

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## RECONSIDERATION ORDER MO-3551-R

Appeal MA16-246-2

Order MO-3517

Toronto Police Services Board

January 23, 2018

**Summary:** The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records related to the requester's arrest. The police denied access to the responsive records in part, citing the discretionary personal privacy exemption in section 38(b) and the discretionary exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with section 9(1)(d) (relations with other governments).

In Order MO-3517, the adjudicator upheld the police's decision under section 38(b) and the police's search for responsive records. The adjudicator did not uphold the police's decision under section 9(1)(d), with section 38(a).

The appellant sought a reconsideration of Order MO-3517. This order dismisses the appellant's reconsideration request.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 5(1), 16, 39(2), 41(1); Information and Privacy Commissioner of Ontario's *Code of Procedure for appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act (Code of Procedure)*, sections 12 and 18.

**Orders Considered:** Orders MO-2205 and MO-3517.

## **OVERVIEW:**

[1] The Toronto Police Services Board (TPS or the police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

This letter is a request for the disclosure of ALL documents/records related to the [date] arrest of [requester's name] [(requester's date of birth)], including, but not limited to,

- records of arrests,
- incident reports and witness statements,
- names of all officers involved,
- memorandum book notes from all officers involved,
- all locations to and from which I was transported and times of transport,
- records of 9-1-1 call(s) or other call(s) placed to police in regard to the incident,
- name of the offender for whom the original call to police was placed.

[2] The police granted partial access to the records and denied access to portions of the records pursuant to the discretionary personal privacy exemption in section 38(b). The police also issued a revised decision in which they also denied access to portions of the records pursuant to the discretionary exemption in section 38(a) of the *Act*, in conjunction with both the law enforcement exemptions in sections 8(1)(c) and 8(1)(l) of the *Act* and the relations with other governments exemption in section 9(1)(d) of the *Act*.

[3] The appellant appealed the police's revised access decision to this office.

[4] During the course of mediation, the appellant advised the mediator that she was appealing the police's decision to withhold portions of the records under the claimed exemptions.

[5] The appellant also questioned the adequacy of the police's search for records. She took the position that all records responsive to the request had not been located by the police.

[6] The police affirmed their access decision but agreed to conduct a second search

for responsive records.

[7] The police subsequently located photographs and issued a supplementary decision granting partial access to these photographs. In the Index of Records, which was forwarded to the appellant, the police claimed the personal privacy exemption in section 38(b) of the *Act* to deny access to some of the photographs, in whole or in part.

[8] The Index of Records also identified the police's decision to deny access to portions of the records that were deemed to be not responsive to the request.

[9] The appellant advised the mediator that she wished to pursue access to the withheld records. She, however, did not wish to pursue access to the following information in the records:

- The particulars of individuals, such as their names, addresses, phone numbers and dates of birth, which had been withheld pursuant to the personal privacy exemption in section 38(b) of the *Act*.
- Police codes and other such information relating to the operations of the police, which had been withheld pursuant to section 38(a) of the *Act*, in conjunction with the law enforcement exemptions in sections 8(1)(c) and 8(1)(l) of the *Act*. The law enforcement exemptions were, accordingly, no longer at issue in this appeal.
- The portions of the records withheld by the police as not responsive to the request.

[10] The appellant also advised the mediator that she continued to believe that all records responsive to the request had not been located.

[11] The appellant also advised the mediator that she wished to proceed to adjudication, where an adjudicator conducts an inquiry, and that she would be raising a constitutional question.

[12] During adjudication, the appellant advised that she did not want access to personal or private information about individuals, but she did want access to contact information that is otherwise available to the public.

[13] Representations were shared between the police and the appellant in accordance with section 7 of the IPC's<sup>1</sup> *Code of Procedure and Practice Direction 7*.

[14] I then issued Order MO-3517 where I upheld the police's decision under section 38(b) and the police's search for responsive records. I did not uphold the police's

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<sup>1</sup> Information and Privacy Commissioner/Ontario.

decision under section 9(1)(d), with section 38(a).

