



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-302

Appeal M-9300501

Metropolitan Toronto Police Services Board



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

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 the investigative file relating to an internal affairs investigation of the requester. The investigation was conducted in January - February 1992.

The Police identified a number of records containing 502 pages as being responsive to the request and denied access to all of them, claiming the application of the exemptions in sections 8(1)(a), (b), (c), (d), (e), (f) and (l), 8(2)(a) and (c), 14, and 38(a) and (b) of the Act. The requester appealed the decision of the Police.

During mediation the Police disclosed 17 pages of the records to the appellant. The Police also raised the exemption provided by section 8(1)(g) of the Act.

Subsequently the Police located some 20 audio tapes that were also responsive to the request. The Police granted the requester partial access to one tape which consisted of an interview with the requester. Other portions of this tape were not disclosed pursuant to section 14 of the Act. The Police have previously indicated, however, that all the records containing personal information of other individuals have relevance to the appellant and that section 38(b) applies. The same exemptions as previously claimed were applied by the Police to deny access to the balance of the tapes.

Further mediation was not successful and notice that an inquiry was being conducted to review the decision of the Police was sent to the Police and the appellant. Representations were received from both parties. In their representations the Police indicated that they had claimed section 8(2)(c) in error. Accordingly, I will not consider it in this order.

ISSUES:

The issues arising in this appeal are:

- A. Whether the records contain "personal information" as defined in section 2(1) of the Act.
- B. Whether the discretionary exemptions provided by sections 8(1)(a), (b), (c), (d), (e), (f), (g), (l) and/or 8(2)(a) of the Act apply.
- C. If the answer to Issues A and B is yes, whether the discretionary exemptions provided by sections 38(a) and (b) of the Act apply.

SUBMISSIONS/CONCLUSIONS:

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

Personal information is defined in section 2(1) of the Act, in part as "... recorded information about an identifiable individual ..." Having reviewed all the records, I am satisfied that they contain personal information about the appellant and other identifiable individuals.

ISSUE B: Whether the discretionary exemptions provided by sections 8(1)(a), (b), (c), (d), (e), (f), (g), (l) and/or 8(2)(a) of the Act apply.

In order for a record to qualify for exemption pursuant to sections 8(1)(a), (b), (c), (d), (g) or 8(2)(a) of the Act, it must first satisfy the definition of "law enforcement" found in section 2(1). This section defines "law enforcement" as:

- (a) policing;
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b).

Given the nature of the investigation undertaken by the Police into the activities of the appellant, I find that this definition has been satisfied.

Section 8(1)(a) of the Act states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,
interfere with a law enforcement matter;

In order for this exemption to apply, the Police must establish a clear and direct linkage between the information contained in the records and the harm alleged (Orders P-581 and P-590). In addition, the word "interfere" in sections 8(1)(a) and (b) of the Act contemplates a situation where the particular investigation or law enforcement matter is still ongoing (Orders P-285, P-316 and P-403).

The appellant states that he was told of the investigation and is aware that "nothing came of it". He also submits that, given the length of time that has passed since the fact of the investigation came to his attention (over two years), it cannot be said that disclosure of the information could interfere with an "ongoing investigation".

The Police indicate that, while the appellant is somewhat aware of the circumstances surrounding the investigation which lead to charges against him, there are still outstanding issues which have yet to be resolved. They have also provided evidence to explain how the disclosure of the requested information could result in the alleged harms. Accordingly, I am satisfied that the exemption in section 8(1)(a) applies to all the written documentation as well as to the audio tapes withheld in their entirety. Given the sensitivity of this matter and the fact that the appellant is himself a law enforcement officer, I cannot be more specific about how I reached this conclusion.

ISSUE C: If the answer to Issues A and B is yes, whether the discretionary exemptions provided by sections 38(a) and (b) of the Act apply.

Section 36(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody of or under the control of an institution. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access, including sections 38(a) and (b) of the Act which state:

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

- (a) if section 6, 7, **8**, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information; [emphasis added]
- (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

I have found under Issue A that the records contain the personal information of the appellant and other individuals. Under Issue B, I found that the written documentation and the audio tapes withheld in their entirety qualify for exemption under section 8(1)(a) of the Act.

Section 38(a) is a discretionary exemption. The Police have provided me with representations regarding their exercise of discretion in refusing to disclose this information to the appellant. I find nothing improper in the exercise of discretion and would not alter it on appeal.

Section 38(b) introduces a balancing principle. In this case, the Police must consider the information in the

undisclosed portion of the one audio tape and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her personal privacy. If the Police determine that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the Police 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 own personal information, the only situation under section 38(b) in which he can be denied access to the information is if it can be determined that disclosure of the information **would** constitute an unjustified invasion of another individual's 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 another individual's personal privacy. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The Police submit that the presumption under section 14(3)(b) applies to the materials deleted from the audio tape that was disclosed to the appellant. This section 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;

Based on the description of the investigation given above, I am satisfied that the presumption contained in section 14(3)(b) applies to the information on the balance of this audio tape.

The only way in which a section 14(3) presumption can be overcome is if the personal information falls under section 14(4) of the Act or where section 16 of the Act, the public interest override, applies (Order M-170).

I have considered section 14(4) and find that the personal information at issue does not fall within the ambit of this provision. In addition, the appellant has not argued that section 16 applies.

Accordingly, I am of the view that disclosure of the balance of the one audio tape would constitute an unjustified invasion of the personal privacy of the individuals mentioned thereon. Section 38(b) is a

discretionary exemption and I am satisfied that there is nothing improper with the exercise of discretion of the Police in refusing to give access to this information.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ April 14, 1994