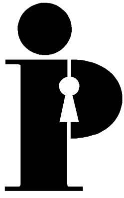

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1428

Appeal MA_000212_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 *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "any and all documents that pertain specifically to the servicing of a Form 9 issued by [a certain hospital] on or about [a certain date]". The requester identified that the Form 9 ("Order for Return" under the *Mental Health Act (MHA)*) related to him. His request stated:

> Specifically;
>
> - the badge number and names of all officers involved in the execution of the form, that is, who attended at a particular address on [specific dates] and the duration spent at that address both in the requester's absence and presence;
> - the identity of the five officers who entered that address on [a specific date] and all notes pertaining to the requester from all five officers;
> - all notes from the two officers who physically brought the requester to the hospital, including all observations relating to the "physical" given in "room 8" in the emergency room;
> - any observations regarding the requester's treatment or care on the seventh floor, specifically "7 west" within the psychiatric ward of the hospital, including any comments made by anyone (doctors, nurses, security, patients, etc.) pertaining to the requester;
> - the Form 9 itself.

The Police identified 39 pages of records as responsive to the request and granted partial access to them. The Police denied access to pages 4, 10 to 14, 16, 17, 18, 20 to 28 and 29, relying on the exemptions in sections 14 (invasion of privacy) and 9 (relations with other governments) of the *Act*. The Police also relied on section 38(b) (invasion of privacy) in conjunction with section 14(3)(b) (investigation into possible violation of law).

The requester, now the appellant, appealed the Police's decision.

During the mediation of this appeal, the Police issued a second decision letter stating that they were also claiming the application of section 8(1)(l) (law enforcement). The appellant then forwarded correspondence to this office, which was shared with the Police, setting out "a list of questions, concerns etc. with respect to the responsive records" and stating that a list of abbreviations previously provided by the Police was incomplete.

In the mediation process, the appellant asserted that more records exist in the Police files and provided examples of the types of records he felt should have been located in their search. The Police responded by stating that the examples are not responsive to the request. Many of them fall outside the scope of the initial request and therefore do not relate to the file under appeal.

The appellant disagrees with this position. The reasonableness of the search conducted by the Police and the responsiveness of the records are, therefore, at issue in this appeal.

The appellant also narrowed the scope of his request to include only pages 1, 2 (page 7 is a duplicate of page 1), 8, 19, 29, 31, 34, 35 and 37, the ORI numbers (also known as CPIC access codes) and Police "ten-codes". Consequently, the application of section 9 of the *Act* is no longer at issue.

This office sent a Notice of Inquiry to the Police initially, summarizing the facts and issues in this appeal. The Notice of Inquiry was then sent to the appellant, together with the non-confidential portion of the Police's representations. The appellant also submitted representations.

RECORDS:

The records at issue consist of the following: pages 1, 2 (page 7 is duplicate of page 1) and 8 of the Occurrence Report, containing the names, addresses and phone numbers of affected parties; pages 19, 29 and 31 of the Event Details Report, on which ORI numbers appear, as well as, the name address and phone number of an affected party; and the severed portions of two police officers' memorandum notes containing the name, address and telephone number of an affected party and message codes (pages 34, 35 and 37).

PRELIMINARY MATTERS:

REASONABLENESS OF SEARCH / RESPONSIVE RECORDS

The appellant believes that additional responsive records should exist. It is my responsibility to ensure that the Police have made a reasonable search to identify all responsive records. The *Act* does not require the Police to prove with absolute certainty that further records do not exist. However, in order to properly discharge their obligations under the *Act*, the Police must provide sufficient evidence to show that they have made a reasonable effort to identify and locate all responsive records (Orders M-282, P-458 and P-535). A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

The Police provided detailed representations in which they objected to the phraseology, "further asked" in the Notice of Inquiry, after which the items listed above were set out. The Police also discussed in detail their interpretation of the word "Specifically;..." in the initial request. In essence, the Police submit:

> The request, as written, is clear and provides sufficient description of the "specified" records sought by the appellant to enable an experienced analyst to correctly identify the responsive records. The institution's search for responsive records was properly determined by the parameters set out in the wording of the request.