[15] The appellant has now sought a reconsideration of Order MO-3517.

[16] In this reconsideration order, I find that none of the grounds meet the IPC's reconsideration criteria and I uphold my decision in Order MO-3517.

## **RECORDS:**

[17] The records at issue in Order MO-3517 were identified as the withheld portions of the following:

- Record of Arrest and Supplementary Records of Arrest;
- Police and Civilian Witness Lists;
- Police Officers' Notes;
- I/CAD (Computer Aided Dispatch) Event Details Report; and
- Photographs.<sup>2</sup>

## **DISCUSSION:**

[18] The IPC's reconsideration criteria are found in section 18 of the IPC's *Code of Procedure*, which reads in part as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision...

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<sup>2</sup> Excluding the information referred to above that the appellant does not wish to pursue access to.

18.04 A reconsideration request shall be made in writing to the individual who made the decision in question. The request must be received by the IPC:

- (a) where the decision specifies that an action or actions must be taken within a particular time period or periods, before the first specified date or time period has passed; or
- (b) where decision does not require any action within any specified time period or periods, within 21 days after the date of the decision.

18.05 A reconsideration request should include all relevant information in support of the request, including:

- (a) the relevant order and/or appeal number;
- (b) the reasons why the party is making the reconsideration request;
- (c) the reasons why the request fits within grounds for reconsideration listed in section 18.01;
- (d) the desired outcome; and
- (e) a request for a stay, if necessary

[19] In her request for a reconsideration, the appellant asks that I reconsider Order MO-3517 and order that the police be compelled to sever other individuals' personal information from the remaining records so that the residual parts of the remaining records could be disclosed to her.

[20] The appellant listed six grounds for seeking a reconsideration of Order MO-3517. I will list each ground, followed by my decision on each of these grounds.

### **Ground 1**

[21] The appellant states:

In your Order settling the issue of Appeal MA16-246-2, you erred in law and breached principles of natural justice by neglecting to consider the relevance of the request to the public interest as set out in the "public interest" provisions in sections 5(1) and 16 of the *Municipal Freedom of Information and Protection of Privacy Act* (the "Act") and as I had raised in my representations.

[22] Sections 5(1) and 16 of *MFIPPA* read as follows:

5(1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

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

[23] In this appeal, the appellant did not raise the possible application of sections 5(1) and 16 during the earlier stage of mediation.<sup>3</sup> Once the appeal moved to the adjudication stage, these issues were initially not before me. The parties were, therefore, not invited in the Notices of Inquiry issued by me to address the possible application of these sections.

[24] However, in her representations made to me later on in the adjudication stage,<sup>4</sup> the appellant for the first time referenced both sections 5(1) and 16. In her representations, the appellant submitted that, as a victim of several crimes who was subjected to "inhumane treatment" and "unreasonable and discriminatory use of force" during her arrest in 2007, the exemptions in sections 9 and 14 of *MFIPPA* should not apply by reason of the application of sections 5(1) or 16. The police did not respond to these issues in their reply representations, nor did the appellant reference them in her sur-reply representations.

[25] As I ordered disclosure of the section 9 information to the appellant, only the application of the information withheld under the personal privacy exemption in section 38(b), where I applied section 14(3)(b), is at issue.

[26] I acknowledge that Order MO-3517 does not directly reference either sections 5(1) or 16. I did not directly address these two issues as, in my view, they did not apply to the circumstances of this appeal.

[27] With respect to the possible application of section 5(1), the appellant did not address how the police had any reasonable or probable grounds that it was in the public interest to disclose the records at issue and also that the records at issue reveal "a grave environmental, health or safety hazard to the public."

[28] In any event, I would also note that previous orders of our office have found

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<sup>3</sup> The Mediator's Report, sent to the parties at the conclusion of the mediation stage and inviting parties to identify any errors or omissions, did not identify sections 5(1) or 16 as issues in this appeal. The appellant did not identify that this was an error.

