



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

ORDER MO-1261

Appeal MA-990118-1

Toronto Police Services Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

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 the following information:

... a complete copy of my personal file as a candidate with the Toronto Police ... This file request is inclusive to all aspects of my progress within the recruitment process (ie. GAT.B, MMPI-2, Interview scores and answers, background analysis in detail).

Please specify the area of concern Toronto Police had with my candidacy for Police Constable, which ultimately resulted in my permanent exclusion from future employment considerations within this field (ie. Police Constable with Toronto).

The Police located 212 pages of records responsive to the request and initially applied section 52(3) to them. The appellant appealed this decision and Appeal MA-980281-1 was opened. This issue was disposed of in Order MO-1193 in which Adjudicator Holly Big Canoe found that section 52(3) does not apply. Having found that the records are subject to the Act, Adjudicator Big Canoe ordered the Police to issue a decision with respect to them.

The Police subsequently issued a decision and denied access to 82 of the 212 pages pursuant to the following sections under the Act:

- law enforcement - section 8(1)(g);
- third party information - section 10(1)(a);
- invasion of privacy - section 14(1)(f), with reference to sections 14(3)(b) and 14(3)(d);
- information published or available - section 15(a); and
- evaluative or opinion material - section 38(c).

The Police also indicated that portions of the records were not responsive to the request.

The appellant appealed the decision of the Police to withhold the records on the basis of the exemptions cited above.

During mediation, the appellant narrowed the records at issue to only those which set out or contain information about the area of concern the Police had with his candidacy for Police Constable which resulted in his not being considered for employment by the Police and in his permanent exclusion from future employment considerations with the Police.

The records which are responsive to the appellant's narrowed request comprise four of the 82 pages to which access was denied. These four pages are the only pages at issue. Because of the narrowing of the records at issue, the exemptions in section 10(1)(a), 14(3)(d), 15(a) and 38(c) are no longer at issue. The Police continue to rely on section 8(1)(g), and section 14(1) with reference to section 14(3)(b) for one page. Further, the Police indicate that a portion of one page is not responsive to the request. The responsiveness of this portion of the record remains at issue in this appeal.

During mediation, it became apparent that the Police also rely on section 8(1)(c) for one page. This exemption was not raised by the Police in any correspondence which was sent to the appellant although it has been claimed on the index which was sent to this office. The mediator indicated on the Mediator's Report that this section was at issue. The appellant did not object to its inclusion as an issue. Therefore, I will consider section 8(1)(c) as an issue in this appeal.

I sent a Notice of Inquiry to the Police and the appellant. Because all of the records appear to contain the appellant's personal information, the possible application of section 38(a) (discretion to refuse requester's own information) was raised in the Notice. Similarly, since the Police have claimed the application of section 14(1) for, at least one page, this Notice raised the possible application of section 38(b). Further, although the Police have not claimed the application of section 14(1) or 38(b) to the other three records, the parties were asked to address the possible application of sections 14(1) and 38(b) to all of the records.

Representations were received from both parties.

DISCUSSION:

RESPONSIVENESS OF ONE PAGE OF THE RECORD

As I indicated above, the Police claimed that one page of the record was not responsive to the request. Although asked to explain their position, the Police did not address this issue in their representations. There is nothing marked on the page which was sent to this office indicating which portion the Police considered to be non-responsive.

In Order P-880, former Adjudicator Anita Fineberg considered the standard to be applied in deciding whether records are responsive to a request. She stated:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I agree with this analysis and adopt it for the purposes of this appeal. In reviewing the page at issue, I am satisfied that all portions of this page are "reasonably related" to the appellant's request. As a result, I find that all of this record is responsive to the request.

PERSONAL INFORMATION

[IPC Order MO-1261/December 20, 1999]

Section 2(1) of the Act defines “personal information”, in part, as recorded information about an identifiable individual.

The records all pertain to the employment application made by the appellant to the Police. They all contain information provided by him relating to himself or about him as recorded by the employment investigator. Accordingly, I find that all four records contain the appellant’s personal information.

One of the records contains references to other individuals. I find that this page contains their personal information.

DISCRETION TO REFUSE REQUESTER’S OWN INFORMATION

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 section 8, would apply to that personal information. The Police claim that section 8(1)(g) applies to all of the records and that section 8(1)(c) applies to one page.

LAW ENFORCEMENT

Sections 8(1)(c) and (g) of the Act read as follows:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons.

Definition of “Law Enforcement”

In order for the Police to rely on section 8(1)(c) of the Act, they must establish that disclosure of the records at issue could reasonably be expected to reveal investigative techniques and procedures ... **used in law enforcement**. For section 8(1)(g) to apply, the Police must establish that disclosure of the information could reasonably be expected to interfere with the gathering of or reveal **law enforcement intelligence** information. “Law enforcement” is defined in section 2(1) of the Act as:

“law enforcement” means,

- (a) policing,

- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b).

