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

ORDER MO-1808

Appeal MA-020218-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The requester made a request to the Toronto Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the Police's policies and procedures for electronically or manually recording certain activities.

The Police issued a decision to the requester, granting partial access to the responsive records. The Police denied access to portions of the records, relying on sections 8(1)(c) and (l) (law enforcement). The Police also took the position that some of the requested records do not exist.

The requester (now the appellant) appealed the Police's decision.

Mediation did not resolve this appeal, and the file was transferred to adjudication. This office sent a Notice of Inquiry to the Police, initially, outlining the facts and issues and inviting the Police to make written representations. The Police submitted representations in response to the Notice. I then sent a Notice of Inquiry to the appellant, together with a copy of the non-confidential portions of the Police's representations. The appellant, in turn, provided representations. Both parties' representations contain confidential submissions that I am not at liberty to disclose in this order.

In this appeal I must decide whether sections 8(1)(c) or 8(1)(l) apply to the records before me, and whether the Police have conducted a reasonable search for additional records the appellant believes exist.

RECORDS:

The record remaining at issue is the Police's *Policy and Procedure Manual*. Specifically, portions of the following pages are at issue: 6, 17, 19, 32, 33, 39, 48, 49, 72, 75, 77, 78, 92, 96, 113, 115, 120, 124, 127, 128, 132, 138, 140, 146, 169, 178, 184, 186, 187, 204, 213, 221, 224, 242, 250, 270, 271 and 318.

BRIEF CONCLUSION:

The Police's search for additional records was reasonable. Some of the information is exempt from disclosure, while the remaining information is not exempt and must be disclosed.

DISCUSSION:

PRELIMINARY MATTER

In their representations, the Police withdraw their objection to disclosing the information at issue on pages 72 and 75. As it is not clear whether the Police have already disclosed this information to the appellant, I will order them to do so.

DID THE POLICE CONDUCT A REASONABLE SEARCH FOR RECORDS?

The appellant believes that additional records pertaining to the operation of videotape equipment and related training programs exist.

General principles

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 (Orders P-85, P-221, PO-1954-I).

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. The institution must, however, provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records (Order P-624).

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In this case, if I am satisfied that the Police's search was reasonable in the circumstances, I will uphold the Police's decision. If I am not satisfied, I may order the Police to conduct further searches.

The parties' representations

Among other things, the Police submit:

> Neither the Toronto Police Service Video Services Unit (VSU), nor [a named College] offer any videotape equipment operators course, nor have the police generated unit policy or instruction manuals.
>
> [A named Video Services Unit supervisor] advised … that no such training or courses are provided by the Video Services Unit.
>
> [A named Staff Sergeant, Program Co-ordinator/Training Standards at a named College] advised that there are no such courses or programs available at [the College].
>
> There is no record that any Videotape Operators instruction manual has ever existed.
> …
>
> The December 17, 1998 version of Policy 04-32 "General Investigations", stated in the first paragraph of page 1 that "A VRS will only be operated by personnel who have completed the required training program." However, there is no

> definition within the policy of what that "training program" comprises. The current version of the same policy contains no similar statement.
>
> A current Freedom of Information Analyst was one of the four employees who participated in the original 1985 police pilot project on videotaping in [a specific police Division]. The Analyst advised that this original group was trained on site … by technical support personnel in the operation of the equipment and received a one week course at [a named College]. They were the only four persons to receive such training – subsequent personnel were trained by their co-workers while on-the-job. There were no policy manuals or technical manuals disseminated.
>
> The procedures (now obsolete) which previously governed videotaping fell under Chapter 21 of the Policies and Procedures Manual. Chapter 21 of the Procedures was deleted in its entirety in December 1998. The Toronto Police Record Retention Schedule in effect at that time (Municipality of Metropolitan Toronto By-Law No. 58-92) provided that procedures be retained only until superseded or cancelled, plus 1 year.

The appellant submits:

> Common sense tells me that normally an Operator's manual is usually disseminated and retained for technical equipment when it is purchased. It is reasonable to believe that such a technical manual for the video equipment is currently available to the operators of the video equipment, together with some sort of instructions relative to ongoing maintenance and servicing of installed equipment. … it is reasonable to believe that some sort of standards exist and are published which provide the necessary criteria to state that an operator is qualified to operate maintain and service the video equipment, even though the skill and knowledge may have been acquired through on-the-job training rather than through some technical classroom course.
>
> …
>
> … it is reasonable to believe that such policy and procedure manuals would be retained for historical and archival reasons. In addition, I believe that on occasions such policy and procedure manuals in effect at a prior date may be referred to in civil and criminal court cases being heard several years after they were superseded or cancelled. For this reason I believe that a rigorous search of the police historical archives would produce the requested sections of the policy and procedures manual.

