



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

ORDER MO-2588

Appeal MA10-198-2

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a report of a specific incident involving the requester.

The Police located the responsive records and granted partial access to them, while denying access to other parts, based on section 38(a), in conjunction with section 8(1) (law enforcement) and 38(b) (personal privacy) of the *Act*. In its decision, the Police indicated that they had not yet received the memorandum notes for nine officers, but that upon receipt of them, the responsive notes would be forwarded to the requester as soon as practicable.

The requester, now the appellant, appealed the Police's decision and appeal file MA10-198 was opened. In his appeal letter, the appellant questioned whether there were additional photographs relating to the contents of the safe and asserted that he should be entitled to receive a named retired detective's notes.

During the mediation stage of the appeal, the Police issued an access decision with respect to the memorandum notes of the nine officers, granting partial access to them while denying access to other portions based on section 38(a), in conjunction with section 8(1) and section 38(b) of the *Act*. In this letter, the Police stated that all responsive photographs had already been disclosed to the appellant and that memorandum notes for the retired detective had not yet been received, but upon receipt, they would be forwarded to the appellant as soon as practicable.

The appellant then confirmed that the only remaining issue in the appeal was access to the retired detective's notes. Subsequently, the Police advised that the retired detective had not provided his notebooks to the Police when he retired. The Police advised the mediator that they would not be contacting the retired detective to obtain his notebooks.

The appellant advised the mediator that he wished to proceed to adjudication to pursue access to the retired detective's notebooks relating to the incident. Therefore, file MA10-198 was transferred to adjudication for a determination as to whether the Police have custody or control over the retired detective's notebooks and whether the Police conducted a reasonable search for these notebooks.

I sent a Notice of Inquiry setting out the facts and issues in this appeal to the Police seeking their representations. The Police then located two pages of notes containing the responsive information from the retired detective's notebook, as well as one additional page from another police officer's notebook and issued a new decision letter to the appellant.

In their decision letter, the Police denied access to portions of the three pages of notes citing the personal privacy exemption in section 38(b) of the *Act* and also claiming that certain portions of these pages were not responsive to the appellant's request. As the Police located the notebook of the retired detective, appeal file MA10-198 was closed since the issues in that appeal had been resolved. However, the appellant continued to seek access to the information severed from the three pages of notes. As a result, appeal file MA10-198-2 was opened. I sent a Notice of Inquiry

to the Police seeking their representations, initially, which I received. I then sent the appellant a Notice of Inquiry along with the representations of the Police. Portions of these representations were withheld due to confidentiality concerns. I received representations from the appellant in response.

The appellant was represented throughout the mediation and adjudication stages of this inquiry by a representative who provided representations in both appeal files MA10-198 and MA10-198-2 on the appellant's behalf.

RECORDS:

The records at issue consist of the information severed from three pages of police officer notes, consisting of:

- Page 69 of a named constable's notebook, and
- Pages 23 and 24 of the retired detective's notebook.

In addition, the appellant wishes to receive the information from page 70 of the constable's notebook.

DISCUSSION:

PRELIMINARY ISSUE – SCOPE OF THIS APPEAL

The appellant's representations contain information about many issues surrounding his request. At the conclusion of the mediation stage of the appellant's appeal in file MA10-198, the mediator's report concluded with the following statement as to the issues remaining to be adjudicated upon:

... the appeal is proceeding to adjudication, on the basis of whether the Toronto Police Services Board has custody or control over [the retired detective's] memorandum notebooks and whether the Toronto Police Services Board conducted a reasonable search for [his] memorandum notebooks.

The mediator's report was sent to the appellant's representative under cover letter dated August 31, 2010. This letter stated that:

The mediation stage of this appeal has now been completed. Enclosed please find a copy of the Mediator's Report setting out any issues that have been resolved and the issues that remain in dispute.

The purpose of the Report is to provide the parties to an appeal with a record of the result of mediation and to provide the Adjudicator with information regarding records and issues that remain to be adjudicated.

Please review the Report and if there are any errors or omissions, please contact me no later than **September 13, 2010**. I will consider your comments and determine whether the Report should be revised. You need not contact me unless there are errors or omissions.

After **September 13, 2010**, the appeal will be transferred to an Adjudicator, who may conduct an inquiry and dispose of the outstanding issues in the appeal...

There is no record of any contact by the appellant's representative by September 13, 2010 concerning any errors or omissions in the mediator's report. As a result, file MA10-198 was transferred to adjudication based on the outstanding issues outlined in the mediator's report.