<sup>4</sup> When I refer to "representations" in this reconsideration order, I am referring to the appellant's representations in support of Order MO-3517, received by the IPC on February 10, 2017.

that only the head of an institution can exercise this power and our office does not have the authority to order a head to do so.<sup>5</sup>

[29] Regarding the possible application of section 16, the language of the provision clearly sets out that first, there must be a compelling public interest in disclosure of the records, and second, this interest must clearly outweigh the purpose of the exemption. These two requirements have been confirmed by previous orders of this office and decisions of the courts.<sup>6</sup>

[30] The appellant's representations did not address either of these two requirements but instead referred to her private interest in addressing her personal experience with the police.

[31] Because of the limited reference to section 16 in this appeal, I decided that it was not necessary to address its possible application in Order MO-3517.

[32] Court decisions have confirmed that decision makers, whether officers or boards or tribunals, need not address every issue raised by a party.<sup>7</sup> I find this to be particularly true where, as in this case, the issues are raised without sufficient particulars or argument.

[33] In the circumstances, I find that the principles of natural justice were not breached by my not referencing the possible application of section 5(1) and/or 16 in Order MO-3517, and I dismiss Ground 1 as a ground for reconsidering the findings in Order MO-3517.

## **Ground 2**

[34] The appellant states that:

You erred in exercising discretion and breached procedural fairness when you took the decision not to consider my constitutional argument with no regard to my reasoning that the question was raised in accordance with s. 109(2.2) of the *Courts of Justice Act* and with 20.01 of the IPC's *Code of Procedure*, which states, "*The IPC may waive or vary any of the procedures prescribed by or under this code, including any requirements or time period specified in any written communication from the IPC, if it of the opinion that it would be advisable to do so in order to secure a just*

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<sup>5</sup> See for example Order MO-2205

<sup>6</sup> See for example Orders P-1344 and PO-3760.

<sup>7</sup> See *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65 (CanLII) at para 3, where the Supreme Court of Canada stated: "This Court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons." See also, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at paras 15-16.

*and expeditious determination of the issues.*" Nonetheless, if the constitutional argument was not considered due to "the late raising of the question", then it should not have been shared with police and should not have been a factor in the decision-making process. However, despite your decision not to take into consideration my position concerning the constitutional issues, you did factor into your decision the police's response to my constitutional argument as well as your own views of the issues and did so without giving Attorney General an opportunity to respond to the notice.

[35] Section 12.02 of the IPC *Code of Procedure* requires that:

A party raising a constitutional question shall notify the IPC and the Attorneys General of Canada and Ontario of the question within the applicable 35-day time period.

[36] Section 3 of the IPC's *Practice Direction 9* provides that an appellant will be permitted to raise a constitutional question at first instance or an additional constitutional question only within a 35-day period after giving the IPC notice of his or her appeal.

[37] In this appeal, the Notice of Appeal was received by the IPC on June 21, 2016. The appellant did not serve her Notice of Constitutional Question on the IPC until February 10, 2017, over seven months after she filed her notice of appeal.

[38] Section 5 of the IPC's *Practice Direction 9* provides that the Adjudicator has the discretion not to consider a constitutional question raised after the applicable time limit if the appeal proceeds to inquiry.

[39] It is clear from Order MO-3517, that despite the lateness of the appellant's *Charter* notice, I addressed her *Charter* argument in Order MO-3517, as follows:

Even if I were to accept the appellant's late application for a *Charter* remedy, I find that the appellant has not provided me with sufficient evidence as to how her rights or freedoms, as they relate to the disclosure of the information at issue under *MFIPPA*, have been infringed or denied under section 24(1) of the *Charter*.

I find that the appellant's *Charter* argument concerns disclosure of information to her with respect to the criminal proceedings brought against her and not with respect to the denial of access under *MFIPPA*. I agree with the police that the appellant mistakenly assumes that all information once provided through court disclosure, or heard during a trial, should somehow be not exempt under the provisions of *MFIPPA*.



I have also considered the appellant's reference to section 15(1) of the *Charter* in her representations. This section reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

From my review of the appellant's representations and the information at issue in the records, I cannot see how either sections 15(1) or 24(1) of the *Charter* apply.