Findings

Based on the evidence before me, I find that the Police have conducted a reasonable search for records relating to the operation of videotape equipment and related training. As noted above, the Police are not required to prove with absolute certainty that any such records do not exist. Rather, they must satisfy me that their searches for these records were reasonable. In cases such as this, where someone familiar with the institution's record-holdings and knowledgeable about the specific subject-matter of the records being sought can confirm that no records exist, it is not necessary for the institution to conduct an actual physical search for records. Thus, the Police's evidence that policy or instruction manuals do not exist, and that previous procedures governing videotaping no longer exist, is enough to discharge the Police's burden of proof. In addition, contacting an employee who participated in the videotaping pilot project was a reasonable means of determining the extent of the training that employees received and whether any related records exist. I will therefore dismiss this part of the appellant's appeal.

DO THE LAW ENFORCEMENT EXEMPTIONS AT SECTIONS 8(1)(C) OR 8(1)(L) APPLY TO THE INFORMATION AT ISSUE?

The Police rely on the discretionary exemptions at sections 8(1)(c) and (l), which read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

More specifically, the Police claim section 8(1)(c) for the information at issue on pages 17, 19, 77, 78, 92, 113, 120, 127, 128, 132, 146, 169, 178, 184, 186, 187, 204, 213, 221, 224, 242, 250 and 318. The Police claim section 8(1)(l) for the information at issue on pages 6, 17, 19, 32, 33, 39, 48, 49, 92, 96, 115, 124, 138, 140, 178, 184, 186, 187, 204, 221, 224, 270, 271 and 318.

General principles

Because sections 8(1)(c) and (l) are discretionary exemptions, even if the information falls within the scope of these sections, the institution (here, the Police) must nevertheless consider whether to disclose the information to the requester.

The term "law enforcement," which appears in section 8(1)(c), is defined in section 2(1) of the *Act* as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b).

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context (*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)).

In order to qualify as an "investigative technique or procedure" under section 8(1)(c), the institution must show that disclosing the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The section 8(1)(c) exemption normally will not apply where the technique or procedure is generally known to the public (Orders P-170, P-1487). In addition, the techniques or procedures must be "investigative." The exemption will not apply to "enforcement" techniques or procedures (Orders PO-2034, P-1340).

Under both section 8(1)(c) and section 8(1)(l), the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient (Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)).

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption (Order PO-2040; *Ontario (Attorney General) v. Fineberg*).

The parties' representations

Among other things, the Police submit that while the public may be aware that certain police procedures exist, it does not know their specifics. It submits that the information at issue "documents an extremely specific facet of policing which is not known to the general public and, should the information become widely available, would either provide information leading to the corruption and/or theft of information; prove an impediment to the control of crime; or … imperil the health or safety of an individual."

The appellant submits, among other things, that the information she seeks consists of "rules and regulations, that are interpretations of the law, and should be provided to anybody in the interests of openness and transparency."

Findings

I have reviewed the records and the parties' representations.

I find that none of the information at issue qualifies for exemption under section 8(1)(c). First, the information at issue on pages 17, 19, 77, 78, 92, 113, 120, 127, 128, 132, 169, 178, 184, 186, 187, 204, 213, 221, 224, 242, 250 and 318 is not of an "investigative" nature and much of it is already generally known to the public. Secondly, the information at issue on page 146 may qualify as an investigative technique or procedure, but its disclosure could not reasonably be expected to hinder or compromise its effective utilization. Thus, the information at issue on pages 17, 19, 77, 78, 92, 113, 120, 127, 128, 132, 146, 169, 178, 184, 186, 187, 204, 213, 221, 224, 242, 250 and 318 does not qualify for exemption under section 8(1)(c).

I also find that much of the information at issue does not qualify for exemption under section 8(1)(l). Based on the materials before me, I am not persuaded that the information on pages 6, 17, 19, 96, 115, 124, 178, 184, 186, 187, 204, 221, 224 and 318, and some information on page 271, could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. In my view, the Police have not provided the "detailed and convincing" evidence required to demonstrate that the harms they allege are not merely speculative.

I find, however, that the information at issue on pages 32, 33, 39, 48, 49, 92, 138, 140 and 270, and some information on page 271, qualifies for exemption under section 8(1)(l). This information includes the location of the Cash Bail Envelope, the location of the Divisional Domestic Bail File, the specific "radii of return" for various offences, information about diplomatic identification cards and information about the security of mobile recording systems; I am unable to describe the remaining information without revealing its contents. I am satisfied that disclosing this information could reasonably be expected to result in one or more of the harms described in section 8(1)(l). I am also satisfied that the Police have properly exercised their discretion in denying access to this information.

I am enclosing with the copy of this order being sent to the Police a copy of page 271 highlighting the portion that the Police must not disclose.

ORDER:

1. I dismiss the part of the appellant's appeal regarding the Police's search for records.

2. I order the Police to disclose the information at issue on pages 6, 17, 19, 72, 75, 77, 78, 96, 113, 115, 120, 124, 127, 128, 132, 146, 169, 178, 184, 186, 187, 204, 213, 221, 224, 242, 250 and 318, and some information on page 271, to the appellant by

July 22, 2004. I am providing the Police with a highlighted version of page 271 with this order, identifying the portion that they must not disclose.

3. In order to verify compliance with Provision 2, I reserve the right to require the Police to provide me with a copy of the information that is disclosed to the appellant.

4. I uphold the Police's decision to deny access to the remaining information.

Original signed by: June 30, 2004
Shirley Senoff
Adjudicator