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

ORDER MO-1186

Appeals MA-980173-1 and MA-980199-1

Toronto Police Services Board

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BACKGROUND:

The Toronto Police Services Board (the Police) received two multiple-part requests under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The first request, which was designated Request Number 980738 by the Police, was for access to records relating to the following:

1. Files "with the Police Complaints Commissioner" pertaining to a hit and run accident in July 1995.

2. Files "with the Police Complaints Commissioner" related to an occurrence where the requesterwas taken by the Police to the Toronto East General Hospital in July 1996.

3. Files "with the Police Complaints Commissioner" pertaining to an occurrence when the Police allegedly assaulted the requester in July 1997.

4. Records relating to the requester's arrest on a charge of mischief in March 1998.

The Police responded by making inquiries of its Public Complaints Bureau to locate any responsive records. Records responsive to the first part of the request were found to no longer exist, as they had been destroyed in accordance with the Police's records retention policy. The Police denied access to records responsive to Parts 2 and 3 of the request, claiming that because of the operation of section 52(3) of the Act, the records fell outside the ambit of the Act. The Police granted access to portions of the records responsive to Part 4 of the request. Access to the undisclosed parts of one record responsive to Part 4 of the request was denied under sections 8(1)(e) (endanger life or safety) and 38(a) (discretion to refuse requester's own information) of the Act.

After receiving the decision of the Police in response to the first request, the requester filed a second request for access to records. This request was assigned Request Number 980946 by the Police and consisted of the following:

1. Any record indicating that he had a history of mental illness.

2. The requester's criminal record.

3. Records relating to any previous arrests of the requester on a variety of specified charges, as well as records pertaining to the hit and run accident in July 1995 which formed part of the first request.

4. All files which he had previously requested.

The Police denied access to records relating to his previous arrests, on the basis that some of these records, compiled prior to 1992, had been destroyed in accordance with its records retention schedule. Access to portions of the records relating to subsequent arrests of the requester were denied under sections 8(1)(e), 14(1) and 38(a) and (b) (invasion of privacy) of the Act. In addition, the Police maintained that records related to the requester's complaints against the Police were not accessible under the Act, due to the operation of section 52(3). Portions of the requester's two-page criminal record were disclosed to him.

The Police denied access to those parts of this record which were not disclosed under sections 14(1) and 38(b) of the Act.

The requester, now the appellant, appealed the Police decision to deny access on the basis that additional records, particularly records relating to his pre-1992 arrests, the July 1995 hit and run accident, a Form 1 under the Mental Health Act and a videotape of his arrest in July 1997, should exist. He also appealed the Police decision to deny access to the records relating to the public complaints made against several police officers, and the severing of information from the records which were disclosed to him.

As mediation was unsuccessful, a Notice of Inquiry was provided to the appellant and the Police. Submissions were received from the Police only. Since there exists some overlap in the records responsive to the two appeals, this office decided to proceed with one inquiry which will dispose of all the issues arising from both requests.

RECORDS:

Request 980738 (Appeal Number MA-980173-1)

The records responsive to Parts 2 and 3 of this request comprise approximately 200 pages. The sole remaining record responsive to Part 4 of this request consists of the undisclosed portions of one page of a Supplementary Record of Arrest dated March 4, 1998.

Request 980946 (Appeal Number MA-980199-1)

The records responsive to this request include all of the records identified above, as well as 14 pages relating to two public complaints, the undisclosed portions of seven pages of Supplementary Record of Arrest and Record of Arrest forms (which include the one page responsive to the earlier request), and the undisclosed portions of the appellant's two-page criminal record.

DISCUSSION:

JURISDICTION

The Police submit that all of the records relating to the appellant's public complaints against police officers, which comprise Parts 2 and 3 of Request 980738 and Pages 16-29 of the responsive records in Request 980946, fall outside the ambit of the Act as a result of the operation of sections 52(3)1 and 3. Accordingly, the first issue to be determined in this appeal is whether the requested information falls within the scope of sections 52(3)1 and 3 and section 52(4) of the Act. These provisions read as follows:

(3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

(4) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment- related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

Section 52(3)1

In order for a record to fall within the scope of section 52(3)1, the Police must establish that:

1. the record was collected, prepared, maintained or used by the institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the Police.

