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

ORDER MO-1928

Appeal MA-040319-1

Toronto Police Services Board

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

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 records related to the requester's detention in the holding cells at a court facility, including information regarding his transfers to and from a jail facility.

In response to the request, the Police denied access to all the responsive records pursuant to section 38(a) (discretion to refuse requester's own information), in conjunction with the discretionary exemption in section 8(1)(a) (law enforcement); and pursuant to section 38(b) (invasion of privacy) in conjunction with the presumption in section 14(3)(b) of the *Act*.

The requester, now the appellant, appealed the decision.

No issues were resolved through mediation, and the file was transferred to the inquiry stage of the process. After the file was transferred, the Police forwarded a letter to this office providing a description of the records responsive to the request. I decided to send a Notice of Inquiry to the Police, initially, and the Police provided representations in response. I then sent a copy of the Notice of Inquiry, along with a copy of the representations of the Police, to the appellant, who also provided representations.

There are six pages of records at issue, all of which are prisoner transportation lists.

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether the exemptions at section 38(a) and/or (b) of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1). The definition states, in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> ….
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The Police state that the records contain the personal information of prisoners who were incarcerated pending their trials on criminal charges. I agree, and find that all of the records contain the personal information of identifiable individuals, as defined in section 2(1)(b) and (h)

of the *Act*. I find that all of the records contain the personal information of the appellant, and that Records 1, 3, 4, 5 and 6 also contain the personal information of other identifiable individuals. Record 2 contains only the personal information of the appellant.

INVASION OF PRIVACY

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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 the requester and other individuals, and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in deciding 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 institution 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.

Section 14(2): factors weighing in favour of or against disclosure

In order to determine whether disclosure of the Records 1, 3, 4, 5 or 6 would constitute an unjustified invasion of privacy under section 38(b), I must consider whether any of the factors under section 14(2) apply. The Police take the position that the factor in section 14(2)(f) applies. Section 14(2)(f) reads:

> 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,
>
> > the personal information is highly sensitive;

The Police state:

> Information showing an individual's contact with police, in particular where an individual has been criminally charged, is highly sensitive, [and] section 14(2)(f) is relevant to an individual's right to protect information that is highly sensitive.

The appellant does not address the factors under section 14(2); however, the appellant acknowledges in his representations that severance of the personal information of other identifiable individuals may be possible in the circumstances.

I accept the position of the Police that the information of identifiable individuals other than the appellant that is contained in Records 1, 3, 4, 5 and 6, is "highly sensitive" personal information of those individuals for the purpose of section 14(2)(f), and qualifies for exemption under section 38(b) of the *Act*.

Severance

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt from disclosure. Having found that portions of Records 1, 3, 4, 5 and 6 qualify for exemption under section 38(b), I must now determine whether any portions of those records could reasonably be severed.

The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

After reviewing Records 1, 3, 4, 5 and 6, I find that it is possible to sever the information in such a way that the information relating to identifiable individuals other than the appellant is not disclosed, but the information relating solely to the appellant is disclosed. In each of the records, the identified individuals are listed by name. I find that it is possible to sever the names of other identifiable individuals, along with all of the other information contained in the lines which relate to those individuals, in such a way as to ensure that any information relating to those individuals is not disclosed. After severing the information relating to other identifiable individuals, the remaining information relates solely to the appellant, and does not qualify for exemption under section 38(b).

Because Record 2 and the remaining portions of Records 1, 3, 4, 5 and 6 do not contain the personal information of any individuals other than the appellant, I will now examine whether these records qualify for exemption under section 38(a).

DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(a), IN CONJUNCTION WITH SECTION 8(1)(a), APPLY TO THE RECORDS?

General principles

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

Because section 38(a) is a discretionary exemption, even if the information falls within the scope of section 8, the institution must nevertheless consider whether to disclose the information to the requester.

In this appeal, the Police rely on section 38(a) in conjunction with section 8(1)(a), which reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > interfere with a law enforcement matter;

The term "law enforcement," which appears in sections 8(1)(a), is defined in section 2(1) of the *Act* as follows:

> "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).

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context (*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)).

Under section 8(1)(a), an institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a per se fulfillment of the requirements of the exemption (Order PO-2040; *Ontario (Attorney General) v. Fineberg*, above).

In order for section 8(1)(a) to apply, the "law enforcement matter" in question must be specific and ongoing. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters (Orders PO-2085, MO-1578).

Representations

The Police submit that the records qualify for exemption under section 8(1)(a) as follows:

> The criminal charges for which the [Police] created an investigative file, the contents of which form the basis of a Crown Brief, are currently before the Ontario Court of Appeal and, therefore, the requested documents relate to an ongoing law enforcement matter.
>
> The [Police] rely on the application of section 8(1)(a) of the *Act* to refuse to disclose the responsive records. The premature release of information, by [the Police], which has been lawfully withheld by the Crown pursuant to his/her obligations … may interfere with the prosecution of the matter. For example, the release of information which the Crown has determined to be not relevant impairs the Crown's ability to limit the scope of a trial to relevant matters and otherwise properly conduct the prosecution on behalf of the state.

