



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2061

Appeal MA-050422-1

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 the tape (or a transcript of the tape) of a 911 emergency call made by a named individual (the affected person) on an identified date and time, and any records created by the police officers attending the call.

The Police located the responsive records and issued a decision denying access to the tape of the 911 call, while granting partial access to the notebook entries of the police officers. Access to the withheld portions of the notebooks, as well as the tape, was denied on the basis of the exemptions found in section 38(a) (discretion to refuse requester's own information), in conjunction with the exemption in section 8(1)(l) (facilitate commission of an unlawful act), and sections 38(b) and 14(1) (invasion of privacy), with reference to the presumption in section 14(3)(b) of the *Act*.

The requester (now the appellant) appealed the decision of the Police.

During mediation, the appellant confirmed that he was appealing the denial of access to the undisclosed portions of the police notebooks and to the tape of the 911 emergency call. However, he agreed that the information for which the exemptions in sections 8(1)(l) and 38(a) were claimed (the police codes) was no longer at issue and could be removed from the scope of the appeal. Also during mediation, the affected person was contacted, and he confirmed that he did not consent to the release of his information to the appellant.

Further mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Police and the affected person, initially, and invited them to provide representations on the issues. The affected person provided confidential representations in which he takes the position that the information contained in the records should not be disclosed. The Police also provided representations in response to the Notice of Inquiry. In their representations, the Police identify that they decided to provide the appellant with additional portions of the notebook entries of the police officers, and the Police attached to their representations a copy of a new decision letter issued to the appellant reflecting this decision.

I then sent the Notice of Inquiry, along with a copy of the complete representations of the Police, to the appellant. I invited the appellant to address the issues concerning access to the requested copy of the 911 tape, and those portions of the police officers' notebooks which were withheld.

The appellant provided detailed representations in response to the issues identified in the Notice of Inquiry. The appellant indicated that he remained interested in access to the portions of the notebooks which were not disclosed to him. As the representations of the Police did not address the application of the exemptions to the undisclosed portions of the notebooks, I invited the Police to provide further representations respecting access to the withheld portions of the police officer's notebooks only. The Police provided representations which were, in turn, shared in full with the appellant. The appellant responded by indicating that he was relying on the submissions he had provided earlier in response to the initial Notice of Inquiry.

RECORDS:

The records remaining at issue consist of one cassette tape (recording two separate 911 calls), and the severed portions of four pages of police officers' notes.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (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,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (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;

With respect to the recording of the 911 tape, the Police state:

The record at issue contains the information which was recorded, relayed and expressed by the affected party during the initial 911 emergency audio call made by the affected party which contains his own personal information and/or opinions. ... this information is about an individual in a personal capacity....

The Police also acknowledge that the tape contains the personal information of the appellant.

With respect to the police officer's notebooks, the police state that the records contain the personal information of the appellant, as well as the personal information of other individuals as defined in paragraphs 2(1)(d) (address and telephone number) and 2(1)(h) (the individual's name with other personal information relating to the individual).

Following my review of the records, I find that all of the records contain the personal information of the appellant, as they contain his name along with other personal information relating to him (paragraph (h)).

I also find that the 911 tape contains the personal information of the affected person, as it contains his personal views and opinions (paragraph (e)), and his name along with other personal information relating to him (paragraph (h)), including statements he made to the Police. Furthermore, I find that some of the severed portions of the police officers' notebooks contain the personal information of the affected person, and that other parts of the severed portions of the notebooks contain the personal information of other identifiable individuals, as they contain their personal views and opinions (paragraph (e)).

DISCRETION TO REFUSE ACCESS TO APPELLANT'S OWN PERSONAL INFORMATION/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, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the Police must look at the information and weigh the appellant's right of access to his own personal information against the other individuals' right to the protection of their privacy. If the Police determine that release of the information would constitute an unjustified invasion of the personal privacy of others, then section 38(b) gives the Police the discretion to deny access to the appellant's personal information.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 14(2) provides some criteria for the Police 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; and 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).

The Police take the position that disclosure of the information in the 911 tape, as well as the severed portions of the police officers' notebooks, is presumed to constitute an unjustified invasion of the privacy of other individuals under the presumption in section 14(3)(b) of the *Act* which reads:

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

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;

With respect to the information contained in the 911 tape, the Police state:

The personal information gathered ... was recorded, relayed and expressed by the affected party in the ... 911 call.

The Police describe the circumstances surrounding the 911 call, and also submit that the presumption in section 14(3)(b) applies regardless of whether or not criminal proceedings were commenced as a result of the incident. With respect to the severed portions of the notebooks, the Police state that these notes were made as a result of the police officers' investigation of the incident and that the undisclosed personal information in these records also falls within the ambit of the presumption in section 14(3)(b).

The appellant does not appear to dispute the position that the records contain information which was compiled and is identifiable as part of an investigation into a possible violation of law, instead, the appellant provides submissions on his reasons for seeking access to the portions of the records which were denied to him. He also identifies how access will bring "clarity" to the issue regarding the actions of the affected party, and that a "true and clear picture of what really happened" would emerge. In doing so, the appellant appears to be referring to the factor in section 14(2)(d) in support of the position that this information should be disclosed.