Parts One and Two of the Test

Based on my review of the review of the records to which the Police have applied section 52(3)1, I am satisfied that they were collected, prepared, maintained and used by the Police. I further find that this collection, preparation, maintenance and usage was in relation to anticipated proceedings under the Police Services Act (the PSA) before an "other entity", specifically the Chief of Police or his delegate (Orders M-835 and M-840). The first two components of the test have, accordingly, been met.

Part Three of the Test

In Order M-835, Assistant Commissioner Tom Mitchinson made the following findings with respect to whether proceedings under the PSA relate to either labour relations or the employment of a person by the Police:

> Despite what I acknowledge to be a general public interest in policing matters, I find that these Part V [of the PSA] proceedings do in fact "relate to the employment of a person by the institution". The penalties outlined in section 61(1), which may be imposed after a finding of misconduct, involve dismissal, demotion, suspension, and the forfeiting of pay and time. In my view, these can only reasonably be characterized as employment-related actions, despite the fact that they are contained in a statute and applied to police officers.

I adopt the findings of the Assistant Commissioner for the purposes of this appeal and find that the records which relate to the investigation into the appellant's complaints against police officers may be characterized as "employment-related" for the purposes of section 52(3)1.

In Order P-1618, Assistant Commissioner Tom Mitchinson found that in order to meet the requirements of section 65(6)1(the provincial equivalent to section 52(3)1), it must be established that the proceedings or anticipated proceedings referred to are current or are in the reasonably proximate past so as to have some continuing potential impact for any ongoing labour relations issues which may be directly related to the records. He went on to find that:

> In my view, section 65(6) must be understood in context, taking into consideration both the stated intent and goal of the Labour Relations and Employment Statute Law Amendment Act (Bill 7) - to restore balance and stability to labour relations and to promote economic prosperity; and overall purposes of the Act - to provide a right of access to information under the control of institutions and to protect the privacy of and provide access to personal information held by institutions. When proceedings are current, anticipated, or in the reasonably proximate past, in my view, there is a reasonable expectation that a premature disclosure of the type of records described in section 65(6)1 could lead to an imbalance in labour relations between the government and its employees. However, when proceedings have been completed, are no longer anticipated, or are not in the reasonably proximate past, disclosure of these same records could not possibly have an impact on any labour relations issues directly related to these records, and different considerations should apply.

In the present situation, the proceedings against the police officers under the PSA have long since been completed. Accordingly, I find that there are no "proceedings or anticipated proceedings before a court, tribunal or other entity", either existing or in the reasonably proximate past. Therefore, the third part of the test under section 52(3)1 has not been met.

The Police submit that the interpretation placed on the language in section 52(3)1 by the Assistant Commissioner in Order P-1618 is currently the subject of an Application for Judicial Review to the Ontario Court (General Division) Divisional Court. As a result, the Police submit that its legal authority to disclose records which may be found to fall outside the jurisdiction of the Act has been called into question. They urge that until the Judicial Review Application has been concluded and a decision rendered by the Divisional Court, it would be improper to disclose information under the Act which may, ultimately, be found to fall outside its ambit.

In my view, until such time as the Divisional Court renders its decision on the interpretation placed on the language in section 65(6)1 (the equivalent provision to section 52(3)1 in the provincial Act) by the Assistant Commissioner in Order P-1618, it remains "good law". Accordingly, I have determined that this approach is the appropriate one and will apply it in the circumstances of this appeal.

Section 52(3)3

In order for the records to qualify under section 52(3)3, the Police must establish that:

1. The records were collected, prepared, maintained or used by an institution (in this case, the Police) or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Police have an interest.

[Order P-1242]

Parts One and Two of the Test

The Police state that under section 76(1) of Part VI of the Police Services Act (the PSA), the Chief of Police is obliged to establish and maintain a Public Complaints Investigation Bureau within the police service to investigate public complaints against police officers. During the course of these investigations, information is gathered concerning a particular complaint and recorded and stored.

