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

ORDER MO-1613

Appeal MA-020199-1

Guelph Police Service

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Guelph Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> … any and all records general and personal of any sort pertaining to myself … (name and date of birth of requester) … This includes but is not limited to any and all records, dialogue, correspondence, etc., with any lawyer, crown, correction facility, government agency, hospital, or other police service or employees of concerning myself or events surrounding April 23/95….

The Police located records responsive to the request and granted partial access to 25 pages of responsive records. In denying access to the remaining portions of the records, the Police relied on section 38(b) of the *Act*, in conjunction with the presumption in section 14(3)(b) (information compiled as part of an investigation into a possible violation of law) and sections 8(1)(a), (b), and (c) (law enforcement) in conjunction with section 38(a) of the *Act*. The Police also provided the appellant with a fee estimate of $65 to cover the cost of searching for and severing the records, as well as the cost of photocopies. The fee was broken down as consisting of $60 for search and severing (2 hours @ $30 per hour), plus $5 for photocopying (25 pages @ $0.20 per page).

The requester (now the appellant) appealed the decision on the basis that the decision letter was inadequate as it did not provide sufficient detail as to what records were being denied. The appellant also argued that the Police did not provide a sufficient explanation as to why the exemptions claimed applied to the various records.

The appellant also objected to the amount of the fee as he is of the view that the records are kept on a computer database that could be readily accessible. The appellant stated that he was not provided with the details of the search and felt that the fee was "exorbitant".

In addition, the appellant took issue with the substantive exemptions claimed by the Police, particularly the application of section 14(3)(b), as the subject matter of the records had been through the courts and the identities of all third parties have been made known to him through "full disclosure" during the trial process.

During the mediation stage of the appeal, the Police issued a supplementary decision letter indicating that in addition to the exemptions claimed in the original decision, they intend to rely on section 13 of the *Act* (danger to safety or health) in support of the decision to sever the names of all persons who appear in the responsive records. The reasons given by the Police for claiming section 13 were the nature of the appellant's criminal charges the circumstances leading up to the charges, and his demeanour in court.

Also during mediation, the Police provided the appellant with an index of records that set out a brief description of the records along with the exemptions claimed and reasons that the exemptions applied. The appellant provided further information to substantiate his belief that further responsive records exist in regard to those occasions where he was escorted by the Police to court. With this new information, the Police agreed to conduct further searches. However, the Police indicated additional records could not be located as records relating to the transportation

of the appellant to court were destroyed after two years in accordance with the Police records retention policy.

Also during mediation, the Police agreed to disclose in full Records 40, 41, 43 and 44 and claimed the application of an additional discretionary exemption, section 8(1)(e) (endanger life or safety) of the *Act*, to some of the records.

Further mediation was not possible and the appeal was moved to the adjudication stage of the process. I sought the representations of the Police, initially, as they bear the onus of proving the application of the exemptions claimed, substantiating the fee charged and the sufficiency of the search for records. In their representations, the Police concede that the $65 fee originally charged was inappropriate and indicate that they have refunded that amount to the appellant. In addition, the Police have decided to disclose portions of Records 39, 42, 58-62 and 63-66 and are no longer relying on the discretionary exemptions in sections 8(1)(a), (b) and (c) of the *Act*.

I decided to withhold access to some portions of the representations of the Police from the appellant due to concerns that I had about their confidentiality. The appellant was then provided with a Notice of Inquiry and the non-confidential portions of the representations of the Police. I received representations from the appellant in response.

RECORDS:

The records remaining at issue consist of the undisclosed portions of the following records:

- Guelph Police Service property report receipts (3 pages);
- Guelph Police Service identification record (1 page);
- Guelph Police Service arrest report (1 page);
- Results summary of 2 canisters submitted to the Centre of Forensic Sciences for analysis (1 page);
- Summary from the Centre of Forensic Sciences regarding analysis of 2 canisters submitted by Guelph Police Service (1 page);
- Report regarding a further charge laid against appellant;
- Report regarding synopsis of incident that occurred on April 23, 1995 (4 pages);
- Willsay statement of Police Officer (4 pages);
- Guelph Police Service General Occurrence Report regarding the execution of a search warrant (1 page)'
- Report summarizing search warrant executed (2 pages);
- Guelph Police Service Weapons Control report dated April 23, 1995 (2 pages);
- Computer printout of incident #96-93 (1 page);
- Witness Statements (13 pages);
- Various computer printouts (28 pages).

DISCUSSION:

REASONABLENESS OF SEARCH

The appellant submits that additional records beyond those identified by the Police ought to exist. Specifically, he is seeking access to records relating to the arrangements made for his transportation for various court appearances in 1995 and 1996, as well as records relating to any contacts between a named police officer and the RCMP.