As stated above, during the adjudication of Appeal MA10-198, the Police located the retired detective's notebooks, as well as one page of notes from a named police constable. This resulted in the conclusion of Appeal MA10-198, as all the issues in that appeal were resolved by the location of the retired detective's notebooks. The Police issued a decision letter dated October 28, 2010 concerning these newly located records. As the appellant wished to obtain access to the information severed from the records, Appeal file MA10-198-2 was opened. The only issues being adjudicated upon in this appeal, Appeal MA10-198-2, are those arising from the appeal of the decision of October 28, 2010. Specifically, this order will only address whether the personal privacy exemption in section 38(b) applies to the three pages of officer's notes and whether the information identified by the Police as non-responsive is actually responsive to the appellant's request.

RESPONSIVENESS OF RECORDS

I will now determine whether page 70 of the constable's notes and the portions of the three pages of notes (23, 24 and 69) marked as non-responsive contain information that is responsive to the request.

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;...
- (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).

In the Notice of Inquiry, the Police were advised that:

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 and P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

The Police only appear to have provided representations concerning pages 69 and 70 of the constable's notes. They submit that page 70 relates to police calls on a subsequent date than that on page 69. The Police state that page 70 contains the personal information of other individuals who had contact with the Police, the constable's employment related information and other law enforcement matters, which do not directly concern the appellant. They submit:

An examination of the records located on page 70 will clearly demonstrate that the portions severed as "not responsive" are wholly irrelevant to the documents in question. The incident involving the appellant was clearly concluded on page 69 when he provided the code for the safe under the bed and acknowledged this by signing his name in the memorandum notebook.

The appellant submits that the information marked as non-responsive by the Police on pages 23 and 24 of the retired detective's notes would be information that is clearly within his knowledge. He also states, concerning pages 69 and 70, that:

It is inconceivable that the information redacted from Constable [name] memorandum notes on page 70 relate to calls on a subsequent date as [his] memorandum note on page 69 clearly indicates the start of his shift...

Analysis/Findings

I have reviewed the information identified by the Police as non-responsive on pages 23, 24 and 69 of the notes, which are the three pages of notes provided by the Police in this appeal. I find that the information that has been identified as non-responsive is not responsive to the appellant's request. The incidents and subject matter described in these pages is totally unrelated to the appellant and the incident that gave rise to the responsive information in the records.

With respect to the existence of responsive information on page 70, I am satisfied that the incident that related to the appellant was recorded by the named constable on page 69 of the notes and that his recording of the incident was concluded on that page and not carried over to page 70. I find that there is no basis for me to conclude otherwise.

Accordingly, I uphold the Police's decision concerning the responsiveness of the records.

PERSONAL INFORMATION

I will now determine whether the four lines of information severed by the Police from pages 23 and 24 of the records contains “personal information” as defined in section 2(1) 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 if 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 where 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].

Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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 and PO-2225].

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 and MO-2344].

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 Police submit that:

The information exempted is not about an individual in a professional, official or business capacity, therefore, in the circumstances of this appeal, sections 2.1 and 2.2 of the *Act* do not apply...

The records clearly contain the personal information of identifiable individuals as they pertain to the investigation. Not only is it reasonable to expect that other individuals may be identified if the information is disclosed to the appellant, but that its release would constitute an unjustified invasion of personal privacy.

The appellant agrees that the records contain the personal information of other identifiable individuals.

Analysis/Findings

The information severed from the records is contained on pages 23 and 24. This information consists of the personal information of the appellant and other identifiable individuals in their personal capacity. This personal information is comprised of information about these

individuals' marital status, address and their personal opinions or views that do not relate to another individual in accordance with paragraphs (a), (d) and (e) of the definition of personal information in section 2(1) of the *Act*.

PERSONAL PRIVACY

I will now determine whether the discretionary exemption at section 38(b) applies to the information at issue.

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

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

If the information 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.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 38(b). Neither sections 14(1)(a) to (e) nor section 14(4) apply to the information at issue in the records.

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). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. Section 16 was not raised by the appellant.

Concerning section 14(3), in their decision the Police rely on the presumption in section 14(3)(b), which reads:

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 records were created in connection with a police investigation into the appellant's arrest... They are comprised of information that was collected or created during the course of the investigation...

The appellant does not disagree with the Police's position that the records were compiled and are identifiable as part of an investigation into a possible violation of law under section 14(3)(b).

Analysis/Findings

Based upon my review of the records and the parties representations, I find that they were compiled and are identifiable as part of an investigation into a possible violation of law under section 14(3)(b) of the *Act*. The appellant was being investigated in relation to the laying of specific charges against him under the *Criminal Code of Canada*.