Section 14(2)(d) 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 relevant to a fair determination of rights affecting the person who made the request;

In addition, the appellant states that he was present at the time when the affected party made the initial 911 call to the Police, and that it would be absurd to deny him access to the tape. I will address this issue under the discussion of the principle of “absurd result”, below.

Findings

I have carefully reviewed the records at issue in this appeal and I am satisfied that they were compiled by the Police in the course of their investigation of the circumstances surrounding the incident involving the appellant. I find that all of the information at issue in this appeal was compiled and is identifiable as part of the Police investigation into a possible violation of law under section 14(3)(b). The presumption still applies, even though no charges were laid in this case (Orders P-223, P-237 and P-1225). Accordingly, I find that the disclosure of the personal information contained in the records is presumed to constitute an unjustified invasion of the personal privacy of the affected person and other identifiable individuals under section 14(3)(b) of the *Act*.

In his representations, the appellant identifies a number of reasons why he is interested in obtaining the records at issue, including his interest in reviewing the information. In addition, the appellant indirectly raises the factor in section 14(2)(d) in support of his position that he ought to have access to the records. However, as set out above, the Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in section 14(2) (*John Doe v. Ontario*).

The records at issue contain the personal information of the appellant as well as other identifiable individuals, and I have found that the presumption in section 14(3)(b) applies to this information. In addition, I find that section 14(4) does not apply, and the appellant has not raised the application of the “public interest override” in section 16. Accordingly, subject to my treatment of the “absurd result” principle set out below, the undisclosed portions of the police officers’ notes and the 911 tape are exempt from disclosure under section 38(b) of the *Act*.

The section 38(b) exemption is discretionary and permits the Police to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Police’s decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

The Police initially disclosed certain portions of the police officers’ notebooks to the appellant, and then subsequently decided to disclose additional information from those notebooks to the appellant. I have reviewed all of the circumstances surrounding this appeal, as well as the Police representations on the manner in which they exercised their discretion and, subject to the “absurd result” discussion below, I am satisfied that the Police have not erred in the exercise of their discretion not to disclose the remaining portions of the records under section 38(b).

ABSURD RESULT

Where a requester originally supplied the information contained in a record, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption. In Order M-444, Senior Adjudicator John Higgins stated:

Turning to the presumption in section 14(3)(b), the evidence shows that the undisclosed information was compiled and is identifiable as part of an investigation into a possible violation of law ... and for that reason, it might be expected that the presumption in section 14(3)(b) would apply.

However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.

It is possible that, in some cases, the circumstances would dictate that this presumption should apply to information which was supplied by the requester to a government organization. However, in my view, this is not such a case. Accordingly, for the reasons enumerated above, I find that the presumption in section 14(3)(b) does not apply. In the absence of any factors favouring non-disclosure, I find that the exemption in section 38(b) does not apply to the information at issue in the records.

Several subsequent orders have supported this position and include similar findings (see, for example, Orders M-613, M-847, M-1077 and P-1263). All of these orders have found that non-disclosure of personal information which was originally provided to an institution by a requester, or personal information of other individuals which would clearly have been known to a requester, would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. These orders determined that applying the presumption to deny access to the information which an appellant provided to the institution would, according to the rules of statutory interpretation, lead to an "absurd" result.

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613];

- the requester was present when the information was provided to the institution [Order P-1414];
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO- 1755]

However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

In my view, the reasoning in these past orders is applicable to the tape of the initial 911 call in the circumstances of this appeal.

As described above, the appellant states that he was present at the time that the initial 911 call was made. The appellant submits that:

As I have repeatedly pointed out ... I was present when [the affected party] made the call to "911 emergency". I was present from beginning to end, across the desk from him. ... Since the [affected party's call] was made in front of [the appellant] and since it was about [the appellant] only, it is absurd to deny [the appellant] [access] on the grounds of privacy and confidentiality. It is obvious that there is no invasion of privacy of the affected party. ...

The affected person provided confidential representations in support of his position that the information contained in the records should not be disclosed. However, the affected person confirms that, when he made the initial 911 call, the appellant was present and "heard every word" that was said to the operator. The affected person also states that the appellant was standing right in front of the affected person when the call to the 911 operator was made, and heard the "original and entire conversation".

In the circumstances of this appeal, I find that applying the section 38(b) exemption to deny access to information that the appellant is clearly aware of, would lead to an "absurd" result. There appears to be no dispute that the appellant was present during the entire initial 911 call, and heard the whole conversation. I also find that, in the circumstances, disclosure is not inconsistent with the purpose of the section 38(b) exemption.

Accordingly, I find that section 38(b) does not apply to the tape recording of the initial 911 call made by the affected party, and that it should be disclosed to the appellant.

ORDER:

1. I uphold the decision of the Police to deny access to the withheld portions of the police officers' notebooks, and to the tape recording of the second call made by the affected party.

2. I order the Police to disclose the tape recording of the initial 911 call made by the affected party, by providing a copy to the appellant by **August 1, 2006**, but not before **July 27, 2006**.
3. 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 record disclosed to the appellant pursuant to Provision 2.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ June 26, 2006