



Information and Privacy  
Commissioner/Ontario

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

# **ORDER M-127**

**Appeal M-9200337**

**Metropolitan Toronto Board of Commissioners of Police**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

# ORDER

## **BACKGROUND:**

The Metropolitan Toronto Board of Commissioners of Police received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all information pertaining to a search of a person by a police officer. The search was conducted in a courtroom of the Ontario Court, General Division in Toronto. The requester is a lawyer acting on behalf of the individual who was searched.

The Police identified six pages of information as responsive to the request. Page 1 is a document entitled "internal correspondence", while pages 2-6 contain excerpts from the police officer's notebook.

The Police notified two individuals who had an interest in the information contained in the record and sought their consent for the release of the record to the requester. Although one of these persons consented to the release of the information which related to him, the Police did not disclose any part of the record because the institution decided to claim sections 8(1)(i) and 8(2)(a) of the Act to exempt the entire record. The requester appealed the denial of access.

During the course of mediation, the Police revised its claim for exemption and now relies on sections 38(a) and (b) of the Act. The section 8 exemptions are raised in the context of section 38(a).

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the Police was sent to the appellant, the Police and the individual who did not consent to the release of the information relating to her (the affected person). Written representations were received from all parties. The affected person responded through an agent.

## **PRELIMINARY ISSUES:**

### **Records not Responsive**

The requester confirmed during mediation that he is not interested in any portion of the record which does not relate to the incident involving his client. I have reviewed the record. Pages 2 (the first 26 lines) and 5 (the last 5 lines) contain notes relating to other investigations. I find that these portions of the record are not responsive to the request and, therefore, that they fall outside the scope of this appeal.

### **Application of the Act**

In his representations, the agent for the affected person states:

Matters of courtroom security have historically been the exclusive responsibility of the judiciary, specifically the presiding judge. Provincial legislation has not altered this position

...

Neither the Municipal Freedom of Information and Protection of Privacy Act ... nor the Freedom of Information and Protection of Privacy Act ... has attempted to include the judiciary within its reach. In any event, I do not believe it would be constitutionally possible for the Legislative Assembly to make such a declaration.

... Clearly it is beyond the jurisdiction of this Inquiry to obtain records directly from [the affected person] regarding the factors she considered relevant ... [T]he applicant is attempting to elicit this information indirectly by making this information request from [the Police]. Such a collateral request cannot be permitted. It is a well recognized principle of law that you cannot do indirectly that which you are prohibited from doing directly.

The representations appear to raise two issues. First, that the records at issue in this appeal are not subject to the Act. Second, that if the Act applies, the appellant should not be able to obtain indirectly any written information that he would be prohibited from obtaining directly.

While the agent for the affected person did not refer specifically to section 65(3) of the Freedom of Information and Protection of Privacy Act (the provincial Act), I believe that an analysis of this section if necessary to fully address the representations made by this party. Section 65(3) provides:

This Act does not apply to notes prepared by or for a person presiding in a proceeding in a court of Ontario if those notes were prepared for that person's personal use in connection with the proceeding.

It should be pointed out that a comparable provision is not found in the municipal Act.

To address these submissions, I would point out first that the request for access was made under the Act for records in the custody or control of the Police. In addition, in my view, the records in question cannot be described as notes prepared by or for a person presiding in a proceeding in a court of Ontario prepared for that person's personal use in connection with the proceeding. In point of fact, these notes were authored by a police officer to document a search which he had undertaken in a courtroom in response to concerns expressed by two individuals. Quite apart from my characterization of these records, it also follows that, where notes of this nature were provided to the Police, they would cease to be employed for the **personal** use of the judge. For all of these reasons, I find that section 65(3) of the Act has no application to the facts of this case.

In responding to the arguments made by the agent for the affected person, I would also note that section

137(2) of the Courts of Justice Act, which is a confidentiality provision that overrides the application of the provincial Act, is not applicable to the facts of this case. That provision deals specifically with the power of the court to order that any document filed in a civil proceeding be sealed and not form part of the public record.

Next, the agent for the affected person, in essence, submits that where information was originally compiled by an individual presiding over a hearing and then shared with the Police, it would be wrong for an appellant to obtain this material from an alternative, collateral source. Since the representations in questions do not indicate that a presiding judge actually authored any written notes of this nature, I cannot accept this argument.

## **ISSUES:**

The remaining issues in this appeal are:

- A. Whether the information contained in the requested records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the records qualify for exemption pursuant to the discretionary exemption provided by section 38(b) of the Act.
- C. Whether the discretionary exemption provided by section 8(1)(i) of the Act applies to the records at issue.
- D. Whether the discretionary exemption provided by section 8(2)(a) of the Act applies to the records at issue.
- E. If the answer to Issues A, C and/or D is yes, whether the records qualify for exemption pursuant to the discretionary exemption provided by section 38(a) of the Act.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the information contained in the requested records qualifies as "personal information" as defined in section 2(1) of the Act.**

Section 2(1) states, in part:

[IPC Order M-127/April 28, 1993]

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

...