As noted above, during mediation of this appeal the appellant raised the issue of reasonableness of search and he inquired about the memorandum notes of the police officers who attended at his

home and accompanied him to the hospital. The Police's position is that these records are not responsive because they were not listed in the initial request. The Police also state that the appellant had attended at the public counter on several occasions and other than discussing the status of obtaining the requested records, he did not raise the issue of other records.

A review of the appellant's initial request indicates that he clearly requests "any and all" records relating to the issuing of the Form 9. The request includes the memorandum notes of all police officers who were involved in the incident, and it was therefore not reasonable for the Police to interpret the request as narrowly as they have. It is not clear from the materials before me exactly the number of police officers who attended at the appellant's home and accompanied him to the hospital. The Occurrence Report indicates that over a period of time several officers were involved in the incident. By limiting the request to the memorandum notes of three identified police officers, the Police have unilaterally narrowed the scope of the request and pre-determined that no further clarification was required. Consequently, the Police have not met their obligation under the *Act*.

The August 28, 2000 request

Later on in the mediation process, the appellant forwarded correspondence to this office, dated August 28, 2000, in which he set out a list of "questions, concerns etc. regarding [his file with the Police]", as well as ten items that he believed required clarification. In their representations, the Police state that "the items listed ... were never identified by the appellant in his original request as records to which he was seeking access." I agree, in part, with the Police's position.

I have reviewed the list and note that the Police have disclosed to the appellant item 4 and the non-confidential portions of the memorandum notes of three officers listed under item 7. Item 1 expands the scope of the request and items 2 and 6 are new items that are not included in the initial request.

The following items fall within the scope of the initial request: Items 3, 8 and 12 (codes for which clarification was requested), item 5 (dispatch transcript) and the memorandum notes of the remaining police officers listed under item 7.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

All of the records at issue pertain to the appellant and thus contain his personal information. The Occurrence Report and the Event Details Report contain the names of the affected persons and other information about these individuals including their addresses and telephone numbers. The information contained in these records is therefore "about" these individuals [paragraph (d)], and fall within the definition of "personal information".

In this particular context, where most of the content of the records have already been disclosed, disclosure of the names alone would reveal information about the affected person's involvement in the incident. This clearly constitutes information "about" these individuals and therefore paragraph (h) of the definition also applies.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/ UNJUSTIFIED INVASION OF ANOTHER INDIVIDUAL'S PRIVACY

Introduction

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 access.

Where a record contains the personal information of both the appellant and another individual, section 38(b) allows the Police to exercise their discretion to withhold information from the record if they determine that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual's personal privacy.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. 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 the disclosure of which 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 14 (2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767]. In other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to in favour of disclosure.

The Divisional Court has stated that the only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the *Act* or where 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 14 exemption.

In this case, the Police have cited section 14(3)(b) in conjunction with section 38(b). Those sections read:

> **38.** A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

> **14.** (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (b) 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 submit that the personal information recorded on the Occurrence Report and the Event Details Report were compiled in accordance with legislated authority under the *MHA*. That is, the appellant was subject to detention under Form 9 for being absent from a hospital facility "without authorization", and the Police were directed to apprehend and return him to a psychiatric facility. They state:

> ... This legal authority to apprehend the appellant, by way of Form 9, caused the police to begin an investigation to locate the appellant and ensure his safety (and the safety of the general public).
>
> The possibility of an individual wanted on a Form 9 may be violent can never be ruled out, and as such officers must investigate with the mind set that the community may be at risk. This policing, to ensure the safety of everyone involved falls under the Act's definition of law enforcement, and as such is subject to exemption under section 14(3)(b).

Section 14(3)(b) of the Act and Section 17 of the MHA

While the Police do not specifically cite section 17 of the *MHA*, it is alluded to in their representations. Section 17 reads:

> 17. Where a police officer has reasonable and probable grounds to believe that a person is acting or has acted in a disorderly manner and has reasonable cause to believe that the person,
>
> (a) has threatened or attempted or is threatening or attempting to cause bodily harm to himself or herself;
>
> (b) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him or her; or
>
> (c) has shown or is showing a lack of competence to care for himself or herself,

and in addition the police officer is of the opinion that the person is apparently suffering from mental disorder of a nature or quality that likely will result in,

(d) serious bodily harm to the person;

(e) serious bodily harm to another person; or

(f) serious physical impairment of the person,

and that it would be dangerous to proceed under section 16, the police officer may take the person in custody to an appropriate place for examination by a physician.

