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

ORDER MO-1179

Appeal MA-980200-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for information concerning a named individual. The requester stated that he had been the victim of an assault by the individual, and that he wanted to know whether or not the individual was on probation at the time of the alleged incident. The requester further indicated that one of the reasons he needed the information was so that "the Ontario Court of Justice might have full knowledge of both the reason for and the circumstances surrounding the noted incident."

The Police responded to the request by refusing to confirm or deny the existence of records responsive to the request, pursuant to section 14(5) of the Act. The Police also indicated that if the requester believes that the record exists, he "can subpoena the Chief of Police and/or Designate for the record. If it does exist it will be sent directly to the court on the day you are appearing. You can go to the provincial court to have them issue a subpoena." It appears that the Police were referring to criminal proceedings relating to this matter before the Ontario Court of Justice (Provincial Division).

The requester indicates that he tried unsuccessfully to obtain a subpoena as suggested. In later correspondence, the requester explained to the Police that he was seeking to review a decision he had received from the Criminal Injuries Compensation Board (the Board). Under section 10(1) of the Compensation for Victims of Crime Act, the Board may review a decision of a single Board member or, in the case of a full Board hearing, the Ontario Court of Justice (General Division) Divisional Court may hear an appeal under section 23 of that statute. The requester also stated that he was entitled to receive the requested information pursuant to sections 4, 5(1)(c), 5(2) and 5(3) of Ontario Regulation 265/98 under the Police Services Act. The requester said that "the requested information would provide me with an opportunity to prevent the threats that I and my family [have received] for three and some half years."

The requester later telephoned the Police seeking a reconsideration of its access decision. In a letter to the requester of the same date, the Police state that in speaking to the requester, a representative of the Police explained why it believed the Regulation did not apply to his request, and that the initial decision of the Police stood.

The requester (now the appellant) appealed the decision of the Police to this office.

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

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS

Introduction

The Police rely on section 14(5) of the Act as the basis for their decision to refuse to confirm or deny whether any responsive records exist. This section reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 14(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even if it does not. This section gives institutions a significant discretionary power which should be exercised only in rare cases [Order P-339].

An institution relying on this section must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. An institution must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested record would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy [Orders P-339, P-808 (upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)]

Thus, before it may be permitted to exercise its discretion to invoke section 14(5), an institution must provide sufficient evidence to establish that:

1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is suchthat disclosure would constitute an unjustified invasion of personal privacy.

Part One: Disclosure of the records (if they exist)

Definition of Personal Information

Under Part One of the section 14(5) test, the Police must demonstrate that disclosure of the records, if they exist, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can result only from disclosure of personal information. Under section 2(1), "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 [paragraph (h)].

The information requested, if it exists, would constitute part of the criminal history of an individual whose identity is known to the appellant. Such information would qualify as the personal information of the named individual.

Unjustified Invasion of Personal Privacy

I must now determine whether disclosure of such records would constitute an unjustified invasion of personal privacy. Section 14(1) of the Act provides a mandatory exemption from disclosure of personal information to any person other than the individual to whom the information relates. There are six exceptions to the mandatory exemption, set out in sections 14(1)(a) through (f). If any of these exceptions apply, the information is not exempt under section 14(1). The section 14(1)(f) exception applies "if the disclosure does not constitute an unjustified invasion of personal privacy." Sections 14(2), (3) and (4) provide guidance in determining whether disclosure would constitute an unjustified invasion of personal privacy. Although the Act does not say so explicitly, by permitting disclosure in the circumstances set out in sections 14(1)(a) through (e), the Legislature has indicated that such disclosures also would not constitute an unjustified invasion of privacy, as in the case where section 14(1)(f) applies.

I will therefore begin my "unjustified invasion of personal privacy" analysis by considering the application of the exceptions listed in paragraphs (a) through (e) of section 14(1). If none of these applies, I will consider section 14(1)(f), in conjunction with sections 14(2), (3) and (4).

Section 14(1)(d) and the Police Services Act Regulation

The appellant has argued that he is entitled to receive the requested information pursuant to sections 4, 5(1)(c), 5(2) and 5(3) of Ontario Regulation 265/98 under the Police Services Act (the Regulation). This argument raises the possible application of section 14(1)(d) of the Act which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the personal information relates except,
>
> > under an Act of Ontario or Canada that expressly authorizes the disclosure.

In my view, should section 14(1)(d) be found to apply, disclosure of the records, if they exist, would not constitute an unjustified invasion of personal privacy.