The appellant provided representations in support of the position that the records do not qualify for exemption under section 8(1)(a).

Findings

I have carefully reviewed the portions of the records remaining at issue, which consist of six pages of prisoner transportation lists and relate solely to the appellant.

In my view, the disclosure of the remaining portions of the records could not reasonably be expected to interfere with a law enforcement matter. These records relate simply to the transportation of the appellant during the period of his incarceration, and the Police have not provided evidence which is sufficiently "detailed and convincing" to establish a "reasonable expectation" that the disclosure of these records could interfere with the law enforcement matter. In my view, the disclosure of the remaining portions of the records could not reasonably be expected to interfere with a law enforcement matter, particularly as the relevant portions of the records relate solely to administrative matters concerning the appellant, specifically to his transportation to and from identified facilities (See Order MO-1908-I).

Accordingly, I find that the remaining portions of Records 1, 3, 4, 5 and 6, and all of Record 2, do not qualify for exemption under section 8(1)(a). As the exemption in section 8(1)(a) does not

apply to these records or portions of records, they do not qualify for exemption under section 38(a). I will therefore order the Police to disclose them to the appellant.

SEARCH FOR RESPONSIVE RECORDS

In his representations, the appellant provides significant background information regarding the processing of this file. He also provides specific information relating to a similar request he made for information from the Ministry of Community Safety and Correctional Services (the Ministry), which resulted in the opening of an appeal with this office and, ultimately, the issuing of Order PO-2335. The appellant also identifies that he made a similar request to the Police, which also resulted in an appeal and, ultimately, the issuing of Order MO-1843. The appellant relies on the facts giving rise to those appeals and orders in support of his position that the Police did not fully respond to the request for records in this appeal, and in support of his position that the searches conducted by the Police are not reasonable.

With respect to the appellant's view that the Police did not respond fully to the request resulting in this appeal, the appellant refers to what he considers to be the three categories of records set forth in his request. He argues that the Police improperly focused their response on one portion of the request, to the exclusion of the others.

I have carefully reviewed the information provided by the appellant. He provides a lengthy and detailed background to this appeal, and identifies the specific manner in which he has been requesting the information. He also refers me to the previous appeals which involved the Ministry and the Police, and I have also reviewed the information and records contained in the appeal files maintained by this office. The request that gave rise to those appeals also related to the appellant's detention in the holding cells at the identified court facility, and to records regarding the communications between the Police and the Ministry regarding the appellant's detention. Responsive records in both of those appeals were dealt with in Order PO-2335 (Ministry records) and Order MO-1843 (Police records). Given the nature of the information requested, the focus of the appellant's request and the nature of the previous appeals dealing with related records, I am satisfied that the Police's response to the request was reasonable in the circumstances.

The appellant also takes the position that the searches conducted by the Police for responsive records were not reasonable. Although the appellant acknowledges that the Police refer to the fact that the records are dated 2001, and that the Police are not required to retain records of the nature requested for more than one year, the appellant maintains that the Police should conduct further searches for records which may exist. The appellant also refers to material he received from the Ministry in his earlier appeal with the Ministry, which he claims supports his position that the Police should conduct further searches.

In addition, the appellant refers to the representations of the Police which identify that certain attachments to the records at issue are no longer in the possession of the Police. The appellant is of the view that further searches for those records should also be conducted.

After reviewing the information provided by the appellant, as well as the information contained in the records at issue and the nature of the information requested, I am not satisfied that the appellant has provided me with sufficient evidence to review whether the search for responsive records was reasonable. Previous orders have established that, although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist (Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920).

As set out above, the appellant identified his concerns regarding the searches conducted by the Police for responsive records and, in particular, about the attachments which are referred to by the Police. Given the nature of the information requested, including the nature of the records which would at one time have been attached to these records (as referred to in the records), I am not satisfied that the appellant has provided a reasonable basis for concluding that additional records exist.

ORDER:

1. I uphold the decision of the Police to deny access to the portions of Records 1, 3, 4, 5 and 6 which I have found to qualify for exemption under section 38(b) of the *Act*.

2. I order the Police to disclose all of Record 2, and the remaining portions of Records 1, 3, 4, 5 and 6 to the appellant by **June 29, 2005**. For greater certainty, I have highlighted the portions of Records 1, 3, 4, 5 and 6 which are not to be disclosed on the copies of the records sent to the Police along with this order. To be clear, the Police are to disclose only the *non-highlighted* portions of the records to the appellant.

3. In order to verify compliance, I reserve the right to require the Police to provide me with a copy of the records disclosed to the appellant pursuant to the above provision, upon request.

Original signed by:

May 30, 2005

Frank DeVries
Adjudicator