



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

ORDER M-365

Appeal M-9400110

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>

NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested copies of records from the Metropolitan Toronto Police Services Board (the Police) relating to a complaint she filed with the Police Complaints Commissioner (the PCC). The Police originally denied access to the records, pursuant to the exemption in section 8(1)(a) of the Act. The Police advised the appellant that the records were not in their custody at the time of the request but were being reviewed by the PCC.

Subsequently, the records responsive to the request were returned to the Police from the PCC. The Police issued a new decision letter to the appellant and provided access to the majority of the records.

The Police claim that the following pages are not responsive to the request: Pages 22, 58, 61, 62 (in part), 68, 69 (in part), 70, 71-76, 79-84, 105 (in part) and 130 (in part). The appellant was advised of the position of the Police with respect to these pages. She initially indicated that, as she had not seen these pages, she was content to rely on the opinion of this office. Subsequently, she advised the Commissioner's office that she had changed her mind. She was notified of this matter but did not submit any representations with respect to her position.

I have carefully reviewed the pages the Police claim are not responsive to the request. I agree with the Police that they are not responsive or relevant to the appellant's request. They all deal with Police investigations involving individuals other than the appellant.

The records remaining at issue in this appeal may be generally described as internal correspondence, police officers' notebooks, investigation log sheets and occurrence reports concerning the appellant's complaint. They are described in Appendix "A" to this order.

The Police rely on the following exemption in denying access to the records at issue:

- invasion of privacy - sections 14(1) and 38(b)

A Notice of Inquiry was provided to the parties to the appeal. Representations were received from the Police and the appellant.

PRELIMINARY MATTER

Processing of the Request

The appellant submitted her request to the Police on January 27, 1994. On February 18, 1994 the Police issued a decision in which, as I have previously indicated, the appellant was denied access to the entire file based on the law enforcement exemption in section 8(1)(a) of the Act. In their decision letter the Police stated:

The file regarding your complaint is presently being reviewed by the Police Complaints Commissioner. Once the review has been completed you will receive a letter stating his decision. After the file is no longer active, you may apply to our office again requesting access to the information relating to your complaint.

The appellant appealed this decision of the Police.

On April 13, 1994, the Police sent the appellant another letter indicating that, with respect to their letter of February 18, 1994, they:

... did not have custody or control of the records at that time, as it was being reviewed by the Commissioner's office for a law enforcement purpose. The review by the Police Complaints Commissioner has now been concluded and this office received custody of the file on April 12, 1994. We will now reactivate your access request and notify you of our decision regarding disclosure of the file not later than May 12, 1994.

On April 26, 1994, the Police issued another decision granting the appellant partial access to her file. It is this decision which I will address in this order.

Given the circumstance described above, in the Notice of Inquiry provided to the parties to this appeal, the Police were asked to comment on the application of section 18 of the Act (transfer of the request) which states:

- (1) In this section, "institution" includes an institution as defined in section 2 of the Freedom of Information and Protection of Privacy Act, 1987. ("institution")
- (2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries to determine whether another institution has custody or control of the record, and, if the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
 - (a) forward the request to the other institution; and
 - (b) give written notice to the person who made the request that it has been forwarded to the other institution.
- (3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

- (4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,
 - (a) the record was originally produced in or for the other institution; or
 - (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.
- (5) Where a request is forwarded or transferred under subsection (2) or (3), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it.

In their submissions, the Police state that the PCC has only temporary custody of the complaint file for administrative convenience and that during this period, the Police retain control over the file. This position is in opposition to that put forward by the Police in their letter to the appellant dated April 13, 1994 and quoted above, in which they state that they "... did not have custody or **control** ..." over the file when they received the appellant's access request.

The representations of the Police go on to state that:

The Municipal Freedom of Information and Protection of Privacy Act requires in section 18 that an institution which receives a request for access to a record that it does not have in its custody or under its control shall transfer the request to the institution having custody or control. Section 18 then goes further to require an institution that receives a request for access to a record for which the head considers another institution has a greater interest in, to transfer the request to the institution with the greater interest.

