



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

# **INTERIM ORDER M-1055**

**Appeal M-9700194**

**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:**

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 all records concerning the requester including photographs.

The Police located a number of responsive records and denied access to them, either in whole or in part, under the following sections of the Act:

- law enforcement - section 8(1)(a)
- relations with other governments - section 9(1)(d)
- invasion of privacy - sections 14 and 38(b)

The Police advised the requester that he should contact the Forensic Identification Bureau (the Bureau) to obtain copies of photographs. The requester (now the appellant) appealed the decision of the Police.

During mediation, the appellant raised the issue of reasonable search. In addition, the Police issued a supplementary decision denying access to the photographs pursuant to sections 15(a) (records available to the public) and 50(2) (records available by statute, custom or practice immediately before the Act came into force) of the Act.

A Notice of Inquiry was sent to the Police, the appellant and a number of individuals whose interests may be affected by disclosure of the record (the affected persons). Because the records appeared to contain the appellant's personal information and the Police relied on sections 8, 9 and 15 to deny access, the application of section 38(a) (deny requester's own information) was raised in the Notice of Inquiry.

In their representations, the Police state that section 8(1)(a) was claimed in error for portions of pages 58 and 59 and they have disclosed this information to the appellant. The Police now rely solely on section 38(b) to exempt the remaining information on these pages.

## **RECORDS:**

The records provided to this office by the Police consist of Occurrence Reports, Supplementary Reports, C.P.I.C. printouts, Records of Arrest, Supplementary Records of Arrest, a Warrant for Witness, Supplementary Records of Appearance Notice and General Occurrence Reports.

The Police did not provide copies of the photographs responsive to the appellant's request.

**DISCUSSION:****JURISDICTION**

Pages 2-17 of the records relate to the investigation of an incident in which the appellant was the alleged victim. They consist of Records of Arrest, Police Reports, C.P.I.C. information and a Warrant for a Witness. I have carefully reviewed these pages and I find that I have no jurisdiction under the Act to consider them.

**PREVIOUS CUSTOM OR PRACTICE**

The Police have relied on section 50(2) and section 15(a) to deny access to the photographs.

Section 50(2) states:

This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by statute, custom or practice immediately before the 1st day of January, 1991.

In their representations, the Police state that the photographs are available to the members of the public from the Bureau. The appellant has objected to the fact that the photographs were not disclosed to him under the Act.

Former Commissioner Sidney B. Linden addressed the application of section 63(2), the provincial equivalent of section 50(2) of the Act, in Orders 187 and 217. He stated:

In general, the thrust of the Act is to promote open government; however, in cases where prior access practices were perhaps not as well thought out as they should have been, I do not believe that subsection 63(2) of the Act should be invoked in order to perpetuate such practices.

Former Commissioner Linden made these remarks in the context of an appeal where the institution had reconsidered its access practices prior to the Act coming into force and determined that more restricted access to certain kinds of information was more appropriate in light of the legitimate restrictions to access contained in the Act.

I agree with former Commissioner Linden's remarks and I find that section 50(2) of the Act may not be invoked to support access practices which may not be in accordance with the purposes of the Act. Section 50(2) allows access mechanisms for information, other than personal information, which existed

prior to the Act coming into force, to continue. It cannot be used by an institution to avoid its obligations under the Act.

In their representations and in discussions with the Appeals Officer, the Police have not confirmed that the appellant will be given access to all responsive photographs through the Bureau. They have not provided me with any details about the procedure followed by the Freedom of Information Unit of the Police or the Bureau with respect to identifying responsive photographs. Nor have they provided any information with respect to how a decision is made to release photographs through the Bureau.

Photographs fall under paragraph (a) of the definition of records found in section 2 of the Act. They have the potential to contain personal information of identifiable individuals other than the requester. This would invoke the application of the mandatory exemption found in section 14 or possibly the discretionary exemption found in section 38(b). The Police have not provided me with any information as to whether the photographs contain personal information. There may also be circumstances in which the Police wish to claim section 8 to exempt photographs from disclosure.

The appellant has asked for photographs concerning matters in which he was involved personally, therefore, it is highly probable that the photographs would contain the appellant's personal information. The wording of section 50(2) clearly states that the section is only to be applied to information that is not personal information.

Therefore, I find that section 50(2) does not apply in the circumstances of this appeal.

## **REASONABLE SEARCH**

The appellant states that additional records should exist which respond to his request including the record of a 911 call.

Where a requester provides sufficient details about the records he is seeking, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that the requested records do not exist. However, in order to properly discharge their obligations under the Act, the Police must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate records responsive to the appellant's request.

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

The Police were asked to provide us with a written summary of all steps taken in response to the appellant's request with the exception of the photographs.

In their representations, the Police provided me with a list of the steps they followed in responding to the appellant's request for records other than the photographs and the name of the individual who conducted the search. The steps included reviewing the request with the appellant at the time it was made. The Police state that although the appellant stated that he wanted to check for all personal records, he did not provide any specific information or dates to help identify the records. The Police state that the record retention period for Occurrence Reports and Records of Arrest is five years. Since the appellant did not give any dates, a search was completed for the last five years and everything identified as responsive was retrieved. The Police also checked the Criminal Records unit but no records were found.

The Police submit that the appellant did not indicate he wanted any records relating to a 911 call at the time of the request. However, when informed that the appellant was looking for this information, the Police conducted a search of the Communications Centre and found no records relating to a 911 call.

Having considered the representations of the Police and the appellant, I find that they have conducted a reasonable search to locate the records other than photographs sought by the appellant.

### **INFORMATION AVAILABLE TO THE PUBLIC**

The Police have claimed that section 15(a) applies to the photographs. Section 15(a) states that a head may refuse to disclose a record where the record or the information contained in the record has been published or is currently available to the public.