Previous orders of this office have said that the interpretation of the words "expressly authorizes" in section 14(1)(d) of the Act closely mirrors the interpretation of similar words in section 28(2) of the Act and its provincial counterpart, section 38(2) of the Freedom of Information and Protection of Privacy Act (Orders M-292, M-1154). In the Commissioner's Compliance Investigation Report I90-29P, the following comments are made about the latter section:

> The phrase "expressly authorized by statute" in subsection 38(2) of the [provincial] Act requires either that the specific types of personal information collected be expressly

described in the statute or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute, i.e., in the form or in the text of the regulation.

I agree with this interpretation and consider it the appropriate test to apply in this case.

Sections 4, 5(1)(c), 5(2) and 5(3) of the Regulation read:

> **4**. (1) In this section,
>
> "victim" means a person who, as a result of the commission of any offence under the Criminal Code (Canada) by another, suffers emotional or physical harm, loss of or damage to property or economic harm and, if the commission of the offence results in the death of the person, includes,
>
> (a) a child or parent of the person, within the meaning of section 1 of the Family Law Act, and
>
> (b) a dependent or spouse of the person, within the meaning of section 29 of the Family Law Act,
>
> but does not include a child, parent, dependent or spouse who is charged with or has been convicted of committing the offence.
>
> (2) A chief of police or his or her designate may disclose to a victim the following information about the individual who committed the offence if the victim requests the information:
>
> 1. The progress of investigations that relate to the offence.
>
> 2. The charges laid with respect to the offence and, if no charges are laid, the reasons why no charges are laid.
>
> 3. The dates and places of all significant proceedings, including any proceedings on appeal.
>
> 4. The outcome of all significant proceedings, including any proceedings on appeal.

5. Any pretrial arrangements that are made that relate to a plea that may be entered by the accused at trial.

6. The interim release and, in the event of a conviction, the sentencing of an accused.

7. Any disposition made under section 672.54 or 672.58 of the Criminal Code (Canada) in respect of an accused who is found unfit to stand trial or who is found not criminally responsible on account of mental disorder.

8. Any application for release or any impending release of the individual convicted of an offence, including release in accordance with a program of temporary absence, on parole or on an unescorted temporary absence pass.

9. Any escape from custody of the individual convicted of the offence.

10. If the individual accused of committing the offence is found unfit to stand trial or is found not criminally responsible on account of mental disorder,

    i. any hearing held with respect to the accused by the Review Board established or designated for Ontario pursuant to subsection 672.38(1) of the Criminal Code (Canada),

    ii. any order of the Review Board directing the absolute or conditional discharge of the accused, and

    iii. any escape of the accused from custody.

5. (1) A chief of police or his or her designate may disclose any personal information about an individual if the individual is under investigation of, is charged with or is convicted or found guilty of an offence under the Criminal Code (Canada), the Controlled Drugs and Substances Act (Canada) or any other federal or provincial Act to,

> (c) any person or agency engaged in the protection of the public, the administration of justice or the enforcement of or compliance with any federal or provincial Act, regulation or government program.
>
> (2) Subsection (1) applies if the individual is under investigation of, is charged with or is convicted or found guilty of an offence under the Criminal Code (Canada), the Controlled Drugs and Substances Act (Canada) or any other federal or provincial Act and if the circumstances are such that disclosure is required for the protection of the public, the administration of justice or the enforcement of or compliance with any federal or provincial Act, regulation or government program.
>
> (3) The procedures to be followed in disclosing personal information under this section to an agency that is not engaged in the protection of the public or the administration of justice shall be in accordance with a memorandum of understanding entered into between the chief of police and the agency.

Section 4 provides a chief of police or his or her designate with a discretionary power to disclose certain personal information about an individual who committed an offence to a victim upon request of the victim. In my view, the information at issue in this case (i.e., whether or not the individual was on probation at the time of the alleged offence) does not fit within any of the 10 categories listed in section 4(2), all of which pertain to information arising from the specific offence suffered by the victim, and not previous offences the individual may have committed.

Section 5(1)(c) provides a chief of police or his or her designate with a discretionary power to disclose any personal information about an individual who committed an offence to any person or agency engaged in the protection of the public, the administration of justice or the enforcement of or compliance with any federal or provincial Act, regulation or government program. There is no evidence before me to indicate that the appellant fits within the category of individuals who may receive information under this section. Accordingly, I find that section 5(1)(c) does not apply.

Section 5(2) describes circumstances in which section 5(1) applies. Section 5(3) addresses the procedure for disclosure under section 5(1) where the receiving agency is not engaged in the protection of the public or the administration of justice. Neither of these sections applies in this case.

