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

ORDER MO-1314

Appeal MA-990290-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Service Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) from a lawyer representing two individuals who were interviewed by the Police in relation to the investigation of a homicide. The lawyers's request was for a copy of any forensic results or reports, photographs, all witness statements and any notes or reports made in connection with the mechanics of the shooting.

The Police identified 680 pages of responsive records and denied access to them in their entirety pursuant to sections 8(1)(a), (b) and (c), 9(1)(d) and 14(1) of the Act. The Police relied on the "presumed unjustified invasion of personal privacy" in sections 14(3)(b) and (h) and the factor listed under section 14(2)(i) in support of the section 14(1) exemption claim.

The lawyer appealed the decision of the Police.

During mediation, the lawyer narrowed the scope of the request by indicating that he only required "records which relate to the physical evidence showing the location of any shell casings, the distance between the shell casings and the deceased and the location from where it is believed the shots took place" and "records which relate to the statements provided by [the lawyer's clients] to the police."

As a result, sections 8(1)(c), 9(1)(d), 14(2)(i) and 14(3)(h) are no longer at issue, since these sections had been applied to records which are not included within the narrowed scope of the request.

I sent a Notice of Inquiry initially to the Police. The Police submitted representations in response to the Notice. I then sent the Notice to the lawyer, together with the non-confidential portions of the Police's representations. The lawyer submitted representations of behalf of his clients. Finally, I sent a Supplementary Notice of Inquiry to the Police, requesting additional information and clarification as to whether the request falls under Part I or Part II of the Act. I also asked the Police to consider the exercise of discretion under section 38(b) should they find that the request falls under Part II of the Act. The Police submitted representations in response to the Supplementary Notice.

RECORDS:

The records at issue consist of police officers' notes, the witness statements provided by the appellant's clients, an exhibit list and photographs. The records total 40 pages and also include two audiotapes.

DISCUSSION:

PRELIMINARY ISSUE

In the Supplementary Notice of Inquiry I asked the Police to provide representations and clarification as to whether the request falls under Part I or Part II of the Act, in light of Order MO-1277-I. In that order I found that:

> In making the request for information, the appellant, as a lawyer, is not standing in the position of a stranger at arm's length from his client; rather, he is acting as the agent of his client in pursuing access to the client's personal information. He is also representing the client's interest in the context of a solicitor-client relationship. The appellant is bound by the Rules of Professional Conduct of the Law Society of Upper Canada to act honestly and in his client's best interests at all times, which would include the duty not to misrepresent his authority to act on the client's behalf in this matter.
>
> The appellant has represented to the Police that he has his client's authority in this respect and the signed waiver provides ample evidence of this authority. In these circumstances, it is clear that the appellant has both express and ostensible authority to act on his client's behalf and that he stands in the client's shoes for the purpose of making the request and taking ancillary steps in this appeal. Lawyers and their clients operate in this fashion before courts and tribunals on a daily basis and this facilitates the better administration of justice. For these reasons, I find that the appellant, as agent, has made the request as if the client had made it himself.
>
> If a request is received from a lawyer for information on behalf of a client which would otherwise be considered a Part II request if made by the client directly, and the lawyer has satisfied the institution that he/she has been given the requisite authority by the client, then the request should be processed as a Part II request for personal information not as a PartI request for general records. The discretionary exemptions provided by section 38 of the Act would be available to institutions in these circumstances, if appropriate, and the $10 appeal fee provided by section 5.3 (1)(b) of Regulation 823 would apply.

In this appeal, the requester is a lawyer representing two individuals who were interviewed in the context of a homicide investigation. The lawyer has provided the Police and this Office with authorizations signed by both individuals allowing him to receive any records on their behalf, including records containing their personal information. Although the Police do not state so explicitly in their representations, they appear to have accepted that the request falls under Part II of the Act, as evidenced by the inclusion of representations on the exercise of discretion under section 38.

I am satisfied that the lawyer is acting on behalf of his clients in this appeal and that the request for information should be dealt with under Part II of the Act.

From this point on, I will refer to the lawyer's clients as "the appellants".

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information" to mean recorded information about an identifiable individual.

