact that information responsive to the appellant's request exists or does not exist would in itself convey information, such that disclosure would constitute a presumed unjustified invasion of personal privacy under section 14(3)(b). Again, for the reasons given above, section 14(4) does not apply. Therefore, I find that part two of the test has also been met, subject to the application of the public interest override.

Conclusion

As both parts of the test for the application of section 14(5) have been met, I find that the Police properly exercised its discretion to refuse to confirm or deny the existence of responsive records, if they exist, and that section 14(5) applies in this case, subject to the application of the public interest override.

PUBLIC INTEREST OVERRIDE

I will now examine the application of section 16 to the information I have found exempt under section 14(1), as well as to any records containing the name of the individual cited in the appellant's request, if they were to exist.

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)]. In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23 of *FIPPA,* which is equivalent to section 16 of the *Act*:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.
>
> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

The appellant submits that "there is a compelling public interest (my compelling interest)" in the information at issue, including any information about the individual named in his request. As part of his representations the appellant submitted an article dated October 26, 2006 from a Toronto community newspaper that discusses a Police investigation and a subsequent series of drug arrests on October 25, 2006 relating to an alleged drug trafficking operation near Queen Street East and Woodbine Avenue in Toronto. The article states that the Police investigation led to the arrest of 23 people. In addition, the individual named in the appellant's request is mentioned in the article as one of the individual's arrested. The appellant states that obtaining the names of the 23 people "could be so helpful for me to put together a puzzle to name other people involved in the [drug] trade." The appellant adds that should he obtain this information he would be prepared to share it with the Police. The appellant also indicates that he requires this information in order to bring a "leave to appeal application to the Supreme Court of Canada." He submits that the compelling public interest in acquiring this information clearly outweighs the purpose of the section 14(1) exemption.

The Police state that section 16 does not apply in this case, as it "demands a much higher threshold than the nature of the matter at hand."

Having carefully considered the parties' representations, I am not convinced that there is a compelling public interest in the disclosure of the information at issue or any records containing the personal information of the individual named in the appellant's request, if they exist. In my view, the appellant's motives for obtaining this information appear to be essentially private in nature, as evidenced by his choice of words "my compelling interest" to describe his motivation for obtaining the information and his stated desire to use any information acquired to assist in an appeal proceeding that appears to involve his interests. While the appellant's objectives may garner some public interest, I am not satisfied that the interest in the information requested would serve the purpose of informing the citizenry about the activities of their government.

Finally, even if I were to find that a public interest does exist in the circumstances of this case, I find that any public interest in the information requested does not clearly outweigh the purpose of the section 14(1) exemption. In my view, the appellant has not demonstrated that any public interest in making this information publicly available (if it exists in the case of the individual named in the request) clearly outweighs the need to protect the personal privacy rights of individuals who may have been the target of a Police investigation and the subject of subsequent charges.

Accordingly, I find that the section 16 public interest override does not apply in the circumstances of this case.

ORDER:

I uphold the Police's decision.

Original signed by: May 28, 2010
Bernard Morrow
Adjudicator