



**Information and Privacy
Commissioner/Ontario**

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

FINAL ORDER M-449

Appeal M-9400217

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

NATURE OF THE APPEAL:

This is my Final Order disposing of the one remaining issue which was initially addressed in Interim Order M-384. In that order, I directed the Metropolitan Toronto Police Services Board (the Police) to provide written representations on the factors they considered in exercising discretion to withhold portions of Records 2 and 4 from the appellant pursuant to section 38(b) of the Municipal Freedom of Information and Protection of Privacy Act (the Act).

The Police responded to Interim Order M-384, but did not provide representations concerning their exercise of discretion.

This final order will address the Police's decision not to exercise discretion in the circumstances of this appeal, as well as render a final decision with respect to Records 2 and 4. To facilitate an understanding of this decision, I have included some background information relating to Interim Order M-384.

BACKGROUND:

Interim Order M-384 dealt with a request for copies of all records from the Police relating to the death of the appellant's husband.

In that order, following my review of the five records and nine photographs at issue, I found that the information contained in Records 2 (a supplementary report) and 4 (police officer's notes) satisfied the definition of personal information, and that the information related to **both** the deceased and the appellant. On this basis, I found that both records were to be analyzed under section 38(b) of the Act.

In their decision letter, the Police claimed that sections 14 and 38(b) applied to the records at issue in this appeal. However, it was not clear from the letter or the records to which portions of the records each section had been applied. Although requested to do so, the Police did not submit representations to the Commissioner's office in support of the exemptions claimed.

In the absence of representations by the Police, and in view of my determination that Records 2 and 4 be analyzed under section 38(b), which, as I indicated above, is a discretionary exemption, I ordered the Police to provide representations on their decision to exercise discretion in favour of not disclosing the information at issue.

DISCUSSION:

In responding to Interim Order M-384, the Police indicated that they disagreed with my finding that Records 2 and 4 must be analyzed under section 38(b). They stated that they applied section 14 to exempt the portions of these two records which remain at issue. Their response implies that they continue to rely on section 14.

The Police were advised by this office that their representations were incomplete with respect to the exercise of discretion and were provided with an explanation of the basis for the analysis of records under

section 38 as opposed to section 14. The Police were again asked to provide representations on their exercise of discretion.

The Police responded to this request. In their response, they state:

This institution does not accept the "approach" developed for the convenience of appeals officers at the IPC. We continue to be guided by the wording of the Municipal Freedom of Information and Protection of Privacy Act.

In my view, the response of the Police indicates a fundamental difference of opinion regarding the approach which I adopted in Interim Order M-384 to analyze the personal information contained in the records. My evaluation was based on the approach adopted in Order M-352 and followed in many subsequent orders.

The approach taken by the Commissioner's office with respect to the analysis of personal information was set out in considerable detail in Order M-352. In that order, Inquiry Officer John Higgins reviewed the statutory context under which an analysis of personal information in a record should be made. Following his discussion of the purpose of both the section 14 and 38 exemptions, Inquiry Officer Higgins stated that:

In order to give effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the Commissioner's office has developed an approach for determining whether Part I or Part II of the Act applies. In that approach, the unit of analysis is the **record**, rather than individual paragraphs, sentences or words contained in a record.

In that order, Inquiry Officer Higgins discussed at some length the legislature's purpose for creating a distinction in the Act between an individual's own personal information and that of another individual. He stated that the rationale is to emphasize the special nature of requests for one's own personal information. In recognizing that individuals have a greater right of access to their own personal information, the Act gives institutions the power to grant access in situations where responsive records may also contain the personal information of other individuals. Inquiry Officer Higgins concluded that:

In my view, the record-by-record analysis best reflects the special character of requests for records containing one's own personal information, and it provides a practical, uniform procedure which all institutions can apply in a consistent manner.

As a result of their disagreement with the approach taken in Interim Order M-384, the Police indicated that, never having considered the application of section 38(b) to the portions of the records which had been severed, they were not prepared to detail an exercise of discretion which never took place.

In my view, the Police's response raises several issues:

1. The Police disagree with the approach which the Commissioner's office has consistently taken to address this issue.
2. As a result of this disagreement, the Police have declined to exercise their discretion in this case.

