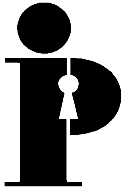

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2012

Appeal MA-050158-1

Ottawa Police Services Board

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NATURE OF THE APPEAL:

The Ottawa Police Service (the Police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> I would like to know what time the original 911 call was received from [a specific address] on March 13, 2005. Also, what time was the ambulance dispatch service notified. Plus any notes explaining any delay in notifying ambulance.

The requester (now the appellant) is an Ottawa radio station. The appellant is represented in this appeal by the radio station's News Director/Assistant Program Director.

By way of background, the request arises out of a multiple homicide and an alleged delay in the dispatch of emergency medical service (EMS) to the scene of the incident.

The Police applied the section 14(1) personal privacy exemption under the *Act* to deny access to the record in its entirety. In support of their exemption claim the Police stated that they are relying on section 14(3)(b) (police investigation).

During the mediation stage, the appellant informed the mediator that it had obtained, from the City of Ottawa, the time when the ambulance dispatch service was notified. This information is, therefore, not at issue.

Remaining at issue are the time when the original 911 call was received by the Police and notes explaining any delay in notifying the EMS.

The appellant raised the application of section 16 of the *Act* (public interest in disclosure) as an issue in the appeal.

I commenced my inquiry by sending a Notice of Inquiry to the Police, seeking their representations on the application of the section 14(1) exemption and the section 16 public interest override to the information at issue. The Police submitted representations and agreed to share them in their entirety with the appellant.

I then sent a Notice of Inquiry and a complete copy of the Police's representations to the appellant. The appellant submitted representations in response.

I shared the appellant's representations in their entirety with the Police and invited them to respond to the appellant's representations on the application of section 16. The Police submitted reply representations.

I then shared the Police's representations with the appellant and sought and received sur-reply representations from the appellant.

RECORDS:

At issue is responsive information found in two records, a Police call hardcopy printout and an "RMS narrative".

DISCUSSION:

PERSONAL INFORMATION

What constitutes "personal information"?

In order to determine whether section 14(1) applies, 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) 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 if 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;

To qualify as personal information, the information must be about the individual in a personal capacity. Previous decisions of this office have held that information "about" an individual in his or her professional or employment capacity does not constitute that individual's personal information [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The parties' representations

The Police submit that the records contain personal information as defined in paragraphs (d) and (h) of the definition of "personal information" found in section 2(1) of the *Act*. The Police state that they received a call from an individual regarding an incident at a specific address. The Police submit that information about the individual who made the call and others involved in the incident should not be released without their consent. The Police state that in this case consent could not be obtained as the individuals involved were the victims of a multiple homicide and information relating to them remains their personal information until they have been deceased for 30 years.

In response, the appellant states that its request does not seek personal information as defined in section 2(1). The appellant submits that it has "never sought names, medical information, or what was said by whom." The appellant also emphasizes that it has not requested a tape or transcript of the 911 call. The appellant states further that it has requested "only the log times" confirming when the call was received by 911 and forwarded to EMS, and any notes on the log or operations reports which may explain the delay. The appellant submits that it has requested information under the *Act* in the past, and understands that any personal information can be "blacked out".

Analysis and findings

The records in this case contain the details of the Police's initial involvement with an incident at a specific address. While I acknowledge the appellant's position that it is not interested in any personal information contained in the records, I must nevertheless decide whether the records at issue contain personal information and, if so, to whom it relates.

The records contain information about the individual who made the 911 call, including her name, address and telephone number and a transcript of her conversation with the dispatcher. In my view, given the notoriety of this case, it is reasonable to expect that the individual to whom this information relates can be identified even if her name and other obvious identifiers are severed. I therefore find that, even if that information is severed, the information about this individual remains her "personal information" [*Ontario (Attorney General) v. Pascoe*, cited above].

The records also contain information regarding the individual who was charged in connection with the incident, including his name and details of his involvement. I find this to be that individual's personal information.

The records do not contain information about any other individuals.

I also find that the records contain information that is non-responsive to the appellant's specific request. This non-responsive information includes information relating to other events that are peripherally related to this incident but which do not respond to the specific request made by the appellant.

I am satisfied that the records at issue contain the personal information of two individuals other than the appellant within the meaning of section 2(1) of the *Act*.

INVASION OF PRIVACY

Operation of section 14

Having determined that the records contain the personal information of individuals other than the appellant, the mandatory exemption at section 14(1) requires that the Police refuse to disclose this information unless one of the exceptions to the exemption at sections 14(1)(a) through (f) applies. In my view, the only exception which could have any application in the present appeal is set out in 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.

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 personal privacy within the meaning of section 14(1)(f). Section 14(2) provides criteria 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 in section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue falls within the ambit of section 14(4) or if the "compelling public interest" override provision at section 14 applies [*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 records is presumed to constitute an unjustified invasion of privacy under the presumption in section 14(3)(b) of the *Act*, which states:

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

The Police state that the information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law under the *Criminal Code*, namely a homicide, and was used to determine whether a criminal offence had, in fact, been committed. At the time of making their initial representations, the Police stated that charges have been laid and that the personal information contained in the records is being used to prosecute the individual charged. At the time of making these representations, the Police also submitted that the charges against this individual are still before the court and the release of the information at issue could hinder any prosecution and the outcome of the court case.

