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

ORDER MO-2298

Appeal MA06-284

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request from an individual under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all Police records that related to him.

The Police identified records responsive to the request and granted partial access to them upon payment of a fee. The Police relied on the discretionary exemptions in sections 38(a) (refuse to disclose requester's own information), in conjunction with section 8(1)(l) (facilitate commission of an unlawful act); and 38(b) (personal privacy) with particular reference to the factor at section 14(2)(g) (information unlikely to be accurate or reliable) and the presumption at section 14(3)(b) (information compiled and identifiable as part of an investigation) of the *Act* to deny access to the portions they withheld. The Police also indicated that some of the withheld information was not responsive to the request.

The requester (now the appellant) appealed the decision denying access.

At mediation, the appellant agreed that the withheld Police codes, along with any non-responsive information, could be removed from the scope of the appeal. As a result, that information and the application of the discretionary exemption at section 38(a), in conjunction with section 8(1)(l) of the *Act*, is no longer at issue in this appeal.

Mediation did not completely resolve the appeal and it was moved to the adjudication stage of the process.

A Notice of Inquiry setting out the facts and issues in the appeal was sent to the Police, initially. The Police filed representations in response to the Notice. They asked that a portion of their representations not be shared with the appellant due to confidentiality concerns. A Notice of Inquiry, along with the non-confidential representations of the Police, was then sent to the appellant. The appellant filed representations in response.

RECORDS:

The records total 127 pages and consist of General Occurrence Reports, Record of Arrest, Supplementary Record of Arrest, Synopsis for a Guilty Plea, Promise to Appear, Police and Civilian Witness lists, Case Tracking Report, I/CAD Event Details Report and excerpts from Police Officers' notebooks. Remaining at issue are the portions of those records withheld by the Police.

DISCUSSION:

SCOPE OF THE REQUEST

The appellant sets out in his representations that he is not seeking access to information pertaining to his ex-wife but rather, "he is interested in obtaining first hand accounts of [any] incidents regarding his biological children which may be material in an ongoing Children's Aid Society (CAS) matter, Family Court matter and wherein a hearing is scheduled at the Child and Family Services Review Board (CFSRB)."

As a result, in this order I will not be reviewing information pertaining solely to the appellant's ex-wife and/or unrelated to "accounts of [any] incidents regarding his biological children".

THE EXERCISE OF ACCESS RIGHTS ON BEHALF OF PERSONS UNDER SIXTEEN

In his representations, the appellant takes the position that he is entitled to the records relating to his children on the basis of section 54(c) of the *Act*. He submits that at the time of the request he had "lawful access with 'care and control' of [his] children". He also takes the position that the request for access to the information of the children "should be treated as though the request came directly from the children", and refers to Orders M-927 and MO-1535 in support of his position. Furthermore, a copy of a Superior Court of Justice judgment which deals with access and custody issues was attached to his initial request.

Section 54(c) of the *Act* states:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual;

Previous orders have established that, under this section, a requester can exercise another individual's right of access under the *Act* if he/she can demonstrate that

- the individual is less than sixteen years of age; and,
- the requester has lawful custody of the individual.

If the requirements have been satisfied, the requester is entitled to have the same access to the personal information of the child as the child would have. In these cases, the request for access to the personal information of the child will be treated as though the request came from the child him or herself (Order MO-1535).

In this appeal, the appellant refers to section 54(c), however, on my review of the appellant's representations, as well as the Superior Court judgment attached to his request, I am not satisfied that the appellant has "lawful custody" of the children. The Superior Court judgment clearly states that custody of the children is granted to the mother, and that the appellant has certain access rights. Furthermore, the orders referred to by the appellant do not support the position that section 54(c) applies to a non-custodial parent. Accordingly, I find that section 54(c) does not apply in these circumstances of this appeal.

PERSONAL INFORMATION

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

Section 2(1) of the *Act* defines "personal information", in part, 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,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where 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", 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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

In my view, all of the records at issue contain the personal information of the appellant. This information qualifies as his personal information because it is recorded information about him that includes his address and telephone number (paragraph (d)), or contains his name along with other personal information about him (paragraph (h)).

The records also contain the personal information of other identifiable individuals. This information qualifies as their personal information because it contains their address and telephone numbers (paragraph (d)), or contains their names along with other personal information about them (paragraph (h)).

However, I find that the withheld information at the very top line of page 8 does not contain the personal information of anyone other than the appellant. As a result, I will order this information to be disclosed to him.

