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

ORDER M-68

Appeal M-9200091

Metropolitan Toronto Police

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ORDER

BACKGROUND:

The Metropolitan Toronto Police (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for information regarding the existence of criminal records for four named individuals.

The Police refused to confirm or deny the existence of any responsive records pursuant to section 14(5) of the Act, and the requester appealed this decision.

Mediation was not successful, and notice that an inquiry was being conducted to review the decision of the Police was sent to the appellant and the Police. Written representations were received from both parties.

ISSUES:

The issues arising in this appeal are as follows:

A. Whether a record of the nature requested would contain personal information as defined by section 2(1) of the Act.

B. Whether the Police properly exercised discretion under section 14(5) of the Act in refusing to confirm or deny the existence of any responsive records.

ISSUE A: Whether a record of the nature requested would contain personal information as defined by section 2(1) of the Act.

Section 2(1) of the Act reads, in part, 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, [emphasis added]

In my view, a record of the nature requested by the appellant, if it exists, would contain the criminal history of four identifiable individuals and, therefore, clearly qualifies as personal information of these individuals as defined by section 2(1) of the Act.

ISSUE B: Whether the Police properly exercised discretion under section 14(5) of the Act in refusing to confirm or deny the existence of any responsive records.

Section 14(5) of the Act reads as follows:

> 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 than other requesters who have been denied access under the Act. By invoking section 14(5), the Police are denying the requester the right to know whether a record exists, even when one does not. This section provides the Police with a significant discretionary power which, in my view, should be exercised only in rare cases.

Section 14(5) is identical in wording to section 21(5) of the provincial Freedom of Information and Protection of Privacy Act. In Order P-339, I discussed the application of section 21(5), which states:

> In my view, an institution relying on this section must do more than merely indicate that the disclosure of the records would constitute an unjustified invasion of personal privacy. An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy.

In their representations, the Police, speaking hypothetically, state:

> The institution cannot consent to confirm that individuals, 'A', 'B' and 'C' do not have records but the 'D' does have a criminal record. It would not provide privacy to 'D' if it was only in his/her case that we were to attach a refuse to confirm or deny exemption ... only by the application of Section 14(5) can we protect the privacy of individuals regardless of whether or not the information exists.

I agree with the submissions of the Police that simply confirming the existence of any responsive records could reveal personal information about an identifiable individual, in the circumstances of this appeal. Having reached that conclusion, I must now determine if disclosure of any such records, if they exist, would constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the person to whom the information relates. Section 14(2) provides some criteria for the Police to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

In their representations, the Police specifically rely on section 14(3)(b), which reads as follows:

> 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;

In my view, a record of a criminal conviction is not information which is compiled as part of an investigation; rather, it is the result of either a guilty plea or a conviction by a court, which by their very nature are events which take place after any investigation has been completed. Therefore, in my view, any responsive record, should it exist, would not satisfy the requirements of section 14(3)(b). Because none of the other types of information listed in section 14(3) would apply to such a record, should it exist, I find that there is no presumed unjustified invasion of personal privacy in the circumstances of this appeal.

In her representations, the appellant states that disclosing a criminal record could have the effect of identifying an individual as someone who has engaged in a criminal activity and, further, that disclosure would identify the individual to society and, perhaps, to other victims.

In their representations, the Police state:

> ... A social stigma is still attached by most people in our society to those people known to possess a 'criminal record' although the fact that someone 'has a record' can mean only that they have a single conviction for a minor crime committed ... years ago, and it can also mean multiple serious offenses committed by a chronic offender.

Although neither the Police nor the appellant have referred specifically to any section of the Act, in my view, their representations can be taken to relate to sections 14(2)(b) and 14(2)(f), respectively. These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(b) access to the personal information may promote public health and safety;

(f) the personal information is highly sensitive;

Section 14(2)(b) contains a factor which, if it applies, would favour disclosure of personal information; section 14(2)(f), on the other hand, contains a factor which favours the protection of personal privacy.

Having reviewed the appellant's representations, in my view, she has not provided sufficient evidence to establish that disclosure of the criminal record of an individual, if it exists, would promote public health and safety, and I find that section 14(2)(b) is not a relevant factor in the circumstances of this appeal.

As far as section 14(2)(f) is concerned, I agree with the submission of the Police, and find that the existence of a criminal record is properly considered as "highly sensitive", and that section 14(2)(f) is a relevant consideration. Accordingly, I find that disclosure of the criminal record of an individual, if it exists, would constitute an unjustified invasion of the personal privacy of the persons to whom the information relates, in the circumstances of this appeal.

In reaching this decision, I am aware of the fact that the existence of a particular criminal conviction is a matter of public record, and that this fact would have been disclosed to the public during a trial or plea taken in open court. However, in my view, it does not necessarily follow that this information should be freely and routinely available to anyone who asks.

Commissioner Tom Wright, considered this issue in Order 180. Although that appeal involved a request for a list of the names of lottery winners, I feel that some of his comments are equally applicable to the request made in this appeal. At page 11 of Order 180, Commissioner Wright stated:

> ... In the recent decision in United States Department of Justice, et al., v. Reporters' Committee for Freedom of the Press et al. 109 S.Ct. 1468(1989), the Supreme Court of the United States considered the question of access to criminal identification records or "rap sheets" which contain descriptive information as well as history of arrest, charges, convictions and incarcerations. Much of the rap sheet information is a matter of public record. ... In considering whether or not the disclosure of the rap sheet would constitute an "unwarranted invasion" of the subject of the sheet, Justice Stevens, speaking for the majority, made the following statements which I feel are relevant to the issues that arise in this appeal. At page 1476, Justice Stevens stated that:
>
> > To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information

> concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private.

Further, at page 1477, Justice Stevens stated:

> But the issue here is whether the compilation of otherwise hard_to_obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives and local police stations throughout the country and a computerized summary located in a single clearing house of information.

Finally, at page 1480, Justice Stevens referred to an earlier decision of the Supreme Court in Whalen v. Roe 97 S.Ct 869 at page 872 where the Court stated:

> In sum, the fact that 'an event is not wholly private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information.

Similarly in this appeal, the appellant might, through diligence and investigation, be able to determine if any of the individuals named in her request do have a criminal record. However, in my view, this does not mean that an easily retrievable computerized record of all criminal convictions, if it exists, should be disclosed to the appellant.

In my view, the Police have provided sufficient evidence to establish that disclosure of the existence or non-existence of a criminal record of the four individuals identified by the appellant would constitute an unjustified invasion of their personal privacy, and I find that section 14(5) of the Act applies.

Section 14(5) is a discretionary exemption. The Police have provided representations on their exercise of discretion in favour of claiming this section, and I find nothing improper in the circumstances of this appeal.

ORDER:

I uphold the decision of the Police.

Original signed by: December 2, 1992
Tom Mitchinson
Assistant Commissioner