[40] In my analysis, I briefly refer to the police's reply submission that the appellant "mistakenly assumes that all information once provided through court disclosure, or heard during a trial, should somehow be not exempt under the provisions of *MFIPPA*."

[41] In support of my finding that the appellant's *Charter* argument concerns disclosure of information to her with respect to the criminal proceedings brought against her and not with respect to the denial of access under *MFIPPA*, I note that the appellant in her Notice of Constitutional Question stated that:

The TPS failed to disclose to the Appellant all relevant information, whether inculpatory or exculpatory, during the 2007/2008 trial, thereby impairing the right of the Appellant to make full answer and defence. By now refusing to disclose those records which it knows or ought to know are the only pieces of evidence available that would demonstrate the extent of the Charter violations that occurred on 8 May 2007 and during the subsequent trial, the TPS denies the Appellant the right to seek remedy under s. 24 of the Charter, which also further denies her the right to equal protection and equal benefit of the law. [Emphasis added by me].

[42] I did provide the appellant an opportunity to provide sur-reply representations to the police's reply representations. In her sur-reply representations, the appellant reiterates that she is not requesting disclosure as a defendant in a criminal matter, but as a victim of multiple violations of her rights under the *Charter* by the police.

[43] In this appeal, the capacity in which the appellant is seeking access to the records, i.e. as a victim or an accused, is irrelevant to whether she obtains access to other individuals' personal information under *MFIPPA*.

[44] The appellant sought access to the records at issue in this appeal on February 5, 2016 relating to an incident between the police, the appellant and other individuals that happened over nine years earlier, in May 2007.

[45] Although the records contain both the personal information of the appellant and

other individuals, remaining at issue is information about individuals other than the appellant and includes information about how these other individuals interacted with the police.

[46] Lastly, with respect to the appellant's concern raised in her reconsideration request that the Attorney General was not given the opportunity to respond, as set out above, section 12.02 of the IPC's *Code of Procedure* required the appellant to notify the Attorneys General of her constitutional question. In this appeal, the IPC did not receive any response from either Attorney General. In any event, their participation was not required as I did not find that the appellant had established that her section 15(1) *Charter* rights had been violated during her *MFIPPA* request to the police.

[47] In the circumstances, I do not accept the appellant's position that I "breached procedural fairness" in my review of the constitutional issue, and I dismiss Ground 2 as a ground for reconsidering the findings in Order MO-3517.

### **Ground 3**

[48] The appellant states that:

You erred in law, erred in exercising discretion, and breached principles of natural justice when you agreed to uphold the police's decision to withhold information related to my [descriptive] body, which is clearly already within my knowledge, without providing a sufficiently clear and reasonable basis for why that information is exempt under 38(b) of the Act as an unjustified invasion of another person's privacy.

[49] The appellant appears to be referring to the absurd result principle, which provides that where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.

[50] I note, however, that the information sought by the appellant relating to her body has in fact been disclosed to her.<sup>8</sup>

[51] I therefore find no error in law or breach of principles of natural justice and I dismiss Ground 3.

### **Ground 4**

[52] The appellant states that:

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<sup>8</sup> See for example pages 22, 36, 45, 61, 64, 72, and 73 of the records.

You made an error of fact by confusing my request for unlawfully withheld information that remains only in police possession with "court disclosure" or disclosure of the information contained in the Crown brief. Your comments at paragraph 67 and 68 of your Order contradict your statements at paragraphs 38-40, 46, 47, and 62 where you do acknowledge my claim that I am requesting the records as a victim of violations of my Charter rights by police and that the information to which I am seeking access includes information that was *not* disclosed in accordance with the law. The fact that the requested records contain evidence that was unlawfully withheld in a criminal proceeding and therefore alters my rights under the Charter and the fact that the police are now using the Act to conceal willful and deliberate interference with disclosure obligations are sufficiently clear reasons for why the information at issue in appeal MA16-246-2 should not be exempt under the Act. [Emphasis in original].