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Police will be upheld. If I am not satisfied, further searches may be ordered.

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.

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

The Police have provided me with representations with respect to the searches undertaken both following their receipt of the initial request and during the mediation stage of the appeal process. They indicate that initial searches were undertaken of their own databases and the case file relating to the matters identified by the appellant, yielding some of the responsive records. During the mediation stage, further searches were undertaken for records relating to the transportation of the appellant. These searches indicated that, pursuant to the Police retention schedules, copies of which were provided to me, these records were destroyed two years after the date of their creation, in 1997 or 1998.

The Police also provided me with representations regarding the search conducted for notes taken by a named officer with respect to contacts he may have had with the RCMP in 1995 concerning the appellant. The Police indicate that it searched the notebooks of this officer for the period April to October 1995 and could find no references to any contacts with the RCMP.

The appellant submits that the notes of the named officer relating to contact between the Police and the RCMP about himself should exist as these types of records are maintained for many years by police services. The Police do not dispute that these notebooks exist; in fact, they located them and examined them for responsive information about the appellant.

Based on my review of the records and the representations of the parties, I find that the Police have conducted a reasonable search for records responsive to the request. The events surrounding the creation of the records occurred some eight years ago yet the Police were able to locate much of what was sought by the appellant. In my view, the Police have provided me with sufficient evidence to demonstrate that its searches for the transportation records relating to the appellant were reasonable, based on the records retention schedules provided by the Police. I find that the Police have made reasonable efforts to identify and locate the records which are the subject of the appellant's request. Accordingly, I dismiss this part of the appeal.

PERSONAL INFORMATION/INVASION OF PRIVACY

The Police take the position that information contained in the records which comprise the occurrence report and witness statements qualifies as "personal information". Section 2(1) of the *Act* defines the term "personal information" 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 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;

The Police indicate that the occurrence reports contain personal information of individuals other than the appellant including their names, addresses, telephone numbers, date of birth, sex and "other personal information". I have reviewed each of the remaining records at issue and make the following findings:

- Records 1, 39, 40 and 41 contain only the personal information of the appellant. As no exemptions appear to have been claimed by the Police for these records and no mandatory exemptions apply to them, I will order that they be disclosed to him.

- The undisclosed portions of Records 2, 3, 4, 5, 6, 7, 8, 9, 10-13, 14-17, 18, 19, 20, 21, 22, 23, 24, 25, 45, 48, 51 and 54 (which is identical to Record 57) contain the personal information of the appellant. These records also refer to the names of certain police officers, two Crown Attorneys and a Justice of the Peace. The portions of these records containing the personal information of the appellant were disclosed to him. In my view, the information relating to the officers, Crown Attorneys and Justice of the Peace does not qualify as the "personal information" of these individuals as it represents information "about" them relating only to their professional, as opposed to their personal, capacities as public servants. [Orders P-257, P-427, P-1412 and P-1621] Accordingly, as this information does not qualify as "personal information" it cannot qualify for exemption under the invasion of privacy exemptions in sections 14(1) or 38(a) and (b). The Police have also applied the discretionary exemptions in sections 8(1)(e), 13 and 38(a) to this information.

- Records 10-13, 19, 20, 25, 26-31, 32-38, 47 (which is identical to Record 53) and 50 (which is identical to Record 56) contain information relating to several witnesses which qualifies as personal information under the definition of that term in section 2(1). These records also contain the personal information of the appellant as they relate to the offences for which he was charged and his subsequent arrest.

- Records 43, 44, 46, 49, 52 and 55 do not contain any personal information. As no exemptions appear to have been claimed for them and no mandatory exemptions apply, I will order that these records also be disclosed to the appellant.

As noted above, only information which qualifies as "personal information" qualifies for exemption under the invasion of privacy exemptions in sections 14(1) and 38(b). I will, therefore, examine the application of section 38(b) to those records which contain the personal information of the appellant and other identifiable individuals, specifically, Records 10-13, 19, 20, 25, 26-31, 32-38, 47 (which is identical to Record 53) and 50 (which is identical to Record 56).

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

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

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

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in 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 institution to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

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 institution 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 rely on the "presumed unjustified invasion of personal privacy" 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;

The Police submit that the personal information relating to the witnesses contained in Records 10-13, 19, 20, 25, 26-31, 32-38, 47 (and 53) and 50 (and 56) was compiled as part of the investigation into certain criminal charges against the appellant and that this information falls within the ambit of the presumption in section 14(3)(b).

The appellant refers to his need for the disclosure of the information contained in the records to assist him in further actions against the Police. I will treat these submissions as a reference to the consideration listed in section 14(2)(d) of the *Act* favouring the disclosure of the information.

