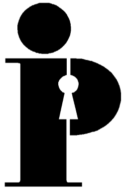

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1621

Appeal MA-020115-1

Ottawa Police Services Board

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NATURE OF THE APPEAL:

The Ottawa Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from two individuals (the appellants) for the following:

- All records associated with and concerning a particular Police case number;
- All Police decision records concerning this case; and
- All "non-personal" personnel records about a named constable.

The Police located approximately 230 pages of responsive information and granted access to six pages consisting of a General Occurrence Report relating to the "case number" identified by the appellants (page 1), a letter from the primary appellant to the Police (pages 5 – 7), a letter from the primary appellant to a named individual (page 4), and copy of a registered letter from the primary appellant to the same named individual (page 9).

The Police denied access to personnel records of the named constable (pages 10-230) pursuant to section 14(1)(f) (invasion of privacy) with reference to the presumptions in sections 14(3)(d) (education and employment history) and (g) (personnel recommendations or evaluations) as well as to three other pages of records. In denying access to the three remaining pages of responsive records, the Police relied on sections 8(2)(a) (law enforcement report), 14(1)(f), with reference to the presumption in section 14(3)(b) (compiled and identifiable as part of an investigation into a possible violation of law) and 38(a) (discretion to refuse requester's own information) and (b) (invasion of privacy) of the *Act*.

The appellants appealed the decision.

During mediation, the primary appellant (on behalf of both appellants) agreed to withdraw the portion of the request relating to the constable's personnel file as he was satisfied that such records by their very nature would be personal to the police constable and would not likely assist them.

Also during mediation, the primary appellant expressed his belief that additional records exist. In support of his belief, the appellant provided the mediator with a copy of a document that appears to be the final report of the Ottawa-Carleton Police following an investigation related to another Occurrence Report Number. The report states that the writer had spoken with a Postal Inspector at Canada Post regarding the appellant's allegation that his mail was being stolen and was advised that Canada Post had no record of any complaint from the appellant. This document leads the appellant to believe that there are other responsive records that the Police have not identified. As well, the appellant stated that he provided the Police with over 60 pages of drawings and other information, addressed to a specified constable, none of which was identified by the Police.

The Police stated that it did not appear that a full investigation had taken place, and as such there were only limited records relating to the complaint. Despite conducting a search, the Police indicated that they were unable to locate the records that the appellant claims to have sent them. The Police were only able to locate the records previously identified. The appellant was not

satisfied with the response provided by the Police and the reasonableness of their search remains an issue.

The mediator contacted an individual identified in the records at issue (the affected person). Although the affected party apparently verbally consented to the disclosure of page 8, he refused to consent to the disclosure of any other information. The affected party did not provide this office, or, to my knowledge, the Police with written confirmation of his consent.

Further mediation could not be effected and this appeal was forwarded to adjudication. I decided to seek representations from the Police, initially. I also provided the affected person with an opportunity to provide representations on the issues at adjudication and to provide a written consent to the disclosure of any part of the records if he wished to do so.

Both parties submitted representations in response. In his representations, the affected person indicates that he does not consent to the disclosure of any of his personal information. I subsequently sought representations from the primary appellant (on behalf of both appellants), and attached the non-confidential portions of the representations made by the Police to the copy of the Notice that I sent to him.

The appellant submitted representations in response, to which he attached a number of documents which he believes supports his contention that more records should exist.

RECORDS:

The records remaining at issue consist of a "Narrative Summary" form completed by the Police (page 2) which was attached to a letter written by the affected person (page 3) and a copy of a letter written by the affected person and addressed to the appellant (page 8).

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he is seeking and the Police indicate that further records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the Police to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the Police must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate records responsive to the request (Orders M-282, P-458 and P-535). A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

As I indicated above, the appellant has provided documents that he believes support his view that more records should exist.

In the Notice of Inquiry that I sent to the Police, I asked them to outline the steps taken to search for responsive records and to provide other details relating to the search for and retention of records.

In their representations, the Police state:

> The original Request for information specifically asked for "All records associated and concerning the [Police case number]. And all OPS decision Records Concerning the said case …And all non-personal Personnel Records about OPSS Constable…
>
> The request did not mention the alleged reports of approximately 60 pages of reports that had been supplied to the [Police] for their investigation. It was not known when the request was submitted that these were records at issue. These records have not been able to be located on this file or any other that could have been filed with our Police Service.