PERSONAL PRIVACY

If a record contains the personal information of the appellant along with the personal information of another individual, section 38(b) of the *Act* applies to render the information exempt from disclosure at the discretion of the Police.

Section 38(b) reads:

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

Accordingly, under section 38(b) where a record contains personal information of both the appellant and another identifiable individual, and disclosure of that information would "constitute an unjustified invasion" of that other individual's personal privacy, the Police may refuse to disclose that information to the appellant.

Despite this, the Police may exercise their discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

The factors and presumptions in sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met.

If the information fits within paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

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; 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 under section 14(3), 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 (*John Doe*)] though it 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 exemption. [See Order PO-1764]

Section 14(1)(b)

The appellant submits that the requested information pertains to the health and safety of his children and section 14(1)(b) of the *Act* therefore applies. In his representations the appellant states that he has "legitimate reason to believe that there are vital records and information regarding the incidents that may assist in determining whether or not the welfare of the aforementioned children are at risk with their custodial guardian/parent". Section 14(1)(b) reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates.

I have carefully considered the contents of the records, the age of the records and the representations on this issue and I find that the appellant has not provided me with sufficient evidence to demonstrate that the circumstances of this appeal qualify as the type of "compelling circumstances affecting the health or safety of his children" that meet the threshold set in sections 14(1)(b). Accordingly, I find that section 14(1)(b) does not apply.

Section 14(1)(d)

The appellant relies upon section 37 of the *Child and Family Services Act* in support of his position that the requested information should be disclosed. As a result, the appellant appears to raise the possible application of section 14(1)(d) of the *Act* which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > under an Act of Ontario or Canada that expressly authorizes the disclosure.

The phrase "under an Act of Ontario or Canada that expressly authorizes the disclosure" in section 14(1)(d) closely mirrors the phrase "expressly authorized by statute" in section 28(2) of the *Act*, which is the equivalent of section 38(2) of the provincial *Act* [Order PO-1933]. This office has stated the following with respect to the latter phrase in section 38(2) of the provincial *Act*:

> The phrase "expressly authorized by statute" in subsection 38(2) of the *Act* requires either that specific types of personal information be expressly described in the statute, or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute i.e., in a form or in the text of the regulation [Compliance Investigation Report I90-29P].

I have reviewed the *Child and Family Services Act* (section 37) and cannot find therein a provision expressly authorizing the disclosure of the undisclosed personal information in the records to the appellant. No other section or statute is referenced by the appellant. Therefore, based on the submissions of the appellant, and my review of the records at issue, I find that the exception in section 14(1)(d) does not apply in this case.

Section 14(3)(b)

Section 14(3)(b) reads as follows:

> 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.

The Police submit that all of the withheld information remaining at issue is personal information that was compiled and is identifiable as part of an investigation into a possible violation of law. As a result they argue that disclosure would result in a presumed unjustified invasion of personal privacy. The appellant submits that disclosing the withheld information would be in the best interests of the children. He also submits that the personal information is relevant to a fair determination of his rights, referring to the factor favouring disclosure at section 14(2)(d) of the *Act*.

I find that section 14(3)(b) applies in the circumstances of this appeal. I have reviewed the severed portions of the records remaining at issue and I conclude that the personal information severed from the records was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code*. Whether or not charges are laid does not affect the application of 14(3)(b) [Order PO-1849]. Because this presumption applies, in

accordance with the ruling in *John Doe* cited above, I am precluded from considering the possible application of any of the factors or circumstances under section 14(2). This would include any consideration of the factor in section 14(2)(d) that was referred to by the appellant in his representations.

The presumed unjustified invasion of personal privacy at section 14(3)(b) therefore applies to this information. Section 14(4) does not apply. Accordingly, I conclude that the disclosure of the withheld personal information contained in the severances remaining at issue would constitute an unjustified invasion of personal privacy. As a result, this information is exempt from disclosure under section 38(b).

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 38(b) is a discretionary exemption, I must also review the Police's exercise of discretion in deciding to deny access to the information they withheld. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Police erred in exercising their discretion where, for example:

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations

In these cases, I may send the matter back to the Police for an exercise of discretion based on proper considerations [Order MO-1573].

I have carefully reviewed the records remaining at issue in this appeal. Many of the records relate directly to the appellant and his actions and only peripherally involve his children. In other records he is referred to, but these records (pages 54 to 64 and 115 to 119), relate more directly to incidents regarding his biological children. These other records also contain information about other identifiable individuals.