Based on my review of the contents of Records 10-13, 19, 20, 25, 26-31, 32-38, 47 (and 53) and 50 (and 56), I find that they were compiled as part of the Police investigation into possible violations of law, various offences under the *Criminal Code*, and that they thereby fall within the presumption in section 14(3)(b). As noted above in my reference to the decision in *John Doe*, considerations listed in section 14(2), such as that in section 14(2)(d), cannot outweigh the application of a presumption, as is the case in this appeal. As the appellant has not raised the possible application of section 16 and the information does not fall within the exceptions in section 14(4), I find that the personal information relating to the witnesses found in Records 10-13, 19, 20, 25, 26-31, 32-38, 47 (and 53) and 50 (and 56) is properly exempt under section 38(b).

DANGER TO SAFETY OR HEALTH/REFUSAL TO DISCLOSE REQUESTER'S OWN INFORMATION

As noted above in my discussion of section 38(b), 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(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information in instances where the exemptions in sections 6, 7, **8**, 9, 10, 11, 12, **13** or 15 would apply to the disclosure of that information. [my emphasis]

I have found above that the undisclosed portions of Records 2, 3, 4, 5, 6, 7, 8, 9, 10-13, 14-17, 18, 19, 20, 21, 22, 23, 24, 25, 45, 48, 51 and 54 (which is identical to Record 57) contain the personal information of the appellant, along with references to other individuals in their professional capacities. The Police have claimed the application of sections 8(1)(e), 13 and 38(a) of the *Act* to the undisclosed information in these records.

Section 8(1)(e) of the *Act* states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,

> endanger the life or physical safety of a law enforcement officer or any other person;

Section 13 of the *Act* states:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

Section 8 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the section 8 exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 42 of the *Act*. [Order P-188]

The requirement in Order 188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the institution seeks to avoid by applying the exemption.[Order P-948]

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the words "could reasonably be expected to" in the law enforcement exemption:

> The words "could reasonably be expected to" appear in the preamble of section 14(1)[which is the equivalent provision in the provincial *Act* to section 8(1)], as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].
>
> In *Ontario (Minister of Labour)*, the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20[which is the equivalent provision in the provincial *Act* to section 13], and harms under other exemptions. The court stated (at p. 6):
>
> > The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that

> the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety . . . Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [section 14(1)(e)] to refuse disclosure.
>
> In my view, despite this distinction, the party with the burden of proof under section 14(1)(e) still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated.

The Police have provided me with extensive representations on the application of sections 8(1)(e) and 13 to the information contained in these records. The submissions formed part of the confidential representations of the Police so I am unable to refer to them in any detail in this order. The Police indicate that the circumstances surrounding the appellant's arrest and subsequent conviction and detention warrant the application of the exemptions in sections 8(1)(e) and 20 as they demonstrate a reasonably-held belief that the health or safety of individuals could be at risk should this information be disclosed to the appellant.

The appellant notes that, at the time of his trial, his counsel received full disclosure of all of the information contained in the records and that disclosure to him at this time will not endanger the health or safety of any of the individuals listed in the records.

Based on my review of the representations of the Police, I am satisfied that the disclosure of the remaining portions of Records 2, 3, 4, 5, 6, 7, 8, 9, 10-13, 14-17, 18, 19, 20, 21, 22, 23, 24, 25, 45, 48, 51 and 54 (which is identical to Record 57) could reasonably be expected to endanger the physical safety of a law enforcement officer or other person. As a result, I find that this information qualifies for exemption under sections 8(1)(e) and 13. Because this information appears in records which also contain the personal information of the appellant, I find that they qualify for exemption from disclosure under section 38(a) of the *Act*.

I have reviewed the representations of the Police with respect to the manner in which they exercised their discretion not to disclose the exempt records to the appellant. Based on those submissions and all of the circumstances of this appeal, I am satisfied that the Police exercised their discretion in an appropriate fashion and I will not disturb it on appeal. Accordingly, Records 2, 3, 4, 5, 6, 7, 8, 9, 10-13, 14-17, 18, 19, 20, 21, 22, 23, 24, 25, 45, 48, 51 and 54 (which is identical to Record 57) are properly exempt under section 38(a).

ORDER:

1. I order the Police to disclose to the appellant Records 1, 39, 40, 41, 43, 44, 46, 49, 52 and 55 by providing him with copies by **March 26, 2003** but not before **March 21, 2003.**

2. I uphold the decision of the Police to deny access to the remaining records and parts of records.

3. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant.

4. The search for records undertaken by the Police was reasonable and I dismiss this part of the appeal.

Original signed by: February 19, 2003
Donald Hale
Adjudicator