



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-312

Appeal M-9300562

Metropolitan Toronto Police Services Board



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ORDER

BACKGROUND:

The Metropolitan Toronto Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the document referred to as "Disclosure" or "Crown's Envelope" relating to the requester's arrest and incarceration.

The Police located 28 pages of records responsive to the request, provided access in full to eight pages and denied access in whole or in part to the remaining 16 pages pursuant to sections 14(1)(a), 14(1)(f), 14(2)(i), 14(3)(a), 14(3)(b), 14(3)(d), 38(b) and 38(d) of the Act. 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. Representations were received from both parties.

The document to which the appellant refers is entitled "Confidential Crown Envelope". The records at issue in this appeal are the 16 pages to which the Police denied access in whole or in part. These pages are listed in Appendix "A" to this order.

ISSUES:

The issues to be addressed in this appeal are as follows:

- A. Whether the records contain "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the records contain the personal information of both the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies to the records.
- C. If the answer to Issue A is yes, and the records contain the personal information of the appellant only, whether the discretionary exemption provided by section 38(d) of the Act applies to the records.

SUBMISSIONS/CONCLUSIONS:

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

Section 2(1) of the Act states, in part, that "personal information" means "recorded information about an identifiable individual".

In my view, all of the information contained in the records qualifies as personal information for the purposes of section 2(1) of the Act. I further find that, with the exception of Pages 25 and 26, each page contains personal information which relates to the appellant and other identifiable individuals. One sentence on Page 25 refers to an individual other than the appellant. The remaining portions of Pages 25 and 26 contain the personal information of the appellant only.

ISSUE B: If the answer to Issue A is yes, and the records contain the personal information of both the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies to the records.

In the majority of the records, the Police have granted the appellant access to the parts of the records which contain reference to or information about himself. The Police have withheld only those parts of the records which, in my view, contain personal information of the appellant and other identifiable individuals.

Section 36(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 38 of the Act provides a number of exemptions to this general right of access. One such exemption is found in section 38(b) of the Act, which reads:

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

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

Section 38(b) introduces a balancing principle. The Police must look at the information and weigh the requester's right of access to his or her personal information against the rights of other individuals to the protection of their personal privacy. If the Police determine that the disclosure of the information would constitute an unjustified invasion of the personal privacy of other individuals, then section 38(b) gives the Police the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's 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 an individual's personal privacy.

Section 14(3) of the Act lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(3)(b) states:

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, all of the above-noted personal information was compiled and is identifiable as a part of an investigation into a possible violation of law, namely The Criminal Code, and I find that disclosure of this information would constitute an unjustified invasion of personal privacy under section 14(3)(b).

Once a presumption under section 14(3) of the Act has been established, it may only be rebutted by the considerations contained in section 14(4) or by the public interest "override" set out in section 16 of the Act (Order M-170). I am of the opinion that none of the information at issue falls within the ambit of section 14(4) of the Act. In addition, the appellant has not argued that the public interest override set out in section 16 of the Act applies to the facts of this case.

Accordingly, I am of the view that the presumption contained in section 14(3)(b) applies to the personal information at issue in this appeal and that the personal information therefore qualifies for exemption under section 38(b) of the Act.

Section 38(b) is a discretionary exemption. I have reviewed the representations of the Police regarding their exercise of discretion to deny access to the records. I find nothing to indicate that the exercise of discretion was improper and I would not alter it on appeal.

ISSUE C: If the answer to Issue A is yes, and the records contain the personal information of the appellant only, whether the discretionary exemption provided by section 38(d) of the Act applies to the records.

Section 38(d) of the Act provides:

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

that is medical information if the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;

Pages 25 and 26 comprise a two-page report prepared by staff psychiatrists at Metropolitan Toronto Forensic Services (Metfors) relating to a court ordered assessment of the appellant. The Police submit that release of this report would seriously prejudice any treatment that the appellant may have undertaken and may prejudice any current or future effort to encourage the appellant to take or continue treatment. The Police have provided no evidence to support these assertions.

Section 38(d) requires that the disclosure of medical information **could reasonably be expected to** prejudice the mental or physical health of the individual. The phrase "could reasonably be expected to" is also found in section 8(1) of the Act.

In Order M-202, it was held that the exceptions to access set out in section 8(1) require that there exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the information and the harm alleged.

I believe this interpretation should also apply to the phrase as it is used in section 38(d) of the Act.

In my view, the Police have not established the linkage between the information contained in the record and the anticipated harm of prejudice to the mental or physical health of the appellant. Accordingly, I find that the record does not qualify for exemption under section 38(d).

Under Issue B, I found that all personal information relating to individuals other than the appellant was properly exempt under section 38(b). I have highlighted on the copies of Page 25 which I have provided to the Police with this order, the portion of this page which should not be disclosed to the appellant as it contains the personal information of an individual other than the appellant. As no other exemptions have been claimed for the remaining portions of Pages 25 and 26, they should be released to the appellant.

ORDER:

1. I order the Police to disclose to the appellant Page 26 in its entirety.
2. I order the Police to disclose to the appellant the portions of Page 25 which are **not** highlighted. I have provided a copy of this page to the Freedom of Information Co-ordinator of the Police with this order.
3. I order the Police to disclose the pages identified in Provisions 1 and 2 within fifteen (15) days of the date of this order.
4. I uphold the decision of the Police not to disclose the remaining pages.
5. In order to verify compliance with this order, I order the Police to provide me with a copy of the pages which are disclosed to the appellant pursuant to Provisions 1 and 2, **only** upon request.

Original signed by: _____

Laurel Cropley
Inquiry Officer

_____ April 22, 1994

APPENDIX "A"

| PAGE NUMBER | DESCRIPTION | DECISION | DISPOSITION |
|-------------|---|-----------------|--|
| 2 | Record of Arrest | Partial release | Decision upheld |
| 3 - 4 | Supplementary Record of Arrest | Partial release | Decision upheld |
| 5 | Witness List | Partial release | Decision upheld |
| 6 | Witness Statement | Withheld | Decision upheld |
| 7 | Witness Statement (first page) | Partial release | Decision upheld |
| 9 | Witness Statement | Partial release | Decision upheld |
| 11 - 12 | Statement of Accused (handwritten) | Partial release | Decision upheld |
| 13 - 14 | Statement of Accused (typewritten version of pages 11 - 12) | Partial release | Decision upheld |
| 15 | Subpoena Request | Partial release | Decision upheld |
| 16 | Information | Partial release | Decision upheld |
| 25 - 26 | Metfors Report | Withheld | Disclosure in accordance with highlighted copy |