The institution submits that, if the transfer of the appellant's request to the Ministry of the Attorney General was appropriate, it would also be appropriate for the Ministry of the Attorney General to transfer the request back to this institution under section 18 because this institution has the greater interest in the records.

Reasonableness and logic **must** prevail. Given the circumstance that the Police Complaints Commissioner's review process is a continuing part of the law enforcement investigation into the complaint lodged by the appellant, the decision of this institution not to transfer the request was appropriate. In a true effort to cause the appellant the least bureaucracy, this institution advised the appellant that access was denied at that time but the request for access would be reconsidered when the Commissioner's review had been completed and the file was returned to our physical custody and control.

I do not agree with the manner in which the Police have interpreted section 18 and their obligations in the circumstances of this appeal.

It is clear that when the Police received the appellant's request, they did not have physical custody of the appellant's file. It was in the hands of the PCC. If, as the Police now appear to suggest, the Police still had **control** of the file, they should have requested the PCC to provide them with copies of the file, which was not very lengthy, in order to make a decision on access within the thirty-day time period mandated by the Act. Moreover, as the Police themselves acknowledge, when the PCC conducts its review, it has the authority to take copies of any relevant documents from the originating police facility, although in practice the original file is forwarded. This practice suggests to me that in fact the Police do retain control over the file even during the PCC investigation.

On the other hand, if the position of the Police is that they had neither custody nor control over the file when they received the request, it is my view that, pursuant to section 18(2) of the Act they should have transferred the request to the Ministry of the Attorney General, the institution responsible for PCC investigations, which had custody or control at that time.

To accept the position of the Police would mean that in cases such as this, requesters would have to wait until the PCC had completed its investigation and returned the file to the local police force where the subject officer is employed. Only then would requesters receive a proper decision on access to their files.

I cannot accept this interpretation of the Act. In the present case, this has resulted in the appellant waiting for some three months from the date of her request prior to receiving a decision on access to the records. It has also resulted in the Police initially making a decision on access to the records when they did not have custody of them. This decision was made without the Police having reviewed the records.

As the Police now have custody of the records, have reviewed them and have made a decision on access, there is no remedial order I can make with respect to this issue in this case. However, it would be advisable for the Police to follow the aforementioned approach in dealing with this situation in the future.

I will now address the decision of the Police with respect to access to the records.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where 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.

I have carefully reviewed all the pages at issue in this appeal to determine if they contain "personal information" and, if so, to whom the personal information relates. I have made the following findings on this issue:

- (1) Pages 4, 5, 6, 9, 25, 26, 28, 31, 32, 33, 35, 36, 54, 55, 57, 59, 60, 62-65, 66, 67, 69, 70, 77, 78, 87, 89, 92-103, 111, 127, 143, 144 and 145 contain the personal information of the appellant **and** other individuals, and
- (2) Pages 56, 106, 133-134 and 154-155 contain the personal information of other individuals only.

As is indicated in Appendix "A", Pages 25, 26, 28, 87 and 111 are copies of Public Complaint Form 1. A copy of the top portion of these forms, excluding information about some possible witnesses, is provided to the individual who files the complaint, in this case, the appellant.

Pages 31-32 consist of a letter that was written on behalf of the appellant and copied to her. Pages 35, 36, 127, 143, 144 and 145 are correspondence authored by the appellant and sent to various individuals investigating her complaint. Pages 59-60 are portions of the appellant's signed statement given to the investigating officer.

In these circumstances, I believe there can be no unjustified invasion of the personal privacy of the individuals whose names were withheld from these documents. Accordingly, Pages 25, 26, 31-32, 35, 36, 87, 59-60, 127, 143, 144 and 145 should be disclosed to the appellant in their entirety. The top portion of Page 28, excluding the names of witnesses which have been withheld, should also be disclosed.

