



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

# ORDER M-719

Appeal M\_9500443

Metropolitan Toronto Police Services Board



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## NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act) of a decision of the Metropolitan Toronto Police Services Board (the Police) to deny access to records requested under the Act.

A company requested a police investigation into the actions of an employee who was suspected of defrauding the company. The Police investigated the matter and criminal charges were laid. The company then requested access, under the Act, to the information contained in the police file. In particular, it requested access to any statements given to the investigating officer by the accused and all other witnesses. The company's request was made on its behalf by its solicitor.

The Police located records responsive to the request and determined that the interests of a number of individuals could be affected by disclosure of the information. The Police notified four of these individuals (the accused and three witnesses) pursuant to section 21 of the Act, and requested representations as to whether they would consider disclosure of these records to be an invasion of their personal privacy. The three witnesses consented to disclosure of their statements. The accused could not be located.

The Police granted partial access to the records, including those portions of the three witnesses' statements which did not contain personal information of other individuals. Access was denied to the remaining information in the records pursuant to section 14(1) of the Act (invasion of privacy).

The company appealed this decision. In its letter of appeal, the company indicates that it is currently involved in civil litigation with the former supervisor of the accused and claims that the statement provided by the accused contains information about the supervisor which is relevant to this litigation.

A Notice of Inquiry was sent to the Police and the company. Representations were received from both parties. The records at issue consist of the withheld portions of a 17-page police report.

## DISCUSSION:

### PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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 reviewed the records at issue to determine whether they contain personal information, and if so, to whom it relates. I have set out my findings below.

1. Pages 1 - 4 consist of a Fraudulent Document Report and Supplementary Report. The withheld portions of pages 1 - 3 contain particulars of the offence, including information about the accused and other individuals. I find this information qualifies as the personal information of the individuals referred to in the record. The Police have withheld page 4 in its entirety. However, I find that only the information on the line "Suspects Received" and "Occurrence No." qualifies as the personal information of the individual identified.
2. Pages 5 and 6 consist of a Fraudulent Cheques Report and Chart. The Police have withheld these pages in their entirety. However, I find that only the "RE:" and File No. portions of page 5 and the "Occurrence #" and File No. portions of page 6 qualify as personal information within the meaning of section 2(1) of the Act.
3. I have found that only portions of pages 4, 5 and 6 contain personal information. I have highlighted in yellow on the copies of the records sent to the Police's Freedom of Information and Privacy Co-ordinator, those portions of pages 4, 5 and 6 which qualify as personal information. As the remaining portions of these pages do not contain personal information, and as no other exemptions have been claimed for this information, it should be disclosed to the appellant.
4. Pages 7 - 12 consist of a Record of Arrest and Supplementary Record of Arrest. This record contains particulars of the arrest, including information about the accused and other individuals, and details of the charges. All of the information in these pages qualifies as the personal information of the individuals referred to in them.
5. Pages 13 - 15 and 17 consist of the statements given by two of the witnesses. The Police have withheld the names of other individuals referred to in the statements. The remaining portions of these pages were disclosed to the appellant pursuant to section 14(1)(a) (consent to disclosure). The information which has been withheld qualifies as the personal information of the individuals referred to in the statements.

## **INVASION OF PRIVACY**

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. Specifically, sections 14(1)(a) and (f) of the Act read:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

### **Section 14(1)(a)**

The company submits that consent does not have to be explicit, but that it may be inferred from the person's conduct or the surrounding circumstances. In the circumstances of this appeal, the supervisor has initiated legal action against the company. The company submits that in doing so, the supervisor has implicitly accepted that full discovery is the company's right.

I have dealt with similar arguments in previous orders (Orders M-603 and P-919). In both those cases, the appellants argued that in bringing an action against the appellant, the affected parties had opened themselves up to full discovery and had essentially waived their privacy rights under the Act. In the current appeal, the company is not arguing that the supervisor has waived his privacy rights. Rather, it submits that he has implicitly consented to disclosure of his personal information. In my view, however, the substance of these arguments raise similar issues.

In Order P-919, I stated with respect to the issue of waiver:

I am unable to accept the appellants' position that by making the Board proceedings relevant to the lawsuit, the family has waived any claim to privacy. One of the primary purposes of the Act is to protect the privacy of individuals with respect to personal information about themselves held by institutions (section 1(b)). In my view, the principles of the Act are not compatible with the concept of waiver with respect to its privacy protection provisions.

In my view, the reasoning in Order P-919 is equally applicable to the company's arguments in the current appeal. Moreover, disclosure through the discovery process and disclosure under the Act function within entirely different schemes. This is expressly recognized in section 51(1) of the Act, which states:

This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

I cannot accept the company's arguments, therefore, that by bringing a civil action against them, and thus opening himself up to full discovery, the supervisor has, in any way, consented to disclosure of his personal information under the Act. Accordingly, I find that section 14(1)(a) does not apply in the circumstances of this appeal.

### **Section 14(1)(f)**

As a result of my finding above, the only exception which might apply in the circumstances of this appeal is section 14(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether 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 Police must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The Police state that the information which has been withheld was compiled as part of a police investigation into the conduct of the accused. Accordingly, the Police argue that the presumption in section 14(3)(b) applies to exempt this information from disclosure. This section provides:

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 submissions of the Police and my review of the records, I find that the personal information which I have identified above was compiled and is identifiable as part of an investigation into possible violations of the Criminal Code. Therefore, the presumption in section 14(3)(b) applies.

The company argues that the presumption against disclosure is rebuttable, and that the head must have regard to the considerations enumerated in section 14(2) of the Act. In this regard, the company refers extensively to the litigation in which it is involved, and indicates that the factor in section 14(2)(d) is relevant in the circumstances. This factor, which weighs in favour of disclosure, states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request.

Even if I were to find that section 14(2)(d) was relevant in the circumstances of this appeal, the Divisional Court's decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767 held that the factors in section 14(2) cannot be used to rebut the presumptions in section 14(3).

As I previously indicated, a presumption in section 14(3) may only be overcome by the application of section 14(4) or section 16 of the Act. The information does not fall within the types of information listed in section 14(4). The company has not raised the possible application of section 16, and I find that it does not apply.

In these circumstances, I find that disclosure of the personal information which the Police have withheld **would** result in an unjustified invasion of the personal privacy of the individuals referred to in the records. Accordingly, this information is properly exempt under section 14(1) of the Act.

**ORDER:**

1. I order the Police to disclose those portions of pages 4, 5 and 6 which are **not** highlighted in yellow, by sending copies of the pages to the appellant on or before **March 18, 1996**. The highlighted portions of these pages should **not** be disclosed.
2. I uphold the decision of the Police to withhold the remaining records from disclosure.
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 records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ February 26, 1996