Elsewhere in their representations, the Police indicate that "it is possible and it is our belief that there were no grounds for an investigation that could have Criminal wrong doing, therefore the documents were not kept on the Police file …"

Based on the above submission, I find that the Police have not provided sufficient information for me to conclude that their search for responsive records was reasonable. In addition, I find that the Police did not respond to the appellants' request in accordance with section 17(1) of the *Act*. I have come to these conclusions for the following reasons:

The Police appear to suggest that the scope of the appellants' request did not include information the appellants provided to the Police. As noted by the Police in their representations, the appellants asked for "all records associated with the particular matter". In my view, it was not reasonable for the Police to interpret this request as narrowly as they did.

Moreover, sections 17(1) and (2) of the *Act* provide that:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

> (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.
>
> …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

In accordance with this section, where it is not clear exactly what the appellants are seeking, the Police are obligated under the *Act* to seek clarification. It does not appear that they did so.

To some extent, this deficiency could have been corrected during the mediation stage of the appeal, and perhaps it was. However, the Police have not provided me with any information as to the steps taken to search for and locate additional responsive records, either during mediation or during the inquiry stage.

The representations submitted by the Police contain no details of where they searched or who they contacted, in particular, the officer involved in the matter and the appellants. The Police attempt to explain why the records might not be on the file but there is no explanation as to what might have happened to the records that were sent to the Police by the appellant, or any of the records identified by the appellants.

Accordingly, I find that the search conducted by the Police was not reasonable. I will, therefore, order the Police to conduct a further search for responsive records.

It is not evident on the face of many of the documents that the appellants provided that they were or might have been sent to or collected by the Police. However, the appellants have provided me with a detailed list of documents, which may be of assistance to the Police in searching for responsive records. As a starting point, the Police will be required to contact the primary appellant to determine exactly what he is seeking.

In my view, it is not acceptable for the Police to simply muse that because the investigation did not result in a conclusive determination of wrong-doing, any records collected by them in connection with it were simply "not kept on the file", implying that they no longer have an obligation to maintain or destroy them, as the case may be. Therefore, the Police will also be required to contact and confirm with the investigating officer named by the appellant whether he received documents relating to the matter under investigation, and if so, what he did with them.

Finally, the Police will be required to explain how files are maintained, and in what form and location. The Police will also be required to explain how files are searched and accessed, and in particular the steps taken in this instance. In addition, the Police will be required to explain how redundant or otherwise unnecessary documents are maintained/destroyed, with specific reference to their records retention schedule.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The records at issue contain information about the primary appellant and thus constitute his personal information. They also contain information about the affected person. This information includes this individual's name and title and corporate letterhead. The narrative portions of the records at issue would, in my view, reveal the identity of the affected person through context.

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

The Commissioner's orders dealing with non-government employees, professional or corporate officers treat the issue of "personal information" in much the same way as those dealing with government employees. The seminal order in this respect is Order 80. In that case, the institution had invoked section 21 to exempt from disclosure the names of officers of the Council on Mind Abuse (COMA) appearing on correspondence with the Ministry concerning COMA funding procedures. Former Commissioner Linden rejected the institution's submission:

> The institution submits that "...the name of the individual, where it is linked with another identifier, in this case the title of the individual and the organization of which that individual is either executive director, or president, is personal information defined in section of the *FIO/PPA*...." All pieces of correspondence concern corporate, as opposed to personal, matters (i.e. funding procedures for COMA), as evidenced by the following: the letters from COMA to the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447, M-122, P-1124, P-1344 and MO-1285). Other orders have recognized that in certain situations, although individuals are identified in their professional capacity, the nature of their involvement in the matter at issue has no relation to their professional duties. In these cases, the records must be viewed contextually (see, for example: Orders MO-1524-I and PO-1983).

In his representations, the affected person explains who he is and how he came into possession of certain information that he subsequently passed on to the Police. He explains his reasons for

doing so, which was primarily out of a sense of "public duty". He clarifies that he did not file a formal complaint, but merely brought the information to the attention of the Police for them to take whatever action they deemed appropriate.

The Police refer to certain concerns expressed by the affected person in his correspondence, and submit that in this instance, information that would identify the affected person should not be disclosed.

The appellants argue that the affected person's communications with the Police were made in his professional capacity and, therefore, the information at issue does not qualify as personal information.

I am satisfied that in the context in which the affected person became involved in this matter, and in which he provided the information to the Police, his actions were personal in nature. Therefore, I find that the records at issue also contain his 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.

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the Police determine that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Police have the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The Police 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 Police determine that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives them 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 determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the 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. 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 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [See Order PO-1764]

If none of the presumptions in section 14(3) applies, the Police must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The Police have relied on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act* and the factor listed under section 14(2)(f) of the *Act*. These provisions state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (b) 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;

Section 14(3)(b)

It is apparent that the affected person provided certain information to the Police in the belief that the information raised certain concerns. The Police, on the other hand, received the information and began an investigation to determine whether there had been a violation under section 345 of the *Criminal Code*:

> The police report 'Mail Tampering' was initially investigated because the Police were lead to believe that mail that had been tampered with, mail that been opened, read and resealed in order for the 'Intellectual Properties' of the appellant to be copied and stolen.