With respect to the balance of the pages of the records, section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 14(1) of the Act prohibits an institution from releasing this information.

In both these situations, sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The Police submit that the presumptions contained in sections 14(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law), 14(3)(d) (employment history) and 14(3)(h) (racial origin) apply to the personal information at issue. They also claim that disclosure of the information would unfairly damage the reputation of individuals referred to in the record (section 14(2)(i)) and that this is a factor which weighs in favour of privacy protection.

Having reviewed the representations of the parties and the records, I have made the following findings with respect to those pages containing both the personal information of the appellant **and** other individuals:

- (1) These pages contain information generated as a result of the PCC investigation into the complaint of the appellant. The investigation was conducted pursuant to the Police Services Act and involved a determination of whether two individuals had violated the Code of Conduct for police officers. I am satisfied that the personal information was compiled and is identifiable as part of the investigation into this possible violation of law. Accordingly, the disclosure of this information would constitute a presumed unjustified invasion of personal privacy under section 14(3)(b).
- (2) None of this information falls within the ambit of section 14(4). Nor has the appellant submitted that section 16 of the Act applies to this personal information.
- (3) Accordingly, the exemption in section 38(b) applies to those portions of Pages 4, 5, 6, 9, 33, 54, 55, 57, 62-65, 66, 67, 69, 70, 77, 78, 89 and 92-103 that are at issue in this appeal, as well as to the names of the witnesses that have been withheld from Page 28.

The remaining pages are those containing the personal information of individuals other than the appellant - Pages 56, 106, 133-134 and 154-155. Based on the same analysis that I have just undertaken, I find that the personal information contained in these pages also falls within the presumption in section 14(3)(b) and that this presumption has not been rebutted. Accordingly, the information at issue in these pages is exempt from disclosure under section 14(1) of the Act.

ORDER:

1. I uphold the decision of the Police to deny access to the names of the witnesses on the bottom portion of Page 28, as well as to those portions of Pages 4, 5, 6, 9, 33, 54, 55, 56, 57, 62-65, 66, 67, 69, 70, 77, 78, 89, 92-103, 106, 133-134 and 154-155 that are at issue in this appeal.
2. I order the Police to disclose to the appellant the top portion of Page 28 and Pages 25, 26, 31-32, 35, 36, 59-60, 87, 111, 127, 143, 144 and 145 in their entirety within fifteen (15) days of the date of this order.
3. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the pages which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Anita Fineberg
Inquiry Officer

August 2, 1994

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	DECISION
4, 5, 6, 9	Investigation Log Sheets	Decision upheld
25, 28, 111	Public Complaint - Form 1	Disclose pages 25 and 111 and top portion of page 28. Decision upheld with respect to witness names on bottom portion of page 28
26	Public Complaint - Form 1A	Disclose in full
31, 32	Two-page letter dated December 20, 1991	Disclose in full
33, 35, 36	Letters dated October 13, 1992 and November 7, 1992	Page 33 - decision upheld Pages 35-36 - disclose in full
54, 55	Internal correspondence	Decision upheld
56	Undated sheet Statement	Decision upheld
57	Statement	Decision upheld
59-60, 62-65	Police officers' notebooks	Pages 59-60 - disclose in full Pages 62-65 - decision upheld
66, 67	Statement	Decision upheld
69, 70	Police officers' notebooks	Decision upheld

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	DECISION
77, 78	Statement	Decision upheld
87	Public Complaint - Form 1	Disclose in full
89	Statement	Decision upheld
92-103	Occurrence/Supplementary Occurrence Reports	Decision upheld
106	Computer Sheet	Decision upheld
127, 144, 145	Letter dated October 16, 1993	Disclose in full
133, 134, 154, 155	Computer Sheets	Decision upheld
143	Letter dated January 27, 1994	Disclose in full