The appellant submits that the Police erred in exercising their discretion by failing to consider that the information would assist a pending CFSRB hearing in determining "if the [appellant's] children are in a safe environment and if their welfare and safety are in jeopardy". The appellant further submits that disclosure of the information would also be of assistance to the decision maker at an ongoing "Family Court" matter. As a result, the appellant argues that providing the requested information is therefore in the best interests of his children.

In their representations, the Police explain that they weighed the appellant's right of access to his own personal information against the other individuals' right to protection of their privacy. Amongst the factors the Police considered was whether it was in the interests of the children to

disclose the information to the appellant. In doing so, they considered the nature of the withheld information at issue and exercised their discretion not to disclose it.

I have carefully reviewed the information remaining at issue, all of which qualifies for exemption under section 38(b).

As identified above, remaining at issue are portions of the 127 pages of records identified as responsive to the request that were not disclosed to the appellant.

The Police have withheld in full the records which directly involved the children (and in which the appellant was involved in only a peripheral way). The Police identify that they exercised their discretion to withhold those records on the basis that the records involved children, contained information of a sensitive nature and it would not be in the interest of the children to disclose it to the appellant.

With respect the other records, which did not directly involve the children, but involved the appellant, the Police were very meticulous in severing the records. This resulted in large portions of those records being disclosed to the appellant, and the severing of a number of small portions of those records, which the Police considered to be mixed in nature. Much of the information relating to appellant was disclosed to him and only small snippets were withheld.

In the circumstances, I am satisfied that the Police did not err in exercising their discretion not to release this information to the appellant. In exercising their discretion, I also find that the Police applied section 4(2) of the *Act* in a proper manner and reasonably disclosed as much of the responsive portions of the remaining records as possible without disclosing material which is exempt [See, in this regard the decision of the Divisional Court in *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)* [1997] 102 O.A.C. 71].

I therefore conclude that the exercise of discretion by the Police to withhold the information that I have not ordered to be disclosed was appropriate given the circumstances and nature of the information.

PUBLIC INTEREST IN DISCLOSURE

The appellant takes the position that the "public interest override" provision in section 16 of the *Act* applies to those records that I have found to be exempt. The appellant submits that it is in the public interest to disclose the information as this would ensure the best interests and welfare of the children are protected. The Police take issue with the appellant's position and submit that the sole interest at stake is purely the appellant's private interest in obtaining the information in the records.

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.

Even though section 38(b) is not listed, because section 16 may override the application of section 14, it may also override the application of section 38(b) with reference to section 14 [see for example Order PO-2246, which deals with the equivalent sections of the *Freedom of Information and Protection of Privacy Act*]. If section 16 were to apply in this case, it would have the effect of overriding the application of section 38(b), and the appellant would have a right of access to the information at issue.

For section 16 to apply two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

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]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, and P-1439]. However, where a private interest in disclosure raises issues of a more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.)].

In my view, the interests being advanced by the appellant are essentially private in nature. I therefore find that the privacy interest protected by section 38(b) (with reference to section 14(3)(b)) concerning the records that I have not ordered disclosed above cannot be overcome in this case by the "public interest override" in section 16 [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767]. There is no compelling public interest in the disclosure of the personal information in this case, as in my view, the appellant is requesting the information for a predominantly personal reason [Order M-319]. Accordingly, in my view, there does not exist any public interest, compelling or otherwise, in the disclosure of the withheld information at issue. As a result, I find that section 16 has no application in the present appeal.

FINAL MATTER

As a final matter the appellant submits in the alternative that if I do not order that he be given access to the information at issue, this office ought to provide the records to various bodies for investigative purposes. In all the circumstances and based on my determinations above, even if I had the power to do so, I would not forward the materials as requested by the appellant.

ORDER:

1. I order the Police to disclose to the appellant the portion of page 8 of the records that I have highlighted on the copy of page 8 that I have provided to the Police with this order by sending it to the appellant by **May 30, 2008** but no earlier than **May 26, 2008**.

2. I uphold the decision of the Police to deny access to the other portions of the records they withheld.

3. In order to verify compliance with provision 1 of this order, I reserve the right to require the Police to provide me with a copy of page 8 of the records as disclosed to the appellant.

Original signed by: April 28, 2008
Steven Faughnan
Adjudicator