The Police indicate that there was insufficient evidence to conclude that an offence had been committed.

Regardless of the affected person's motivation in bringing the information to the attention of the Police, it is apparent that the Police commenced an investigation on the basis of this information. Therefore, I am satisfied that the information contained in the records at issue was compiled and is identifiable as part of an investigation into a possible violation of law. Moreover, the

presumption in section 14(3)(b) may apply even though charges are not laid (Orders MO-1451 and PO-1966, for example).

I find that neither section 14(4) nor section 16 are applicable to the records at issue.

Absurd Result

Page 8 of the records at issue is a letter written by the affected person that was addressed to the primary appellant. The appellants included a copy of this letter in the documents they attached to their representations. The appellants also attached a copy of page 2 of the records at issue to their representations, although it is not clear how they came to have this copy.

In Order MO-1323, I commented on the rationale for the application of the absurd result principle as follows:

> As noted above, 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 (section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the *Act* in recognition of these competing interests.
>
> In most cases, the "absurd result" has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial *Act*). The reasoning in Order M-444 has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the *Act* and section 14(2)(a) of the provincial *Act*) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288).
>
> In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

It is clear that the appellant is already aware of the identity of the affected person. Since he already has a copy of pages 2 and 8, it would be an absurdity to apply the presumption in section 14(3)(b) to withhold these two pages.

I have also considered whether any other presumption or factor might apply to these two pages, and conclude that none do. In particular, there is nothing particularly sensitive in either of these two pages. Page 2 merely reflects that correspondence was received and page 8 is a reply letter

from the affected person in response to a letter sent to him from the primary appellant. In the circumstances, I am not persuaded that the factor favouring withholding this record in section 14(2)(f) is relevant in the circumstances, or if it is, that it is significant enough to override the absurd result principle.

Accordingly, pages 2 and 8 of the records are not exempt under section 38(b) of the *Act*.

Based on the circumstances under which the information was provided to the Police and the affected person's stated concerns, as well as the records themselves, I am satisfied that the Police have properly exercised their discretion in favour of non-disclosure of page 3 and this page is, therefore, exempt under section 38(b).

LAW ENFORCEMENT/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

The Police have also applied the discretionary exemptions in sections 8(2)(a) and 38(a) to the records at issue. I will consider whether they apply to pages 2 and 8.

Where a record contains the personal information of the requester, the Police may refuse to disclose it to that individual under section 38(a) if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. Section 8(2)(a) reads:

> A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

Only a report is eligible for exemption under this section. The word "report" is not defined in the *Act*. For a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information (Order P-200). Generally speaking, results would not include mere observations or recordings of fact (Order M-1048).

The Police state only that:

> the records in this appeal were gathered by the police for a possible investigation for a violation … The police report 'Mail Tampering' was initially investigated because the Police were lead to believe that mail that had been tampered with …copied and stolen.

As I noted above, page 2 is simply a cover attached to page 3 indicating that the correspondence had been received. Page 8 is a letter written by the affected person. In themselves, these records do not comprise "a formal statement or account of the results of the collation and consideration of information prepared by the Police."

Although there is no evidence that pages 2 and/or 8 formed part of the General Occurrence Report relating to this matter that was provided to the appellant, I have also reviewed this record. In my view, the General Occurrence Report can only be described as a collection of "mere observations and recordings of fact". Therefore, neither pages remaining at issue nor the "report" (individually or collectively) qualify as a "law enforcement report" and sections 8(2)(a) and 38(a) do not apply to them.

ORDER:

1. I uphold the decision of the Police to withhold page 3 of the records at issue from disclosure.

2. I order the Police to disclose pages 2 and 8 to the appellants by providing them with a copy of these two pages no later than **April 8, 2003,** but not earlier than **April 3, 2003**.

3. I find that the search conducted by the Police for responsive records was not reasonable.

4. I order the Police to conduct a further search for responsive records in accordance with the directions set out above.

5. I order the Police to provide the appellants with information as to the results of this further search in accordance with the requirements of sections 19, 21 and 22 of the *Act* (and the directions set out above) and without recourse to a time extension under section 20 of the *Act* using the date of this order as the date of the request.

6. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the material disclosed to the appellants in accordance with Provision 2.

Original signed by: March 4, 2003
Laurel Cropley
Adjudicator