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

ORDER MO-1293

Appeal MA-990195-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The appellant submitted a request to the Toronto Police Services Board (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records in the custody and/or under the control of the Police relating to himself between 1981 and the date of the request. In particular, the appellant sought his "full file" from the "80 East Mall Court".

The Police located approximately 96 pages of responsive records and granted full access to pages 1, 75, 77, 78 and 85, and partial access to pages 73, 74, 79, 80, 81, 82, 84, 86 and 87. The Police advised the appellant that some information was removed from the records as it was not responsive to his request. The Police denied access to the remaining records and parts of records pursuant to the exemptions in the following sections of the Act:

- danger to life or safety - section 8(1)(e);
- facilitate commission of unlawful act - section 8(1)(l);
- law enforcement report - section 8(2)(a);
- relations with government - section 9(1)(d);
- invasion of privacy - sections 14(1)(f) and 38(b) with reference to section 14(3)(b);
- information publicly available - section 15(a);
- discretion to refuse requester's own information - section 38(a); and
- danger to mental or physical health of requester - section 38(d).

The appellant appealed the decision of the Police and indicated that he believes more records should exist.

During mediation, the Police provided the appellant with a second decision letter in which they clarified that occurrence reports for the period of time prior to 1992 had been purged in accordance with their records retention by-law.

Further mediation was not possible and this appeal was moved on to inquiry. I sent a Notice of Inquiry to the Police initially. The Police submitted representations in response to the Notice. Parts of the representations made by the Police were then attached to a Notice of Inquiry and sent to the appellant. The appellant submitted representations in response to this Notice.

RECORDS:

The records at issue consist of the following:

- occurrence reports: pages 73, 74, 79, 80, 81, 82, 84, 86 and 87 in part;
- occurrence reports: pages 76, 83, 88 - 96 in full;
- Crown Brief: pages 2 - 72 in full.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he is seeking and the Police indicate that further records do not exist, 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 further records do not exist. However, in my view, 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 request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Police response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The Police indicate that during the initial processing of this request, the appellant was contacted and he provided his date of birth. Following a search through their records, the Police were only able to locate records relating to the East Mall matter. The Police advised the appellant at that time that most records prior to 1992 would have been purged pursuant to their Records Retention Schedule. The Police go on to explain, in detail, the steps taken by two experienced employees to search for responsive records. The Police also attached a copy of their Records Retention Schedule which sets out the retention periods for various types of records which might be responsive to the request.

With respect to the East Mall matter, the Police indicate that the appellant told them that he had attempted to get information from the East Mall Court but nothing was given to him. From this conversation, the Police determined that the contents of the crown brief and the appellant's criminal record would be the responsive records.

The Police describe their attempts to clarify with the appellant exactly what he was looking for and whether the records they located were, in fact, responsive to his request. The Police indicate that the appellant was not able to provide them with any further information which would assist them in their search.

The Police note that although the Mediator assigned to this file informed them that the appellant felt there should be more records, it appeared that she also did not have information which would facilitate a further search for responsive records.

In his representations, the appellant lists a number of events in which he was involved which may or may not have involved the Police. The appellant does not indicate whether the Police were called or involved in them. Further, much of the information pertains to events which occurred prior to 1992. If information from this time did exist, I am satisfied that it would have been destroyed in accordance with the Police Records Retention Schedule. In my view, the appellant's representations do not provide any assistance in determining whether records should now exist.

Section 17(1)(b) of the Act requires that "a person seeking access to a record shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record ...". In view of the above, I find that the appellant did not provide the Police with sufficient detail to enable them to locate any further responsive records, despite their attempts to obtain this information from him. Even if the appellant had provided the Police with the information he set out in his representations, I am not convinced

that it would have assisted them in searching for further responsive records. In the circumstances of this case, I am satisfied that the search conducted by the Police for responsive records was reasonable.

NON-RESPONSIVE RECORDS

In Order P-880, former Adjudicator Anita Fineberg defined "responsive" as meaning "reasonably related to the request." I agree with this interpretation.