The Police submit that the information contained in the Public Complaints Investigation Bureau record-holdings was collected, prepared, maintained and used by the Police in relation to the preparation of a report for the Chief of Police, who will then make a decision as to the disposition of the complaint under section 90(3) of the PSA. In this way, the Police submit that the investigating officers communicate the results of their investigation into a public complaint to the Chief of Police by way of a final report.

In Order P-1223, Assistant Commissioner Tom Mitchinson made the following comments regarding the interpretation of the phrase "in relation to" in section 65(6) of the provincial Freedom of Information and Protection of Privacy Act, the equivalent to section 52(3) of the Act:

> In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was **for the purpose of, as a result of, or substantially connected to** an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity. (emphasis added)

In my view, information contained in the Public Complaints Investigation Bureau files was collected, prepared, maintained and/or used by the investigating police officers **in relation to** the preparation of a final report on the results of their investigation, which they then communicated to the Chief of Police. Therefore, I find that the first and second requirements of section 52(3)3 have been established.

Part Three of the Test

The Police submit that, in Order M-931, a finding was made that proceedings under Part VI of the PSA "relate to employment" for the purposes of paragraph 3 of section 52(3).

Investigations under Part VI of the PSA are conducted by the Public Complaints Investigation Bureau within a police service. Such investigations are begun following the receipt of a complaint from a member of the public against a police officer. A number of consequences may flow from an adverse finding against an officer by the Chief of Police under section 90(3) of the PSA. For example, a Board of Inquiry may be convened pursuant to section 60 of the PSA, which may impose sanctions, including discipline, dismissal, suspension, forfeiture of pay or time against the officer under investigation.

In accordance with my finding in Order M-931, records which were prepared, maintained, collected or used in relation to communications about an investigation under Part VI of the PSA, including information used by investigating officers, are about employment-related matters.

In Order P-1618, Assistant Commissioner Mitchinson examined whether the Ontario Provincial Police "have an interest" in records relating to a complaint made against an officer six years prior to the date of the request. He found that:

> In the present appeal, I agree that the OPP had an obligation under the PSA to investigate the appellant's spouse's complaint against the two OPP officers, and that this constituted a legal interest in an employment-related matter at the time of the investigation. However, six years have passed since the OPP's investigation and the subsequent complaint to the PCC. I have been provided with no evidence to suggest that there is an outstanding interest in the investigation that has the capacity to affect the OPP's legal rights or obligations.
>
> As I noted above, section 65(6)3 is record specific and fact specific. In the circumstances of this case, there is no matter pending or reasonably foreseeable which has the capacity to affect the Ministry's legal rights or obligations. Therefore, I find that the Ministry has not demonstrated that it has a sufficient legal interest in the investigation records to bring them within the ambit of section 65(6)3.
>
> Therefore, I find that the third requirement of section 65(6)3 has not been established.

I adopt the reasoning expressed by the Assistant Commissioner for the purpose of the appeals before me. In these appeals, the records relate to complaints made by the appellant against police officers in 1996 and 1997. I find that I have not been provided with sufficient evidence to demonstrate there is a matter pending or reasonably foreseeable which has the capacity to affect the legal rights or obligations of the Police. Accordingly, I find that the Police have not demonstrated that they have a sufficient legal interest in the complaint records to bring them within the ambit of section 52(3)3 and the third part of the test has not been satisfied.

The Police have not claimed the application of any of the exemptions contained in the Act to the records which relate to the appellant's complaints against the Police. Because neither section 52(3)1 nor section

52(3)3 applies, I find that all of the records responsive to Parts 2 and 3 of the appellant's first request and pages 16-29 of the records responsive to the second request, which comprise the Public Complaints Investigation Bureau files, fall within the jurisdiction of the Act. I will include a provision in this order requiring the Police to make an access decision on these records, pursuant to sections 19 and 22 of the Act.

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 address and telephone number of the individual (section 2(1)(d)), and the individual's name if 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 (section 2(1)(h)).

The sole record responsive to Part 4 of the appellant's first request and the identical document, designated as Page 7 of the records responsive to the second request make reference to the appellant, as well as two other individuals involved as victims in the matter which gave rise to the charges against the appellant. Although these individuals are not identified by name on this record, I find that it contains sufficient information to enable the appellant to identify them. The record therefore contains their personal information under the introductory wording to the definition of that term in section 2(1), in addition to that of the appellant.