Since none of the sections of the Regulation cited by the appellant applies, section 14(1)(d) has no application. Even if I were to find that one or more of these sections applied, in my view, section 14(1)(d) would not apply in any event, because these disclosure powers granted by the Regulation are discretionary rather than mandatory in nature. The Regulation is designed to permit chiefs of police or their designates to exercise discretion in each case and to disclose personal information only where they deemed it appropriate in the circumstances. In some cases, even if the conditions for disclosure in the Regulation are met, the chief or designate may determine that the invasion of privacy resulting from disclosure outweighs any benefit and

decide not to disclose. If section 14(1)(d) were interpreted in a way that the personal information **must** be disclosed in the event the conditions in sections 4 or 5 of the Regulation were met, this would undermine the discretionary nature of the power, the intent of the Regulation and one of the purposes of the Act, as set out in section 1(b), to protect the privacy of individuals with respect to personal information about themselves held by institutions.

I have found that section 14(1)(d) does not apply in the circumstances. I further find that, based on the material before me, none of the exceptions listed in paragraphs (a), (b), (c) or (e) applies. Thus, the only exception which could apply in this case is section 14(1)(f), which permits disclosure where it would not constitute an unjustified invasion of personal privacy, based on a consideration of the factors and circumstances set out in sections 14(2), (3) and (4).

Sections 14(3) and (4)

Section 14(3) sets out a number of circumstances in which disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) sets out circumstances in which disclosure does not constitute an unjustified invasion of personal privacy. Based on the material before me, I find that none of the circumstances set out in either of these sections is present here.

Section 14(2)

Section 14(2) contains factors which weigh either in favour of or against a finding of an unjustified invasion of personal privacy under section 14(1)(f). In addition, unlisted factors may be considered in the analysis.

Section 14(2)(f) applies where the personal information is "highly sensitive". In my view, information pertaining to an individual's criminal history is highly sensitive, and I find that section 14(2)(f) is a relevant factor weighing against of disclosure of any information, should it exist.

The appellant in his correspondence with the Police indicated that one of the reasons he needed the information was so that "the Ontario Court of Justice might have full knowledge of both the reason for and the circumstances surrounding the noted incident". The appellant also indicated that he tried, unsuccessfully, to procure the information by obtaining a court subpoena as suggested by the Police. Further, the appellant stated that he was seeking to review a decision he had received from the Criminal Injuries Compensation Board, either by way of review by the Board of a decision of a single Board member or appeal to the Ontario Court of Justice (General Division) Divisional Court under sections 10(1) and 23 of the Compensation for Victims of Crime Act respectively. The foregoing raises the possible application of section 14(2)(d), a factor which weighs in favour of disclosure where the personal information "is relevant to a fair determination of rights affecting the person who made the request."

Assistant Commissioner Tom Mitchinson stated the test for the application of section 14(2)(d) in Order P-312 [upheld on judicial review in Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner) (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)]:

> In my view, in order for section 21(2)(d) [section 14(2)(d) of the municipal Act] to be regarded as a relevant consideration, the appellant must establish that:
>
> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The appellant has referred to two legal proceedings. Since the appellant made no representations in response to the Notice of Inquiry, and the Police did not address these points in its representations, I have little information beyond the appellant's vague references. It is reasonable to assume that one of the matters consists of criminal proceedings against the individual who allegedly committed the assault, while the second consists either of review proceedings before the Board or appeal proceedings before the Divisional Court under sections 10(1) and 23 of the Compensation for Victims of Crime Act respectively. In the case of the criminal matter, the court would not be adjudicating the rights of the appellant, and therefore section 14(2)(d) could not apply. While the Board and/or the Divisional Court matter could affect the rights of the appellant, I do not have sufficient information to determine the relevance of the requested information to the issues in that proceeding. Therefore, I find that section 14(2)(d) does not apply.

In addition, I find that there are no other relevant factors, either unlisted or listed under section 14(2), weighing in favour of disclosure.

Since I have found that the only relevant factor which applies in this case weighs against disclosure, I find that disclosure of the requested information, should it exist, would constitute an unjustified invasion of personal privacy. Therefore, part one of the test under section 14(5) has been met.

Part Two: Disclosure of the fact that records exist (or do not exist)

Under part two of the test for the application of section 14(5), the Police must demonstrate that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

Disclosure of the existence or non-existence of records containing the requested information would reveal whether or not the named individual has a criminal record and, more specifically, whether he or she has or has not been on probation. In my view, this information is itself highly sensitive within the meaning of section 14(2)(f). I further find that, for the same reasons outlined above, disclosure of this information would constitute an unjustified invasion of privacy of the named individual. This finding is consistent with a finding made in similar circumstances by former Inquiry Officer John Higgins in Order M-692.

Conclusion

Both parts of the test for the application of section 14(5) have been met.

PUBLIC INTEREST OVERRIDE

Section 16 of the Act reads:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

I received no representations on the application of this section. In the circumstances, based on the material before me, I find that section 16 does not apply here.

ORDER:

I uphold the decision of the Police.

Original signed by: December 29, 1998
David Goodis
Senior Adjudicator