[53] As discussed under the heading of Ground 2, whether the appellant makes her request as a victim or an accused does not affect the legal tests for access under *MFIPPA*.

[54] I acknowledge that the appellant is claiming that information that ought to have been disclosed in her criminal trial was withheld, but as I stated at paragraph 49 of Order MO-3517:

...the appellant does not dispute the police's submissions that what she is seeking is to obtain greater disclosure of records produced in the criminal cases in which she is involved in and has confused the process of disclosure under the criminal system with that of disclosure under *MFIPPA*.

[55] The appellant appears to be asking that I review the criminal prosecution disclosure process and the nature of any information that was withheld from her at her criminal proceeding. However, the issue before me in this appeal, and my obligations under *MFIPPA*, are to review the head's decision under section 41(1) of *MFIPPA*, not to review the Crown's disclosure requirements in a criminal proceeding.

[56] The appellant appears to be asserting that her *Charter* rights were violated both during her interaction with the police and at her subsequent related trial. It may be that the appellant could have addressed these issues at trial, in a civil proceeding, or through a formal complaint during which processes she may have been able to obtain any relevant records which were withheld at her trial. However, even if her *Charter* rights were violated at those times, this would not alter or affect the legal analysis under *MFIPPA* of her right to access other people's personal information.

[57] In the circumstances, I dismiss Ground 4 as a ground for reconsidering the

findings in Order MO-3517.

### **Ground 5**

[58] The appellant states that:

You breached procedural fairness when you failed to notify or to require that the police notify the affected parties of the request.

[59] Section 39(2) of *MFIPPA*, which relates to notification, provides that notification of affected persons is a discretionary. This section reads as follows:

Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and may also inform any other institution or person with an interest in the appeal, including an institution within the meaning of the Freedom of Information and Protection of Privacy Act, of the notice of the appeal. [Emphasis added by me].

[60] The appellant's request for records relate to a May 2007 incident and was made in June 2016. This appeal was referred to the adjudication stage of the appeal process in December 2016, over 9 years after the incident in the records occurred.

[61] Upon review of the information at issue, and considering that the events in the records occurred nine years prior to the appellant's request being made and that the appellant was not seeking disclosure of other individuals' identities, I decided that it was not necessary to notify any affected persons prior to making my determination as to the application of the personal privacy exemption to the information remaining at issue in this appeal.

[62] In the circumstances, I find that deciding not to notify did not breach procedural fairness and I dismiss Ground 5 as a ground for reconsidering the findings in Order MO-3517.

### **Ground 6**

[63] The appellant states that:

You erred in fact when you stated in your Order that one of the remaining issues included a "list of witnesses" and their personal information, confusing that with my request for witness statements about me which do not include personal information about those witnesses.

[64] There are two lists of witnesses in the records. These are not witness statements.

[65] One is a civilian witness list,<sup>9</sup> where the name of one civilian witness has been withheld. As the appellant specifically stated that she was not interested in names withheld under section 38(b), I did not adjudicate upon this one withheld name.

[66] The other witness list is a police witness list,<sup>10</sup> where the entire list has been disclosed, including the names of the police officer witnesses, except for two words that I found to be the personal information of one of the police officers, and decided qualified for exemption under section 38(b).

[67] Although there are no formal "witness statements" identified as responsive records, the records do include references to statements made by witnesses to the police.<sup>11</sup> Any records remaining at issue which contain such statements do not include statements "about the appellant," and are about other individuals. The appellant received access to the police officer notes that reflect her interaction with the police that led to the charges against her.

[68] As I did not confuse witness statements with witness lists, I dismiss the final ground sought by the appellant for a reconsideration of Order MO-3517, Ground 6.

**ORDER:**

I uphold my decision in Order MO-3517 and dismiss the appellant's reconsideration request.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_  
January 23, 2018

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<sup>9</sup> At page 9 of the records.

<sup>10</sup> At page 10 of the records.

<sup>11</sup> These statements are copied on the pages that contain the handwritten notes of the police officers that took the statements.