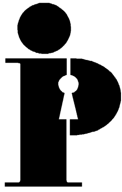

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1617

Appeal MA-020180-1

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 "any records that show [a named individual] was awarded an 'out of court' settlement by the Toronto Police Services". The appellant provided additional information about the named individual (the affected person), including the amount he allegedly received from the Police.

The Police issued a decision in which they refused to confirm or deny the existence of any responsive records pursuant to section 14(5) (invasion of privacy) of the *Act*.

The appellant appealed this decision.

Mediation of this appeal was not possible and the file was moved into adjudication.

I first sought representations from the Police, and sent them a Notice of Inquiry setting out the facts and issues at adjudication. The Police submitted representations in response. I then sought representations from the appellant and sent him a copy of the Notice along with the non-confidential portions of the submissions made by the Police.

The appellant also submitted representations in response.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS AND THE PERSONAL INFORMATION EXEMPTION

Introduction

The Police rely on section 14(5) of the *Act* as the basis for their decision to refuse to confirm or deny whether responsive records exist. This section reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power, which should be exercised only in rare cases [Order P-339].

An institution relying on this section must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. An institution must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested record would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy [Orders P-339; P-808, upheld on judicial

review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)]

Before the Police may be permitted to exercise its discretion to invoke section 14(5), they must provide sufficient evidence to establish that:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy [Order MO-1179].

Findings regarding the application of section 14(5)

I uphold the decision of the Police to refuse to confirm or deny the existence of records relating to the affected person.

I have set out the bases for my findings below.

Part one: disclosure of the records (if they exist)

Definition of Personal Information

Under part one of the section 14(5) test, the Police must demonstrate that disclosure of the records, if they exist, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The Police point out that the request on its face is for records that show that the affected person was awarded an out of court settlement. The Police indicate further that the appellant referred to a specific amount of money in his request letter. The Police submit that a record, if it exists, would contain the personal information of the affected person.

I agree. If a record were to exist, it would contain recorded information about a financial settlement between the affected person and the Police. I find that this would constitute recorded information about the affected person, whose identity is clearly known to the appellant.

Unjustified invasion of personal privacy

I must now determine whether disclosure of such a record, if it exists, would constitute an unjustified invasion of privacy of the affected person.

Where 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 that could apply is section 14(1)(f), which states:

> 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 determining whether section 14(1) applies, 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 14 exemption.

The Police rely on the factors in sections 14(2)(e) and (f). The appellant has alluded to the factor in section 14(2)(a). In my view, the presumption in section 14(3)(f) should also be considered. These sections read:

> (2) 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,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The appellant's representations

The appellant describes himself as "a justice advocate, with particular interest in 'civilian oversight of policing services' in Ontario". His representations outline his relationship with the affected person, his knowledge of the affected person's activities, comments made to him by third parties who also appear to know the affected person and his own discussions with Police personnel regarding the affected person and a named police officer. The appellant explains why he is interested in pursuing the information he requested:

> My position is that [the affected person] was paid as an informant, who went to infiltrate groups and individuals, posing as himself a victim of unlawful arrest and charges. I think the police routinely use this technique in intelligence gathering. It's very effective and for quite some time I would allege I was 'conned' or 'suckered' into believing [the affected person] was in a situation which in retrospect was not anything as it appeared which leads to my interest and questions.
>
> I do not think it appropriate that police infiltrators be used on law abiding citizens or groups. Hence my interest. [The] community is a very intimate community and there are a large number of people in the community who believe [the affected person] was the victim of unlawful arrest/charges. I would also like to put this matter to rest, but to date I have not been able to find out conclusively if or what may have happened to public funds.

Along with his representations, the appellant submitted a number of pieces of correspondence, which in general do not assist in the determination of this issue.

The appellant also provided a copy of a Notice of Commencement of Proceedings, Statement of Claim, Notice of Appointment of Solicitor, Affidavit of Service, Consent (to a dismissal of the action) and Order, all of which pertain to an action brought by the affected person against the Police for damages for malicious prosecution.

The Police submissions and my Findings

Section 14(3)(f)

Previous orders of this office have dealt with monetary entitlements relating to various types of agreements. Many of these orders found that "one time payments to be conferred immediately or over a defined period of time that arise directly from the acceptance by the former employees of the retirement packages" cannot be described as an individual's "finances, income, assets, net worth, financial history or financial activities for the purpose of section 14(3)(f) of the *Act*." (See Orders M-173 and M-1082). This conclusion has also been applied to the one-time amount agreed to in the settlement of an individual's human rights complaint against a municipality (Order M –1160), and to the one-time amounts agreed to in the settlement of an individual's claim of wrongful dismissal against the institution (Order MO-1184).

In my view, these conclusions would also be applicable to a record that reflects the out of court settlement identified by the appellant in his request, if such a record were to exist. Accordingly, I find that the presumption in section 14(3)(f) would not apply in the circumstances.