The issue of a police officer's duties pursuant to section 17 of the *MHA*, was addressed in Order MO-1384, in which Assistant Commissioner Tom Mitchinson found:

> Section 17 of the *Mental Health Act* does not create an offence for the actions of individuals which may justify the involvement of the Police. The Police have provided no evidence to suggest the appellant's behaviour harmed or threatened to harm any other person. Rather, it would appear that the Police decided to approach the appellant on the basis of possible harm she might inflict on herself. In my view, absent evidence to the contrary, the actions taken by the Police, under the apparent authority of the *Mental Health Act*, do not fall within the scope of section 14(3)(b) because, while they involve police officers, they do not involve or relate to "a possible violation of law". This situation can be distinguished from investigations undertaken by police services in situations involving a suspicious death, where possible foul play may have occurred. In those circumstance, it is often reasonable for a police service to conclude that there may have been "a possible violation of law", specifically the *Criminal Code* of Canada.

The principles articulated in Order MO-1384 are applicable in this appeal. To satisfy the requirements of section 14(3)(b), the information at issue must have been compiled as part of an investigation into a possible violation of law. Although the Police have stated that an investigation was initiated to locate the appellant, they have not persuaded me that the appellant was engaged in any potential criminal activity or that the "investigation" undertaken by the Police, after a Form 9 was issued, was related to a possible breach of the *Criminal Code* or any other law.

In the absence of this evidence, I find that the presumption of an unjustified invasion of personal privacy does not apply. I will now turn to a consideration of the factors at section 14(2).

Section 14(2) factors

The Police state that they have exercised their discretion to refuse access to the records at issue under section 38(b) and cite factors at section 14(2) as weighing against disclosure of the names, addresses and phone numbers of the affected parties. They assert that disclosure of the requested information would constitute an unjustified invasion of personal privacy. The three factors raised in the Police's representations, at section 14(2), are:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Section 14(2)(d) - fair determination of rights

For section 14 (2)(d) 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.
>
> [See Orders 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.)] and PO-1764]

The Police state that when the appellant indicated to them the information was of such importance that he would appeal their decision if he was not granted disclosure, they considered the factor in section 14(2)(d). They also submit that the appellant did not provide further information which would confirm his intentions or offer support for the application of section 14(2)(d).

The appellant raises allegations of Charter and criminal violations on the part of the Police, but does not elaborate further.

He has not established the existence of any current or contemplated proceeding to which the information in question would be relevant. Accordingly, I find that section 14(2)(d) cannot apply in the circumstances.

Section 14(2)(e) - pecuniary or other harm

The Police submit that having provided information to the Police, an affected party has the right to consider the matter closed. They suggest that if the identities of the affected parties are revealed they will be vulnerable to being contacted by the appellant: "The nature of the contact could range from a single contact by telephone or personal visit to ongoing contact by the appellant." The Police further note that the appellant has expressed feelings that he has been "wronged" and it is not known what steps (if any) he is going to take to correct the situation, including the possibility of proceeding with a complaint or civil suit.

In response, the appellant indicates that the Police have not detailed what harm is contemplated and he is not considering any action. He asserts that his interest is in the information that the affected parties received about him.

I have not been provided with any substantial basis for the assertion that disclosure of the information relating to the affected persons would expose them unfairly to pecuniary or other harm. The mere possibility of harm is not sufficient (Orders P-558, P-676). Therefore, section 14(2)(e) does not weigh in favour of privacy protection in the circumstances of this appeal.

Section 14(2)(h) - supplied in confidence

Although the Police do not specifically refer to section 14(2)(e) or (h), they state in their representations that they have considered the factor of confidentiality:

> When considering factors in relation to the affected parties' right of privacy, we considered the expectation of confidentiality, as well as the *Act*'s direction that such a release would be an unjustified invasion of privacy.
>
> One of the implied elements of trust held by members of the public is that the law enforcement agency will act responsibly in the manner in which it deals with recorded personal information. Our Police Service must be able to maintain that trust and protect the personal information that we obtain from them during such law enforcement investigations. There is certainly no expectation that such information would be routinely available for any purpose other than its original collection.