All of the records at issue relate to a police investigation into a homicide. Records 1 through 11 contain the appellants' crime scene witness statements to the Police as follows:

- Records 1-6 appear to be a police officer's handwritten notes of an audio taped statement provided by one of the appellants;
- Records 7-9 are a police officer's typed notes of an audio taped interview with one of the appellants; and

- Records 10 and 11 consist of a handwritten statement of one of the appellants.

Records 12 and 12A are audiotapes of police interviews with the appellants.

The Police point out that the appellants' names, addresses and telephone numbers are included in their statements, and I note that the appellants' statements and interviews also refer to other named individuals.

I find that Records 1-12A contain the personal information of the appellants and the other identifiable individuals referred to in the records.

Record 320 is a Scene Exhibit List which contains the personal information of the victim only. Record 355 is a photograph of a crime scene which includes a vehicle's license plate. This plate is an "identifying number" assigned to an individual other than either of the appellants and, as such, I find that it constitutes the personal information of the owner of the vehicle. The rest of the photograph does not include personal information.

Records 215-216, 219-220, 298-300 and 305-306 are all police officers' notes, and Records 336-339 and 341-353 are all photographs of the crime scene. None of these records contain any personal information.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/INVASION OF PRIVACY

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(b) of the Act, where a record contains the personal information of both an appellant and other individuals (ie. Records 1-12A), and the Police determine that the disclosure of the information would constitute an unjustified invasion of the other individuals' personal privacy, the Police have discretion to deny the appellant access to that information. Where, however, the record only contains the personal information of other individuals (ie. Record 230 and the license plate number in Record 355), 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 of this appeal, the only exception to section 14(1) 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 considering sections 38(b) and 14(1)(f), sections 14(2) and (3) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of the personal privacy of the individuals 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 in John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, 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).

Section 14(3)(b)

The Police claim that the disclosure of Records 1-12A, 320 and the licence plate number in Record 355 would constitute a presumed unjustified invasion of privacy as defined in section 14(3)(b), which reads:

> 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;

The Police point out that the appellants' statements were provided to police officers during the initial investigation of a homicide, and thus were compiled and are identifiable as part of an investigation into a possible violation of the Criminal Code.

Although they appear to acknowledge the context in which the statements were provided, the appellants submit:

> Refusing to provide a person with their own statements does not create confidence in either the system or the efforts of the police in conducting investigations. It is absurd that one should not be given access to their own statements, particularly when they are required for their own defence in a related civil proceeding.

The appellants also submit:

> With respect to the Appellants' own witness statements given to the police, the denial of access contradicts the very purpose of the legislation which (in addition to that set out above) is also provided in Section 1(1)(b);
>
> > "to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information, ..."

The Police submit that the "absurd result" principle should not apply:

> Release of information to any individual must be construed as release to the public in general - therefore the release of statements given during the course of a criminal investigation, in this instance statements which name and/or describe other individuals present - would constitute the dissemination of information relevant to an ongoing investigation to the public (and press) at large.
>
> The 'absurd result' theory ignores a basic fact acknowledged in section 38(b); that information must be able to be refused to the person to whom it relates when that disclosure would constitute an unjustified invasion of another individual's privacy.

I do not accept the position of the Police on this issue.

The Commissioner's position on the "absurd result" principle was first enunciated in Order M-444 by former Adjudicator John Higgins as follows:

> However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.

Several subsequent orders have supported this position and include similar findings (eg. Orders M-613, M-847, M-1077 and P-1263).

In this case, Records 1-12A consist of information given by the appellants to the Police. I find that to apply the presumption in section 14(3)(b) to these records would lead to an absurd result. Consequently, I find that disclosure of these records would not result in an unjustified invasion of privacy, and Records 1-12A do not qualify for exemption under section 38(b).

I find that Record 320 and the licence plate portion of the photograph found in Record 335, which does not contain any of the appellants' personal information, were compiled as part of an investigation into a possible

violation of the Criminal Code and therefore satisfy the requirements of section 14(3)(b). The information in both of these records does not fall within the types of information listed in section 14(4), and I find that it qualifies for exemption under section 14(1) of the Act.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

The Police claim that section 8(1)(a) and (b) apply to all of the records.