The appellant does not make any representations on the application of the section 14(3)(b) presumption. The appellant argues that the position taken by the Police amounts to "little more than an effort to avoid public scrutiny of possible police/dispatch errors." In a supplementary submission the appellant states that "the only person investigated by [the Police] in connection with the incident […] has been deemed not criminally responsible for his actions…" by a court on the basis that he is not of "sufficient mental capacity to understand the gravity of his actions for which he was criminally charged." As a result of this development, the appellant concludes that the Police can no longer "credibly claim that revealing the log information relevant to the 911 call is protected as part of a criminal investigation."

In reply, the Police confirmed that "a hearing" took place on August 31, 2005 and that the accused was "found not criminally responsible" on the charge of homicide.

Analysis and findings

Based on my review of the records and the Police's representations on the application of section 14(3)(b), I am satisfied that the Police compiled all of the information at issue in the records as part of an investigation into a possible violation of law, a homicide under the *Criminal Code*. The appellant takes the position that because the individual charged in this incident has been found not criminally responsible, the Police can no longer rely on the section 14(3)(b) presumption. I disagree. Even in circumstances where an investigation has been conducted and criminal proceedings have not been commenced this office has consistently found the section

14(3)(b) presumption applicable. The presumption only requires that there be an investigation into a possible violation of law [Orders P-237, M-701, PO-1849]. By extension, the fact that the investigation is complete and the charges seemingly disposed of does not negate the applicability of the section 14(3)(b) presumption in this case.

Having found that the section 14(3)(b) presumption applies, I am precluded from considering any of the factors weighing for or against disclosure under section 14(2), because of the *John Doe* decision.

In the circumstances, I find that the section 14(3)(b) presumption is not rebutted by section 14(4). However, as noted above, the appellant has raised the application of the section 16 "public interest override" to the information at issue. I will consider this issue below.

In conclusion, subject to the application of section 16, I find the personal information contained in the records exempt under section 14(1) of the *Act* since disclosure would be an unjustified invasion of personal privacy and the exception to the exemption at section 14(1)(f) therefore does not apply.

PUBLIC INTEREST IN DISCLOSURE

General principles

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)]. In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23 (the provincial *Act* equivalent of section 16):

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.
>
> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been

> requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

The parties' representations

The Police submit:

> There is no doubt that some members of the media may have an interest in the record[s] at issue. However, freedom of the press guaranteed under Section 2 of the Charter of Rights and Freedoms is limited by section 1 of the Charter to those limits prescribed by law as can demonstrably justified in a free and democratic society.
>
> Freedom of expression, including freedom of the press and other method[s] of communication are vital in a democratic society and we assist them as much as **lawfully** permitted. We have in the past released to the media information in order to alert/inform the public to dangerous individuals or incidents that pose a danger to the community.
>
> Having said that, the individuals have a right to their privacy. The accused in this case also has a right under Section 11 of the Charter to a fair trial. The information to which the appellant seeks may very well be information that will come out in the trial and will then become part of a public record through Provincial Court once the trial is completed. Therefore there may be another avenue for the appellant to obtain this information once the trial is over.
>
> We therefore assert that disclosure of the record at issue would be an unjustified invasion of personal privacy and is exempt under Section 14 of the Act. We feel that section 16 does not apply in this case and the public interest does not outweigh the purpose of the established exemption claimed in section 14.

The appellant states in response:

> [T]here is clear and compelling interest in disclosure of the information. As one city councilor stated after this tragic accident, "of course we need to know why it took 12 minutes for an ambulance to be called. If I'm in need of an ambulance, I want to know that it won't take 12 minutes just to dispatch one!" Her comments were echoed by another city councilor who says "the bottom line is that we should know if something should be handled differently in the future." He added: "after all, it's our tax money that pays for this service, and they're supposed to be working for us, right?"

. . . . .

> Just as previous rulings found that a public interest has been found to exist, for example, where the integrity of the criminal justice system has been called into question (Order P-1779) or public safety issues relating to the operation of nuclear facilities have been raised (Order P-1190), there is a clear public interest in this case where there are legitimate questions about the handling of an emergency call, and questions about whether the 12:20 delay in dispatch of an ambulance was an error which can be prevented in the future. Certainly there would be few issues which the public would consider *more* compelling or urgent than one which addresses a possible error in sending emergency response, or at the very least, being reassured that this call was handled in the best possible way under the circumstances.
>
> [T]he compelling public interest of improving an emergency paramedic service for an entire community should outweigh the protection of the privacy of three deceased individuals.
>
> The remedy we seek is the release of the log times and any annotations which may explain the delay in dispatch time.