This exemption is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access; it is not intended to be used in order to avoid an institution's obligations under the Act (Orders P-1114, P-1316 and P-1387).

In order for a record to qualify for exemption under section 15(a), the record, or the information contained in it, must either be published or available to members of the public generally, through a regularized system of access, such as, for example, a public library or a government publications centre (Orders P-327, P-1316 and P-1387).

Once an institution establishes that section 15(a) applies, the fee structure of the Act, including the provisions for fee waiver, is no longer operative (Orders 159, P-1316 and P-1387).

In order to establish that a regularized system of access exists an institution must demonstrate that there is a system, that the record or information is available to everyone and there is a pricing structure which is applied to all who wish to obtain the information (Order P-1316).

In the particular circumstances of this appeal, in order to have the photographs qualify for exemption under section 15(a), the Police must demonstrate that **all** photographs which are responsive to the appellant's request would be made available to him through the Bureau.

During the mediation stage of the appeal, the Appeals Officer attempted to confirm with the Police that access to all responsive photographs was guaranteed if the appellant requested them through the Forensic Identification Bureau. The Appeals Officer was unable to obtain this confirmation.

In their representations, the Police addressed this issue very briefly. They stated:

[Section 15(a)] was used regarding photographs. The photographs are available to members of the public from our Forensic Identification Services.

The Police have not provided any evidence respecting the Bureau's procedure with regard to identifying responsive photographs for disclosure nor have they stated that all photographs responsive to a request would be made available to the public generally.

As with any request for information under the Act, when the Police receive a request for photographs they must determine which photographs are responsive to the request and make a decision under the Act. In some instances, the Police may wish to exercise their discretion to apply section 15(a) to exempt the photographs from disclosure under the Act because all of the photographs would routinely be made available to the public. However, for the reasons I expressed in my discussion of section 50(2), I cannot accept that this is the case in every situation. Photographs will frequently contain personal information of the requester and/or other identifiable individuals. Therefore, they would not be disclosed to the public generally.

For these reasons, I cannot conclude that all photographs are routinely made available to the public through the Bureau. I find that the Police have not established that the photographs are "published or available to the public". Therefore, section 15(a) does not apply.

The Police denied access to the photographs pursuant to sections 50(2) and 15(a) of the Act. I have not upheld the application of either section. Because the photographs may contain information to which a mandatory exemption will apply, the Police will be given an opportunity to review the photographs and make an access decision with respect to the possible application of sections 10 or 14. I remain seized of this appeal until this matter is resolved.

## **INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records and the submissions of the Police. I find that page 44 of the records contains the appellant's personal information only. I find that all of the remaining pages constitute the personal information of the appellant and other identifiable individuals.

Section 36(1) of the Act allows individuals access to their own personal information held by a government institution and the appellant, therefore, he has a general right of access to those records which contain his personal information. Section 38 also sets out exceptions to this right.

Under section 38(a) of the Act, the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions including section 9 would apply to the disclosure of the personal information.

## **RELATIONS WITH OTHER GOVERNMENTS**

Section 9(1) states:

A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

- (a) the Government of Canada;
- (b) the Government of Ontario or the government of a province or territory in Canada;
- (c) the government of a foreign country or state;
- (d) an agency of a government referred to in clause (a), (b) or (c);
- ...

The Police state that the information for which section 9(1)(d) was claimed was retrieved from the Canadian Police Information Centre (C.P.I.C.) database by the Police. The Police also state that the information was supplied to the C.P.I.C. system by the Ontario Provincial Police Suspension Control Centre in Orillia.

In many circumstances, it will be clear that a reasonable expectation of confidentiality exists among police agencies providing information to and retrieving information from the C.P.I.C. system. I do not accept, however, that the OPP have a reasonable expectation of confidentiality against the appellant with regard to the specific information obtained from the C.P.I.C. system on this occasion. All the information retrieved relates to the suspension of the appellant's driving licence. Therefore, I find that page 44 does not qualify for exemption under section 9(1) of the Act. Accordingly, section 38(a) does not apply and the record should be disclosed to the appellant.

## **INVASION OF PRIVACY**

Where a record contains the personal information of both the appellant and other individuals, section 38(b) of the Act gives the Police the discretion to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. 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 23 of the Act applies to the personal information.

The Police submit that section 14(3)(b) of the Act applies to all of the records at issue. Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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.

The Police submit that the records were compiled as a result of investigations into a number of matters involving the appellant. In some matters the appellant was a possible suspect while in other matters the appellant was the complainant or alleged victim.

Having reviewed the records, I find that all of the remaining records were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, I find that they are subject to the presumption found in section 14(3)(b) of the Act.

I have considered the application of section 14(4) of the Act and find that none of the personal information at issue falls within this provision and the appellant has not claimed that section 23 applies in this case. Thus, I find that disclosure of the records **would** constitute an unjustified invasion of the personal privacy of other identifiable individuals and, therefore, the records are exempt under section 38(b) of the Act.

**ORDER:**



1. I order the Police to disclose page 44 of the records to the appellant by sending the appellant a copy by **January 15, 1998**.
2. I order the Police review the responsive photographs and make a decision under the Act with respect to the application of any **mandatory** exemptions in accordance with section 22 of the Act by **January 30, 1998**.
3. I dismiss the appeal with respect to pages 2-17 of the records.
4. I uphold the decision of the Police to withhold the remaining information.
5. In order to verify compliance with the provisions of this interim order, I reserve the right to require the Police to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.
6. Prior to disclosing any photographs, I order the Police to provide me with a copy of the decision and the responsive photographs referred to in Provision 2. These should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: \_\_\_\_\_  
Marianne Miller  
Inquiry Officer

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December 30, 1997