The Police indicate that portions of pages 27, 29, 34, 35, 37, 38, 42, 43, 44 consist of parts of the police officers' notes relating to other matters recorded by the officers during their tour of duty. The Police indicate further that portions of pages 81, 82 and 84 contain CPIC information which does not pertain to the appellant.

The Police submit that none of the information in these records which has been removed as being non-responsive pertains in any way to the appellant, his case, or anyone else involved with the matter. Therefore, the Police conclude that it is not reasonably related to the request.

Upon review, I agree that the portions of the records which have been withheld as being non-responsive, in fact, do not pertain in any way to the appellant, but rather, contain information about other matters which is routinely the case in these types of documents. Therefore, I find that these portions of the records are not reasonably related to the appellant's request and were properly withheld as being non-responsive to the request.

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, as recorded information about an identifiable individual. All of the records at issue pertain to the criminal matter involving the appellant. I find that they all contain his personal information even if they do not directly refer to him by name as they relate to the investigation into his activities. All of the records, with the exception of pages 80, 81 and 82, also contain information about other identifiable individuals, including names, addresses, telephone numbers, and personal statements. I find that this information qualifies as the personal information of these individuals.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access. Under section 38(a) of the Act, the Police have the discretion to deny access to an individual's own personal information in instances where certain exemptions, including sections 8, 9 and 15 would apply to that personal information. The Police claim that section 8(1)(e) applies to pages 1a - 72 and 88 -95 and that section 8(1)(l) applies to pages 80, 81 and 82. I will begin with these sections as a preliminary step in determining whether these records qualify for exemption under section 38(a).

LAW ENFORCEMENT

Section 8(1)(e)

Section 8(1)(e) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> endanger the life or physical safety of a law enforcement officer or any other person;

An institution relying on the section 8 exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm by virtue of section 53 of the Act (Order P-188).

The words "could reasonably be expected to" appear in the preamble of section 8(1), as well as in several other exemptions under the Act, dealing with a variety of anticipated "harms". Previous orders of this office have found that in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373 and Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 and 40 (Div. Ct.)].

However, when dealing with the harms associated with the endangerment to life or physical safely of a person (sections 8(1)(e) and 13 of the Act), a different test applies. In these limited circumstances, the court in Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Ministry of Labour, Office of the Worker Advisor), (1999), 46 O.R. (3d) 395 at 403 (CA), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.) stated that, if an institution has established a reasonable basis for believing that a person's safety will be endangered by disclosing a record, and these reasons are not a frivolous or exaggerated expectation of this harm, then sections 14(1)(e) and/or 20 (the provincial Act equivalents of sections 8(1)(e) and/or 13) may be properly invoked to refuse disclosure (Orders PO-1772 and MO-1262).

The Police begin by noting that the criminal matter to which the records relate arose as a result of a death threat made by the appellant. The Police refer to various parts of the records at issue as well as communications they had with the appellant during the processing of this access request in support of their belief that disclosure of the records could reasonably be expected to result in the harms identified in section 8(1)(e).

In his representations, the appellant outlines in considerable detail the events of his life. In my view, the appellant's perspective on the criminal matter supports the view taken by the Police. While I appreciate that the appellant is frustrated by his experiences with government systems, the evidence, including the records and his representations, establishes a reasonable basis for believing that a person's safety could be endangered by disclosing the records. Accordingly, I find that the exemption in section 8(1)(e) applies.

In considering the totality of the representations submitted by the Police, I am satisfied that they have taken the appropriate factors into consideration in exercising their discretion not to disclose the records to the appellant. Therefore, I find that pages 1a - 72 and 88 - 96 are exempt under section 38(a).

Section 8(1)(l)

Section 8(1)(l) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to, facilitate the commission of an unlawful act or hamper the control of crime.