In response to the appellant's representations regarding the desire for accountability with respect to the delay in EMS dispatch, the Police state:

> The public interest in this case should revolve around the need to know more about the tragic circumstances which led up to this triple homicide and the loss of three innocent lives. There has been extensive media coverage already about the events leading up to the tragedy and trial of the accused, which would satisfy any public interest in this case.
>
> . . . . .
>
> There has already been public coverage or debate of this issue, and the records would not shed further light on the matter.

The Police state that if the appellant felt that there is a compelling public interest in disclosure, it could have been present during the accused's trial, which was open to the media and the public. As stated above, the Police confirm that a hearing took place and that the accused was found not criminally responsible on the charge of homicide. The Police submit that any information that might have been available during the trial is again subject to non-disclosure in accordance with the privacy provisions of the *Act*.

In response to the Police's position that the matter has already received extensive public exposure, the appellant states:

> To suggest "there has already been public coverage of this issue" is unfortunate and misleading. The only public coverage of this particular issue (time delay) was done by [a named local news radio station] prompting a brief follow-up in [a named local newspaper and two named television stations]. The story we were able to broadcast was done not *because* of police interest in publicly dealing with the matter, but rather *in spite of* the police force's adamant refusal to provide any factual information.

Regarding the Police's view that information regarding this matter could have been obtained during the accused's trial, the appellant submits that this is not in accord with the "wording and spirit" of the *Act*. The Police submit that the *Act* is intended to "allow public access to matters of public interest". In the appellant's view, that some information "*may* be available through appealing to another agency or judicial forum does not exempt the police from a reasonable duty of public accountability." In any event, the appellant states that during the accused's trial a publication ban would have been in place, making it impossible to report on the matter.

Analysis and findings

Is there a "compelling" public interest?

In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Addressing the first requirement under section 16, the appellant has made a strong case that there is a compelling public interest in the release of log times and annotations that may explain the time delay in the dispatch of EMS in respect of the specific incident in question in this appeal. In my view, the public has a right to know the causes of the delay in this case, including whether this was an isolated incident or representative of systemic deficiencies and, if warranted, to consider possible solutions for improving response time in EMS dispatch within the Ottawa community. In my view, this is a serious issue of public safety, and based on the nature of the information and the appellant's representations, I am satisfied that this issue "rouses strong interest or attention". Disclosure of this information would also shed light on the operations of the Police in an important area of public interest and safety.

That said, I must also consider any public interest in *non*-disclosure that may exist [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. In their initial representations, the Police assert that non-disclosure is necessary in order to protect an accused's right to a fair trial.

However, as the criminal charges against the accused have been dealt with, any public interest in non-disclosure that may have existed disappears.

Accordingly, I find that the first requirement under section 16 has been met.

Does the "compelling public interest" outweigh the purpose of the exemption?

Having found that a compelling public interest exists in this case, this interest must then be balanced against the purpose of any exemption that has been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [see Order P-1398].

Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. Section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

Commenting generally on the scope of a personal privacy exemption under any future freedom of information legislation, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that "[a]s the personal information subject to the request becomes more sensitive in nature . . . the effect of the proposed exemption is to tip the scale in favour of non-disclosure" [see Order MO-1254].

In their representations, the Police have focused on the need to protect the privacy of the individuals involved in this tragic incident. In particular, the Police emphasized the need to maintain the privacy of the individual charged in this incident to ensure that he is provided with a fair trial. While this may have been a valid consideration weighing in favour of non-disclosure, this argument now carries little weight since the charge against this individual has been disposed of.

After a careful examination of the information at issue in the records, I find that the personal information that is responsive to the appellant's narrowed request is not particularly sensitive in light of the disposition of the criminal charges and the fact that the individuals who were the victims of this tragic incident are now deceased. In addition, I am satisfied that the information in the records that is responsive to the appellant's request does not contain the personal information of the individual who was charged and tried as a result of this incident.

Transparency and public accountability are key purposes of access-to-information legislation [see *Dagg v. Canada (Ministry of Finance)* (1997), 148 D.L.R. (4th) 385]. Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be limited and specific."

In taking stock of these key purposes of the *Act*, in these unique circumstances I have concluded that concerns regarding public safety trump protection of personal privacy. I am satisfied that there is a public interest in any information that might shed light on the delay in the dispatch of EMS, which far outweighs the application of the section 14(1) personal privacy exemption in this case. Accordingly, I find that the second requirement under section 16 has been met.

In conclusion, I am satisfied that there is a compelling public interest in the disclosure of information responsive to the appellant's request that overrides the operation of the section 16 exemption.

ORDER:

1. I order the Police to disclose portions of the records, no later than **February 6, 2006** but not before **January 31, 2006**, in accordance with the highlighted version of these records included with the Police's copy of this order. To be clear, the Police should not disclose the highlighted portions of these records.

2. With respect to provision 1 of this order, I reserve the right to require the Police to provide me with copies of the severed records.

Original Signed By: December 30, 2005
Bernard Morrow
Adjudicator