In considering the representations and the nature of the information which has been withheld from the record, I am persuaded that individuals who provide information to the Police can reasonably expect that his/her identity would be held in confidence. In Order MO-1384, which was discussed above, the Peel Regional Police stated:

> When the police receive calls of this nature [pursuant to section 17 of the *Mental Health Act*] there is an expectation on the part of the caller that their identity will be protected.

Assistant Commissioner Mitchinson found that this assumption was a reasonable one in the circumstances. I agree.

I find that personal information appears on pages 1(7), 2 and 8 of the Occurrence Report, and on page 29 of the Event Details Report. Therefore, the factor in section 14(2)(h) is a relevant consideration and carries moderate weight in favour of non-disclosure.

Analysis of the factors

The only factor I have found applicable is the one at section 14(2)(h) which weighs moderately against disclosure. In my view, this factor outweighs the appellant's right of access in the circumstances and disclosure of the affected parties' names, addresses and phone numbers would constitute an unjustified invasion of privacy. This is consistent with the finding in Order MO-1384 as noted above. Consequently, the exemption at section 38(b) applies to this information.

Section 38(b)

The Police representations indicate that they have balanced the appellant's right of access to his personal information in the record with the affected persons' right to privacy and concluded that the affected persons' rights outweighed those of the appellant. In doing so, they considered the factors at section 14(2) as discussed above. I am satisfied that the Police have properly exercised their discretion under section 38(b), by taking into account all of the relevant circumstances of this request.

LAW ENFORCEMENT

The Police have claimed the exemption provided in section 8(1)(l) for message codes (referred to in this appeal as a "ten-codes") used by police officers in their communications with one another and ORI Numbers (also known as CPIC access codes). Section 8(1)(l) reads:

> 8. (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

Ten-codes

The Police submit that section 8(1)(l) applies to the ten-codes referred to in the records. They state that release of these codes would leave officers more vulnerable and compromise their ability to provide effective policing services. If ten-codes become known to the public at large, individuals engaged in illegal activities could circumvent the policing process by placing false 911 calls. The Police contend that "the ten-codes referred to in the records do not, in isolation,

provide a specific meaning to each code. However, when read in the context of the records at issue, the corresponding meaning would easily be revealed."

In response, the appellant asserts that ten-codes are transmission codes used by police officers for the purpose of communicating with each other and for this reason ought not to appear in their notebooks. The appellant's view is that these message codes are for use in encoding information that is to be conveyed over an unsecured medium. The appellant states that he requires the messages represented by ten-codes so that he can understand the information contained in the officers' notes.

To support their argument, the Police refer to Order PO-1665, in which it was decided that disclosure of the ten-codes would make it easier for individuals engaged in illegal activities to carry them out and to communicate with each other on publicly accessible radio transmission space. There is a line of orders establishing that ten-codes should not be disclosed (Orders M-393, M-757, PO-1777). The appellant has not persuaded me that I should reach a different conclusion in this case. Accordingly, I find that ten-codes are exempt from disclosure under section 8(1)(l) of the *Act*.

ORI Numbers *(CPIC access codes)*

The Police state that if the public gained access to the CPIC database, the accuracy of the information contained on the database would be jeopardized. They also state that access to transmission codes may ultimately allow access to the CPIC database. Prior orders of this office have upheld the application of section 8(1)(l), or its provincial equivalent to CPIC access codes (Orders M-933, M-1004). I agree with the approach in these decisions and find that it applies in this appeal. Therefore that ORI Numbers are also exempt under section 8(1)(l).

ORDER:

1. I uphold the decision of the Police not to disclose the information concerning the records at issue.

2. I find that the Police's search for other records responsive to the appellant's request as too narrow and therefore, not reasonable.

3. I order the Police to conduct a further search for responsive records, such as other police officers' memorandum notes, and to advise the appellant of the results of the search no later than May 28, 2001.

4. If, as a result of the further search, the Police locate additional responsive records, I order the Police to provide a decision letter to the appellant regarding access to these records, treating the date of this order as the date of the request.

5. 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 are disclosed to the appellant, only upon request.

Original signed by: May 7, 2001
Dora Nipp
Adjudicator