These sections read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

Under section 38(a) of the Act, the Police have discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 8 would apply. In the case of Records 1-12A, which contain the appellants' personal information, I will consider sections 8(1)(a) and (b) as a preliminary step in determining whether the records qualify for exemption under section 38(a).

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 the 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.)].

The activities of the Police in investigating a possible homicide under the Criminal Code clearly qualify as "law enforcement" activities as the term is defined in section 2(1) of the Act.

The purpose of the sections 8(1)(a) and (b) exemption is to provide the Police with discretion to deny access to records in circumstances where disclosure could reasonably be expected to interfere with an ongoing law enforcement matter or investigation. In this regard, the Police submit:

> This unsolved murder is part of an aggressive campaign by the Toronto Police Homicide Squad to bring to justice the perpetrators of unsolved homicides (see enclosed Toronto Star newspaper clipping). Staff Inspector Ed Hooey is quoted in the article thus:

> "... there are a number of homicides here we feel will be solved. All of these cases are open, they are active and all of our investigators still have files at their desks."

> Should a suspect or involved party to this investigation become aware of the extent of information already in the possession of the police, they could flee the jurisdiction to escape arrest and prosecution. The disclosure could also reveal information that could tip an involved party or suspect as to the direction of the investigation, providing an opportunity to tamper with evidence which the police would have uncovered at a later time had these parties not been privy to information. In other words, premature release could allow the suspects the opportunity to cover their tracks and evade charges.

The appellants' narrowed request relates to the location of shell casings found at the crime scene. On this specific point, the Police submit:

> The placement of shell casings at the scene of a shooting is obviously of paramount importance. Such casings indicate where the perpetrator was standing, the trajectory of the shot(s), and a variety of still more esoteric forensic information - all of which are vital to the investigation, arrest and conviction of the victim's killer.

The appellants do not deal directly with sections 8(1)(a) or (b) in their representations. However, they do point out that:

> To be clear, the information requested, at this point, is limited, in any event, and does not require the police to comment upon the full investigation, the full extent of the information which they have, or the names and/or identities of suspects and witnesses. The Appellants are not seeking <u>any information</u> which would name and/or suggest or otherwise identify any individual as a potential suspect of witness or otherwise compromise such person or persons. ... All that is being sought is raw data regarding the location of the shooter by reference to shell casing, etc. ...

In my view, the Police have established that the murder investigation remains ongoing.

As far as the police officers' notebook entries which comprise Records 215-216, 219-220, 298-300 and 305-306, and the crime scene photographs contained in Records 335-339 and 341-355 are concerned, which do not contain the appellants' personal information, I find that I have been provided with detailed and convincing evidence from the Police sufficient to establish that disclosure of these records could reasonably be expected to interfere with this ongoing murder investigation, and they qualify for exemption under section 8(1)(b) of the <u>Act</u>. Record 320 and the licence plate number contained in Record 355, which I found qualify for exemption under section 14(1), also qualify for exemption under section 8(1)(b) in the alternative.

However, I find that the disclosure of records which contain information originally provided to the Police by the appellants, specifically Records 1-12A, could not reasonably be expected to interfere with this law enforcement matter or investigation, and they do not qualify for exemption under section 38(a) of the <u>Act</u>.

PUBLIC INTEREST IN DISCLOSURE

The appellants make reference to public interest considerations in their representations.

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.

With the exception of Records 1-12A which I will order disclosed to the appellant, all remaining records at issue in this appeal qualify for exemption under section 8(1)(b) of the Act. Section 8 is not included among the sections covered by the section 16 public interest override, so section 16 has no application in the circumstances of this appeal.

ORDER:

1. I order the Police to disclose Records 1 through 12A to the appellants by **July 7, 2000**.

2. I uphold the Police's decision to deny access to Records 215-216, 219-220, 298-300 and 305-306, 320 and the photographs on pages 335-339 and 341-355 in their entirety.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Police to provide me with a copy of the records which is disclosed to the appellant pursuant to Provision 1.

Original signed by: June 22, 2000
Tom Mitchinson
Assistant Commissioner