



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

INTERIM ORDER MO-1287-I

Appeal MA-990226-1

Toronto Police Services Board



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BACKGROUND AND NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) from a lawyer representing an individual who was injured in an incident involving the local transit authority. The request was for a copy of the notebook entries of the two investigating police officers.

After notifying a witness identified in the records (the affected person) and receiving no response, the Police granted partial access, claiming section 14(1) of the Act as the basis for denying access to information relating to the affected person. The Police relied on the “presumed unjustified invasion of personal privacy” in section 14(3)(b) of the Act in support of the section 14(1) exemption claim.

The appellant appealed this decision.

I sent a Notice of Inquiry to the Police, the appellant and the affected person. Only the Police and the appellant responded by submitting written representations. After reviewing the representations and the one-page record which remained at issue, I issued Interim Order MO-1277-I. In that order, I found that the record satisfied the requirements of section 14(3)(b) of the Act, but that the Police had improperly processed the request under Part I rather than Part II of the Act. As a consequence, the Police had failed to exercise discretion under section 38(b) of the Act, which provides the Police with discretion to balance two competing interests - the appellant’s right of access to his personal information and the affected person’s right to privacy. If the Police were to conclude that the balance weighs in favour of disclosure, the record could be released to the appellant, even if the Police have determined that this disclosure would represent an unjustified invasion of the affected person’s privacy.

I included a provision in Interim Order MO-1277-I requiring the Police to exercise discretion under section 38(b) with respect to the record and to provide me with representations as to the factors considered in doing so. I received representations from the Police in compliance with this provision.

DISCUSSION:

With respect to their exercise of discretion, the Police state:

Under section 38(b) “A head may refuse to disclose to the individual to whom the information relates personal information, if the disclosure would constitute an unjustified invasion of another individual’s personal privacy”. In my view, none of the information which could be considered as the personal information of the appellant could be disclosed without revealing the personal information of the witness. In exercising discretion to exempt the information in favour of protecting the privacy of [the affected person], the following factors were considered:

- (a) Section 29 of the Act authorizes the indirect collection of personal information for the purpose of law enforcement. Section 28 introduces safeguards to the collection of personal information. In the case at issue, the balance between right of access and the

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protection of privacy must be given in favour of protecting the privacy of the third party.

- (2) In assessing the value of protecting the privacy interests of an individual other than the requester, one needs to consider the nature of the institution. The nature of a law enforcement institution is in great part to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police. Law enforcement institution records are not simple business transaction records in which disclosure of another individual's personal information may not, on balance, be offensive. Given the unique status of law enforcement institutions within the Act and the unique status to authorize the collection of personal information, we generally view the spirit and content of the Act as placing a greater responsibility in safeguarding the privacy interests of individuals where personal information is being collected.

An important principle contained in the freedom of information legislation is that personal information held by institutions should be protected from unauthorized disclosure. The information collected from the third party was supplied to the investigating officer(s) as a result of a law enforcement activity. Police investigations imply an element of trust that the law enforcement agency will act responsibly in the manner in which it deals with recorded personal information.

In Order No. M-352, Inquiry Office John Higgins writes that:

“From a practical perspective, even under section 38(b), it would be a rare case where an institution would decide to disclose the personal information of an individual other than the requester, in circumstances where that would constitute an unjustified invasion of personal privacy.”

The mandate and, indeed, spirit of the Act is the balance of privacy protection with the public's right to know. This institution scrupulously weighs these factors in each and every access request file. As the majority of our records contain sensitive material, we must balance the access interests of the requester with the privacy rights of another person.

...

The ramifications of non-disclosure to the requester were carefully balanced against the possible harms to the third party and the institution and, in light of the particular circumstances of this request, we have opted to withhold the information of the third party. No other factors or public interest considerations outweigh the privacy considerations of the individual who would be affected by such disclosure.

An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility to ensure that this exercise of discretion is in accordance with the Act. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion (Order 58).

I have carefully reviewed the representations provided by the Police, and assessed them in the context of the particular facts of this appeal and the specific content of the one record which remains at issue. In so doing, I have come to the conclusion that the Police have not properly exercised discretion in this instance. My conclusion is based on the following:

- I accept the Police's submission that the nature of police institutions and the work they do are valid considerations in the exercise of discretion, but I do not accept that this places the Police in a "unique status" as it relates to the safeguarding of privacy interests of individuals. All institutions under the Act are charged with the responsibility to balance access and privacy rights under section 38(b) of the Act, including police institutions, and the fact that the Police gather personal information as part of their law enforcement mandate is only one factor that must be taken into account in the proper exercise of discretion.
- Although the Police state that they weigh privacy and access rights in every access request file, and have done so "in light of the particular circumstances of this request", the representations provided by the Police do not establish this. Other than a brief response to my reference to section 14(2)(d) in Interim Order MO-1277-I, the Police do not discuss the appellant's right of access to his personal information, nor do the Police identify the particular privacy interests of the affected person being considered in balancing the two rights.
- Although the affected person was notified by both the Police before responding to the request and by me during this inquiry, at no point did he provide representations as to the sensitivity of his personal information contained in the record. The Police do not appear to have taken this relevant fact into account in exercising discretion.
- Although in Order M-532, former Inquiry Officer Higgins expresses his view that the exercise of discretion under section 38(b) to disclose personal information of an individual other than the requester would be rare, he also states clearly in his discussion that the decision is a discretionary one that must be made by balancing the competing interests present in a particular fact situation.

In my view, the Police have not adequately taken into account the competing interests of access and privacy protection, and it is not clear to me that the Police have taken the particular circumstances of this case into account in exercising discretion in favour of denying access in this matter. Accordingly, I have decided to

again return this appeal to the Police for the purpose of properly exercising discretion in deciding whether or not to claim exemption for the undisclosed information pursuant to section 38(b) of the Act.

INTERIM ORDER:

I order the Police to reconsider the exercise of discretion under section 38(b) of the Act with respect to the record and to provide me with representations as to the factors considered in doing so by **April 4, 2000**. The representations concerning the exercise of discretion 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:
Tom Mitchinson
Assistant Commissioner

March 21, 2000