- (g) the views or opinions of another individual about the individual, and
- (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;

In my view, all of the records at issue in this appeal contain the personal information of the appellant's client. The Police submits, however, that portions of the record also contain the personal information of other individuals. One of these individuals has consented to the release of the information relating to him. Therefore, I do not need to consider whether that portion of the record qualifies as his "personal information", as defined in the Act. The agent for the affected person, however, does not consent to the release of the information relating to his client. Therefore, I must consider whether that portion of the record constitutes the affected person's personal information.

It has been established in a number of previous orders that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not "personal information" (Orders P-326, P-333 and P-377). In my view, similar circumstances exist in this appeal. The concerns expressed by the affected person were made in that person's official capacity and I find that the information relating to the affected person does not qualify as that individual's personal information for the purposes of the Act.

**ISSUE B: If the answer to Issue A is yes, whether the records qualify for exemption pursuant to the discretionary exemption provided by section 38(b) of the Act.**

Section 36(1) of the Act gives individuals a general right of access to personal information in the custody or control of institutions. However, this right of access is not absolute. Section 38(b) provides an exception to this general right of disclosure of personal information to the person to whom the information relates. Specifically, section 38(b) provides that:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under Issue A, I found that the records contain the personal information of the appellant only. Therefore, section 38(b) does not apply in the circumstances of this appeal.

**ISSUE C: Whether the discretionary exemption provided by section 8(1)(i) of the Act applies to the records at issue.**

Section 8(1)(i) states:

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

endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

Section 8 of the Act requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather be one that is based on reason (Orders M-4, M-15 and M-22).

In its representations, the Police submits that:

Municipal police forces have, by legislation, the responsibility for the security of court facilities within their jurisdictions. The reality of today's economy requires that police resources be capable of providing a reasonable level of security to areas including court facilities with a minimum of personnel. The assignment of police personnel to particular courts, floors of a courthouse or any defined area of a courthouse facility is not public knowledge and such knowledge being made public would endanger the security of such

facilities.

The records at issue relate to an incident which occurred in a courtroom over a year ago. I am not satisfied that disclosure of information, which would reveal the assignment of a particular police officer to an area of a facility over a year ago, could reasonably be expected to endanger the security of the building now or in the future.

The agent for the affected person also provided representations on this issue. The gist of the submission is that disclosure of the record could reasonably be expected to negatively affect future security in courtrooms because important information regarding potentially dangerous situations may not be conveyed for fear that an access to information application may subsequently be made. I do not agree. No evidence has been provided to me to substantiate that such an expectation is reasonable.

Accordingly, I find that the record does not qualify for exemption under this section of the Act.

**ISSUE D: Whether the discretionary exemption provided by section 8(2)(a) of the Act applies to the records at issue.**

The Police submits that section 8(2)(a) applies to the entire record. Section 8(2)(a) reads:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order to qualify for exemption under section 8(2)(a) of the Act, a record must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

(Order M-12)

The word "report" is not defined in the Act. However, it is my view that, in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order M-12).

Pages 2-6 of the records reflect information that was recorded by the police officer at the time of the incident. Page 1, which essentially contains the same information, was prepared by the officer in response to a directive by her Unit Commander to explain the circumstances of the contact between the officer and the appellant's client. It was created approximately five months after the original notes were taken. The Police submits that the records in their entirety detail the officer's assignment for the shift, the information ascertained, the actions taken and the results of those actions.

In my view, neither the internal correspondence nor the police officer's notes meet the definition of a report. The correspondence and the notes contain only observations or recordings of fact. Finally, page 1 of the record was not prepared in the course of the investigation. On this basis, it is my view that section 8(2)(a) does not apply to the records at issue.

Having found under Issues C and D that neither of the exemptions in sections 8(1)(i) or 8(2)(a) of the Act apply to the record, it is not necessary for me to address Issue E.

### **ORDER:**

1. I order the Police to disclose the records to the appellant, with the exception of the portions of the records on pages 2 and 5 which are not responsive to the request, within fifteen (15) days of the date of this order. I have attached a highlighted version of those pages which identifies in yellow the parts which should **not** be disclosed.
2. In order to verify compliance with the order, I order the Police to provide me with a copy of the records which were disclosed to the appellant pursuant to Provision 1, **only** upon request.



Original signed by: \_\_\_\_\_ April 28, 1993  
Irwin Glasberg  
Assistant Commissioner