Even if no criminal proceedings were commenced against the appellant, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Orders P-242 and MO-2235]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. Accordingly, subject to my review of the absurd result principle and the Police's exercise of discretion below, disclosure of the personal information at issue in the records is presumed to be an unjustified invasion of the personal privacy of the other identifiable individuals in the records.

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444 and 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 and M-451]
- the requester was present when the information was provided to the institution [Orders M-444 and P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679 and 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 and MO-1378].

The Police submit that the absurd result principle does not apply in this appeal. With respect to the personal information at issue, which is contained at pages 23 and 24 of the records, the appellant submits that the absurd result principle applies as this information is clearly within his knowledge.

Analysis/Findings

The records concern the seizure by the Police of handguns belonging to the appellant. I agree with the appellant that he may be, in the particular circumstances of this appeal, aware of the personal information of other identifiable individuals contained in the records. However, I will not order disclosure of the severed information in the records despite the fact that the appellant may be aware of it. In particular, I find that the absurd result principle is inapplicable to allow disclosure of this personal information of identifiable individuals other than the appellant referred to in the records. In the particular circumstances of this case, I agree with the findings of Adjudicator Laurel Cropley in Order MO-1524-I, where she stated that:

The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.

I also adopt the findings of Adjudicator Frank DeVries in Order PO-2440, where he stated:

I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, the unusual circumstances of this appeal, and the nature of the allegations brought against the police officer and others. I also note that the Ministry has, in the course of this appeal, disclosed certain records to the appellant. I find that, in these circumstances, there is particular sensitivity inherent in the personal information contained in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act* identified by Senior Adjudicator Goodis in Order MO-1378 (namely, the protection of privacy of individuals, and the particular

sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

The information that I have not ordered disclosed by reason of the absurd result principle contains the personal information of identifiable individuals other than the appellant. These individuals were involved in a law enforcement investigation in connection with a pending charge of Assault and Threatening Death. I find that the sensitivity of the particular personal information constitutes a compelling reason for not applying the “absurd result” principle. Disclosure of this personal information would be inconsistent with the purpose of the exemption, which must include the protection of the personal privacy of individuals in the law enforcement context.

EXERCISE OF DISCRETION

I will now determine whether the Police exercised their discretion under section 38(b) concerning the personal information at issue at pages 23 and 24 of the records and, if so, whether I should uphold this 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 and 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.

The Police submit that:

In exercising discretion to exempt information in favour of protecting the privacy of another person, the following factors were considered:

a) Section 29 of the *Act* authorizes the indirect collection of personal information for the purpose of law enforcement. Section 28 introduces safeguards to the collection of personal information. In the case at issue, the balance between right of access and the protection of privacy must be given in favour of protecting the privacy of the other involved parties.

b) In assessing the value of protecting the privacy interests of an individual other than the requester, one needs to consider the nature of the institution. The nature of a law enforcement institution is in great part to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police.

Law enforcement institution records are not simple business transaction records in which disclosure of another individual's personal information may not, on balance, be offensive. Given the unique status of law enforcement institutions within the *Act* and the unique status to authorize the collection of personal information, we generally view the spirit and content of the *Act* as placing a

greater responsibility to safeguarding the privacy interests of individuals where personal information is being collected.

An important principle contained in the Freedom of Information legislation is that personal information held by institutions should be protected from unauthorized disclosure.

The records that fulfilled all the criteria under the *Act* were released. Police investigations imply an element of trust that the law enforcement agency will act responsibly in the manner in which it deals with recorded personal information...

The rights of other involved parties to talk freely and confidentially to investigative police officers outweigh the appellant's right of access to any personal information that may pertain to them contained within the record...

The appellant submits that he is fully aware of the personal information of everyone involved, and indeed has provided part of the information redacted from pages 23 and 24 of the records. He states that he is not requesting "the public's right to know," he is requesting information about an incident in which he was a participant and, therefore, he has personal knowledge of the events.

Analysis/Findings

I find that the Police disclosed as much of the information in the records as could reasonably be disclosed without disclosing material which is exempt under section 38(b). I find that in denying access to the undisclosed portions of pages 23 and 24 of the records, the Police exercised their discretion under section 38(b) in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. I find that the Police applied the claimed exemption in the *Act* appropriately to the withheld portions of the records at issue. Any additional disclosure of information would constitute an unjustified invasion of the personal privacy of other identifiable individuals in the records. Accordingly, I find that the undisclosed portions of the records are exempt under section 38(b) of the *Act*.

ORDER:

I uphold the Police's decision and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

January 5, 2011