Sections 14(2)(e) and (f)

The Police note that if there had been civil litigation between the affected person and the Police, there would have to be some basis for it, such as "interaction" between them. Referring to Order P-1167, the Police continue:

> Where an individual has interaction with police, it could be as an accused person, as a victim of a crime, or as an innocent bystander or witness. If the events are such that the individual has sufficient cause, or believes they have sufficient cause, to begin civil litigation against the [Police], they follow the procedures established for civil litigation. At some point, whether by informal agreement, as in an out of court settlement, or by way of judgement, the matter is ultimately concluded. Upon conclusion of the litigation process, the affected party can consider the matter closed and move past not only the litigation process itself, but put the events which led to the litigation behind them.
>
> It should be noted that once information is released to the public, there are no restrictions on how or when it may be used.

In addition, the Police note that there are several areas of an individual's life that are recognized as being highly sensitive, such as health issues, financial issues and involvement in law enforcement issues.

In general, I accept that an individual's involvement with the Police acting in their law enforcement capacity is usually considered highly sensitive. Similarly, the fact that an individual had entered into settlement discussions with the Police relating to some interaction between them, and the financial details of such a settlement would reasonably be viewed as highly sensitive by that individual. I, therefore, find that section 14(2)(f) is relevant to a record that would disclose the details of an out of court settlement, if such a record existed.

In Order P-1167, former Adjudicator Anita Fineberg commented on the relevancy of section 21(2)(f) (the provincial *Act* equivalent to section 14(2)(e)) with respect to the settlement of a human rights complaint:

> I agree that section 21(2)(e), unfair exposure to pecuniary or other harm, is a relevant consideration in this case. I am of the view that once the parties have followed the appropriate procedures to file a complaint with the Commission and have reached a satisfactory settlement, they are entitled to consider the matter as "closed". Based on the information contained in the records and the submissions of the parties, including the Town and the Police, I accept that disclosure of the records at this time could expose the complainants unfairly to harm in the form of a continuing, and potentially public, reminder of these unpleasant events.

I agree with these conclusions, and find that they are similarly applicable in the circumstances of the current appeal. Accordingly, the factor weighing against disclosure in section 14(2)(e) would also be relevant to a record, if it existed.

Section 14(2)(a)

As I indicated above, the appellant appears to be motivated, in part, by a desire to know how public funds are being used. But he is primarily interested in verifying rumours about the affected person within his "community". Commenting on this, the Police state:

> Even though funds may be considered "public", when they are associated to a civil matter which has settled out of court, as alleged by the appellant, the requirement to preserve an individual's privacy is paramount. Also it would appear that the appellant does not wish to scrutinize the institution but rather scrutinize the individual's integrity in regards to allegedly 'boasting' about receiving such funds. It should be noted at no time was anything provided to the institution to support the appellant's claim that the affected party had gone 'public' with his claim.

I accept that there is a general public interest in knowing how institutions use public funds. I am not persuaded, however, that the interest in disclosure identified by the appellant in his representations is sufficient to render disclosure of the affected person's personal information desirable, if such a record were to exist.

The appellant's representations describe his own knowledge of the affected person and third party information attributing comments made by the affected person. Despite the apparent familiarity of the appellant with all of the individuals referred to in his representations, including the affected person, the appellant has not provided any information directly from these individuals to corroborate his position.

In my view, the appellant is motivated by his own personal interest in matters pertaining to the affected person, not the activities of the Police. I find that section 14(2)(a) would not be relevant to the record requested, if such a record were to exist in the circumstances of this appeal.

Even if public scrutiny could be found to be relevant, in my view, it would not be sufficient to outweigh the prejudice to the affected person if a record, such as that requested by the appellant were disclosed. On this basis, I conclude that if the record existed, it would be exempt from disclosure pursuant to section 14(1)(f) since its disclosure would constitute an unjustified invasion of privacy.

Part two: The application of section 14(5)

The appellant has provided evidence in the form of public documents, which confirm that the affected person has had some involvement with the Police and that he had initiated civil action in that regard. This evidence also confirms that the matter was dismissed on consent.

However, in my view, the appellant is "fishing" for additional information relating to the affected person's activities vis-à-vis the Police. Confirmation that the affected person has or has not entered into and/or concluded a settlement in respect of his civil action against the Police, in and of itself, provides the appellant with information about his activities, and in particular, about the amount of a settlement.

The appellant appears to be somewhat knowledgeable about the affected person, and at one time called him "a friend", yet there is no indication that his "friend" knows about this request or that he consents to the disclosure of information about him to the appellant. In these circumstances, I find that the affected person is entitled to move on with his life, free from the curiosity of his "friends and community".

On this basis, I am satisfied that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of privacy. Accordingly, I find that the Police may refuse to confirm or deny the existence of records relating to the affected person.

Neither section 14(4) nor 16 apply in the circumstances of this appeal.

ORDER:

I uphold the decision of the Police.

Original signed by:
Laurel Cropley
Adjudicator

February 27, 2003