In my view, the test established in Ontario (Workers' Compensation Board) should be applied when considering a section 8(1)(l) exemption claim. Although the harm envisioned by this section relates to the commission of an unlawful act, this does not necessarily imply endangerment to the bodily integrity and individual safety concern of any individual. Moreover, section 8(1)(e) is available to the Police to address this type of harm (Order PO-1772).

Therefore, in order to establish the section 8(1)(l) exemption claim, the Police must provide "detailed and convincing evidence" establishing a reasonable expectation of probable harm should the withheld portions of pages 80, 81 and 82 be disclosed.

The portions of pages 80, 81 and 82 which have been withheld contain specific computerized data base information which the Police submit would facilitate unauthorized access to information on the CPIC system. The Police indicate that unauthorised use of this date base constitutes a criminal offence and for this reason, providing the information at issue on these pages to any individual not authorized to use this system, would assist the commission of an unlawful action should the CPIC system be penetrated.

Several previous orders of this office have upheld the application of the exemption in section 8(1)(l) (and its provincial equivalent in section 14(1)(l)) for transmission access codes for the CPIC system (Orders M-933, M-1004 and P-1214). In my view, the findings in these orders apply equally to the data base information in the portions of pages 80, 81 and 82 which remain at issue.

Accordingly, I am satisfied that the disclosure of the data base information in pages 80, 81 and 82 could reasonably be expected to facilitate the commission of an unlawful act, that being the unauthorized use of the information contained in the CPIC system. I find, therefore, that these portions of the records qualify for exemption under section 8(1)(l) and are exempt under section 38(a) of the Act.

INVASION OF PRIVACY

Under section 38(b) of the Act, 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.

Where, however, the record only contains the personal information of other individuals, section 14(1) of the Act prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. In the circumstances, the only exception which could apply is section 14(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

In both these situations, 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. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the Act or if a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 16 exemption.

The Police have claimed the application of section 14(1) and/or 38(b) for the majority of the records at issue. As I found above that many of these records are exempt under section 38(a), I will only consider the invasion of privacy exemption for the remaining pages, which consist of pages 73 - 74, 76, 79, 83 and 86 - 87. As I indicated above, all of these records contain the personal information of both the appellant and other identifiable individuals.

Pages 73 - 74 consist of a fraudulent document report, page 76 is a fraudulent cheque document report, pages 79 and 86 - 87 are Supplementary Occurrence Reports and page 83 is a Police Report.

The Police submit that the presumption in section 14(3)(b) applies to all of the personal information in these records as this information was compiled and is identifiable as part of law enforcement investigations into criminal matters pertaining to the appellant.

The appellant does not believe that he has violated any law, but rather, believes that he has been subjected to improper investigation based on incorrect and inaccurate information.

I am satisfied that the personal information in the records was compiled and is identifiable as part of an investigation conducted by the Police, which is an agency that has the function of enforcing the law, into the appellant's activities. I am also satisfied that the purpose of these investigations was to determine whether there had been a violation of law and that, in fact, the primary investigation ultimately resulted in the matter going to trial. Therefore, I find that disclosure of the personal information in pages 73 - 74, 76, 79, 83 and

86 - 87 would constitute a presumed unjustified invasion of personal privacy pursuant to section 14(3)(b) of the Act.

I find that none of the circumstances outlined in section 14(4) which would rebut a section 14(3) presumption are present in this appeal. The appellant has not raised the application of the public interest override and I find, in the circumstances of this appeal, that it does not apply.

Similar to my findings above under section 38(a), I find there was nothing improper in the exercise of discretion in refusing to disclose this information. Therefore, I find that the personal information in pages 73 - 74, 76, 79, 83 and 86 - 87 is exempt under section 38(b).

Because of the findings I have made in this order, it is not necessary for me to consider the exemptions in sections 8(2)(a), 9(1)(d), 15(a) or 38(d).

ORDER:

1. The search conducted by the Police for responsive records was reasonable and this part of the appeal is dismissed.

2. I uphold the decision of the Police to withhold the records from the appellant.

Original signed by: April 18, 2000
Laurel Cropley
Adjudicator