Pages 8, 10, 11, 13, 14 and 15 contain the names, addresses and telephone numbers of two identifiable individuals who were involved in two other incidents which resulted in charges being brought against the appellant. I find that this information constitutes the personal information of these individuals under section 2(1)(d). Further, I find that each of these records also contain the personal information of the appellant.

Pages 30 and 31 of the records responsive to the appellant's second request consist of the appellant's criminal record. The only information which was not disclosed to the appellant in this document are the names of the victims and the appellant's associates who are listed therein. I find that this information qualifies as the personal information of these individuals as it includes their name, along with other personal information about them, as contemplated by section 2(1)(h). Because this record describes the appellant's criminal history, I find that it also contains his personal information as defined by section 2(1)(b).

INVASION OF PRIVACY

Where a record contains the personal information of both the appellant and another individual, section 38(b) allows the Police 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. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The Ontario Court of Justice (General Division) determined in the case of John Doe et al. v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, that the only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 14 exemption.

Section 14(3)(b) states that:

> A disclosure of personal privacy 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.

The Police state that the information contained in Page 7 of the records responsive to the appellant's second request (which is identical to the sole record responsive to the first request), and Pages 8, 10, 11, 13, 14, 15, 30 and 31 were compiled and are identifiable as part of several police investigations into the appellant's activities. The Police submit, therefore, that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, and its disclosure would constitute a presumed unjustified invasion of personal privacy.

I have reviewed the undisclosed portions of each of these records and considered the representations of the Police. I find that each record was created as part of a police investigation into allegations of criminal wrong-doing by the appellant which were conducted with a view to determining whether criminal charges should be laid against him. Therefore, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law. Neither section 14(4) nor section 16 apply to the personal information in the records. Accordingly, I find that the withheld portions of the records are properly exempt under section 38(b).

Because of the findings I have made, it is not necessary for me to consider the possible application of the exemptions in sections 8(1)(e) and 38(a) to the records.

REASONABLENESS OF SEARCH

In his letter of appeal, the appellant indicates that he is seeking access to any records relating to a "hit and run accident" in 1995. It appears that the appellant also initiated a complaint about the conduct of the police in relation to this incident and that the Police's Public Complaints Investigation Bureau opened file 95-08-070 as a result. These records are responsive to Part 1 of the appellant's first request.

The Police indicate that staff at the Public Complaints Investigation Bureau were notified of the request for this specific investigation file at the time the request was made in May 1998. The Public Complaints Investigation Bureau advised that the 1995 complaint file had been purged in accordance with the Records Retention Schedule of the Toronto Police Service, Bylaw 58-92. This policy mandates that records of minor complaints lodged with the Public Complaints Investigation Bureau are retained only for a period of two years. The Police submit, accordingly, that Complaint File 95-08-070 was purged prior to the date of the request and that the information no longer exists.

In cases where a requester provides sufficient details about the records which he or she is seeking and the Police indicate that records do not exist, it is my responsibility to insure that the Police have made a reasonable effort to identify and locate any records that are responsive to the request. The Act does not require that the Police prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Police must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

Based on the information provided to me by the Police with respect to its Records Retention Schedules and file purging procedures, I am satisfied that they conducted a reasonable search for the requested information relating to Complaint File 95-08-070.

ORDER:

1. I uphold the decision of the Police to deny access to the undisclosed portions of Pages 7, 8, 10. 11, 13, 14, 15, 30 and 31 of the records responsive to Request 980946 and the sole record responsive to Request 980738.

2. I am satisfied that the Police conducted a reasonable search for records relating to the 1995 incident involving the appellant and I dismiss that part of the appeal.

3. I order the Police to make an access decision on those records responsive to Parts 2 and 3 of the appellant's first request and Pages 16 to 29 of the appellant's second request, pursuant to sections 19 and 22 of the Act, treating the date of this order as the date of the request.

4. I order the Police to provide me with a copy of the decision letter referred to in Provision 3 by sending a copy to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: February 2, 1999
Donald Hale
Adjudicator