The Police acknowledge that the records at issue were created during the routine background check performed on all police service applicants. The Police state that such checks are undertaken solely to investigate the kind of persons with whom a prospective employee associates and is conducted pursuant to section 43(1) of the Police Services Act (the PSA), which states:

No person shall be appointed as a police officer unless he or she,

- (a) is a Canadian Citizen or a permanent resident of Canada;
- (b) is at least eighteen years of age;
- (c) is physically and mentally able to perform the duties of the position, having regard to his or her own safety and the safety of members of the public;
- (d) is of good moral character and habits; and
- (e) has successfully completed at least four years of secondary school education or its equivalent.

While I appreciate that in evaluating the ability and desirability of an individual for the position of a police officer, the Police are required to take greater care in investigating the “background” of the prospective employee than would be expected from many other employers, I do not accept that this activity, in and of itself, constitutes “policing”, or that it relates to any of the other activities referred to in the definition of “law enforcement”.

Rather, such an “investigation” primarily relates to human resources issues and the hiring process. In my view, this type of activity does not fall within the definition of “law enforcement”.

That being said, however, the Police indicate that the source material for much of the information at issue in this appeal originates from their Intelligence Unit and was obtained pursuant to their policing function. The Police note that, in having his application declined, the appellant was simply told that “something in his background check was the reason”. The Police submit that the information in the four pages at issue was withheld because to disclose it would reveal law enforcement intelligence information.

Because of the unique position of the Police and the resources available to them in conducting background checks on prospective employees, it is possible that information which was obtained as part of their policing function would turn up as a result of their queries relating to an employment background check. I am satisfied that the information at issue falls into this category of information and thus meets the definition of “law enforcement”. This pertains to all of the information on three of the records and to a small portion of the information on the fourth record.

The remaining portions of the fourth record, which is an investigator's check list, are clearly linked to the human resources function being performed by the Police in determining the eligibility of the appellant to be considered for a position with them. The first two portions of the record simply identify the candidate and whether he has met basic requirements for employment. The third section of this record describes the various resources used in conducting the background investigation on prospective applicants. The Police submit that although prospective employees know that certain standard checks are done, they may not be aware of the resources accessed in doing so. Moreover, the Police assert that many of the resources are generally not widely known.

In my view, apart from the reference to section 43(1) of the PSA, the Police have provided insufficient evidence which links the performance of a human resources function with their law enforcement mandate. Consequently, with respect to the one exception referred to above, I am not persuaded that any portion of the record relates to "law enforcement" for the purpose of a finding under section 8. I have highlighted in yellow on the copy of this record which is being sent to the Freedom of Information and Privacy Co-ordinator for the Police that portion of the record which satisfies the definition of law enforcement.

As the remaining portions of this record only contain the appellant's personal information, neither section 14(1) nor section 38(b) can apply to it and these parts of the record should be disclosed to the appellant.

Section 8(1)(g)

The purpose of section 8(1)(g) is to provide the institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information. Previous orders have defined intelligence information as:

information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence (Orders M-202 and P-650).

The Police state that certain types of information, such as that referenced in the current case, is routinely gathered by the intelligence units of police agencies and used for the maintenance of law and order. The Police state further that the gathering of intelligence information enables the police to take a pro-active approach in dealing with various groups and activities.

The Police submit that disclosure of information which was obtained as part of this "intelligence gathering" could have a number of consequences, including identification of individuals who are being monitored, informants and infiltrators and could result in individuals or groups going "underground" or otherwise taking active steps to conceal their activities or associations.

I have considered the representations of both parties and am satisfied that disclosure of the information contained in the remaining portions of the records at issue would reveal law enforcement intelligence
[IPC Order MO-1261/December 20, 1999]

information gathered by the Police. Accordingly, I find that the records at issue are exempt under section 8(1)(g). Because the records contain the personal information of the appellant, they are exempt under section 38(a).

Because of the findings I have made, it is not necessary for me to consider the application of the other exemptions claimed by the Police.

In concluding this appeal, I am aware of and am sympathetic to, the appellant's frustrations in trying to understand the reasons for the rejection of his application by the Police which has, apparently, had a dramatic effect with respect to his aspirations and his own sense of self worth. In their representations, the Police indicate that to simply release the cause of their concern would, in essence, lead to unfair speculation by the appellant. It is clear, based on the expressions of concern, anger and frustration in the appellant's representations, that non-disclosure of the cause of their concern has had the same result.

ORDER:

1. I order the Police to provide the appellant with a copy of one page of the records in accordance with the highlighted copy of this record which I am attaching to the copy of this order by January 14, 2000. The non-highlighted portions of this record are to be disclosed.
2. I uphold the decision of the Police to withhold the remaining information in the records.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Police to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ December 20, 1999