With respect to the first issue, if the Police do not agree with a decision of the Commissioner, appropriate legal mechanisms exist to challenge such a determination. In the absence of disputing the decision in this manner, the Police are required to comply with the order.

The second issue is more complex. The Police indicate that since the analysis of the personal information at issue was originally undertaken under section 14, they cannot now, in retrospect, provide representations on factors relating to the exercise of discretion under section 38(b) that were not originally considered.

In my view, it is implicit that if the original decision was made under section 14, which does not require the exercise of discretion, and a subsequent decision is made that the analysis was incorrect, a new decision would be required to be made by the institution in order to comply with the requirements of the part of the Act under which the analysis should have been done.

It would appear that the Police have implicitly taken the position that once they have made a decision, they cannot subsequently reconsider that decision under another section of the Act.

In maintaining this position, the Police have indicated an unwillingness to consider that the information in the two records contains the appellant's personal information, and to consider her right to access to this information.

In my view, if this approach was accepted, the Police would effectively be able to forestall a decision relating to an individual's request for personal information by simply refusing to respond to the Notice of Inquiry. Such a result is prejudicial to all parties to a request, and is clearly not contemplated in the legislation.

Section 43(1) of the Act requires that the Commissioner's office dispose of all issues that arise in an appeal. In my view, the disposition of the issues must be in accordance with the access and privacy protection principles enunciated in the Act. In the absence of representations from the Police on the factors they considered in refusing access to the information at issue, I have no choice but to undertake an independent review of the records and to consider the relevant circumstances in this case.

ACCESS AND PRIVACY RIGHTS WITH RESPECT TO PERSONAL INFORMATION

The purposes of the Act are two-fold with respect to the treatment of personal information. One purpose of the Act is to protect the privacy of individuals with respect to personal information about themselves held by institutions. The second purpose of the Act is to provide individuals with a right of access to that information.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government institution. Section 38 provides a number of exceptions to this general right of access, one of which is found in section 38(b) of the Act.

Under this provision, 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.

Section 38(b) introduces a balancing principle. The requester's right of access to his/her own personal information must be weighed against another individual's right to the protection of his or her personal privacy. If it is determined that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives an institution the discretion to deny the requester access to the personal information (Order 37).

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. Section 14(3) lists the types of information whose disclosure is presumed to constitute such an invasion.

In Interim Order M-384, I found that the information at issue was compiled and is identifiable as part of an investigation into a possible violation of law, and that there existed a presumed unjustified invasion of personal privacy under section 14(3)(b) of the Act. However, in determining whether or not disclosure of this information would constitute an unjustified invasion of another individual's personal privacy under section 38(b), **all relevant circumstances** must be considered and consideration need not be restricted to the specific criteria in the Act (Order 14).

In my view, it is particularly important in law enforcement matters, given the broad application of the section 14(3)(b) presumption to personal information contained in these types of records, for the person analyzing the request to turn his or her mind to the principles enunciated in the Act regarding the rights of individuals to access information in such records which contain their own personal information.

Section 38(b) clearly contemplates the possible disclosure of information which relates to another individual when that information is found in the same record that also contains the personal information of the requester. Disclosure of this information is possible under section 38(b) even in circumstances where disclosure would otherwise be presumed to constitute an unjustified invasion of another individual's personal privacy.

I have reviewed the appellant's representations and the portions of Records 2 and 4 which remain at issue. I have carefully considered all the circumstances in this appeal. In balancing the interests of the appellant in disclosure of the personal information and the privacy interests of the deceased, I find that disclosure of the

information at issue in Records 2 and 4 would **not** constitute an unjustified invasion of personal privacy under section 38(b) of the Act.

The information in Records 2 and 4 should, therefore, be disclosed to the appellant. For greater clarity, I have highlighted the portions of Records 2 and 4 which are to be disclosed to the appellant on the copy of the records which has been provided to the Police's Freedom of Information and Privacy Co-ordinator with a copy of this order.

ORDER:

1. I order the Police to disclose to the appellant, within fifteen (15) days of the date of this final order, the portions of Records 2 and 4 which have been highlighted on the copy of the records which has been provided to the Police's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. In order to verify compliance with the provisions of this final order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

January 24, 1995