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

ORDER MO-1786

Appeal MA-020349-1

Ottawa Police Services Board

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:

This appeal concerns a decision of the Ottawa Police Services Board (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to copies of the following

> [the Police's] written policy on domestic assault… [and the Police's] policy, research data, procedures and materials on partnership and liaison which have been provided to community organizations in Ottawa who have partnered with police.

The Police provided complete access to the following documents:

- the draft terms of reference for the "Police Action Committee (COMPAC)", dated September 4, 2002

- the terms of reference for the "Ottawa-Carleton Police Liaison Committee for the Lesbian, Gay, Bisexual and Transgender Communities", effective May 1998, and

- the "Regional Municipality of Ottawa-Carleton Police Services Board Public Consultation Policy", dated November 1997

The Police also provided partial access to the "Partner Assault/Partner Conflict (Domestic Violence)" policy document (the Policy), relying on sections 8(1)(c) and (e) (law enforcement), and 13 (danger to safety or health) of the *Act* to deny access to portions of the record.

The appellant appealed the Police's decision and also expressed a belief that more responsive records exist.

During the mediation stage, the Police agreed to an expanded request that included records provided from named community groups to the Police as well as records provided to these named community groups from the Police, at the appellant's request. I understand that the Police found additional records and disclosed them to the appellant in full.

The appellant indicated during mediation that he was not satisfied with this additional disclosure. He maintains that further records responsive to his request exist. Therefore, reasonableness of search remains an issue in this appeal.

The Police have acknowledged that minutes of meetings of the Regional Co-ordinating Committee to End Violence Against Women (the Committee) held prior to 2001 do exist but that they do not have custody or control over these records. The Police have also indicated that minutes of Committee meetings have not been kept since 2001.

Further mediation was not possible and the file was referred to adjudication.

After the completion of the mediation stage but prior to seeking representations from the parties, the appellant sent preliminary representations to this office setting out his position on the issues in dispute.

The appellant agreed to share his preliminary representations with the Police. These were included with a Notice of Inquiry that was sent to the Police seeking representations.

The Police submitted representations in response to both the appellant's preliminary representations and the Notice of Inquiry. The Police's representations were shared in their entirety with the appellant.

I then sought representations from the appellant who submitted representations in response.

The appellant's representations were shared with the Police and they were given an opportunity to reply. The Police declined to submit further representations.

I then sought representations from the Committee on the custody and control issue relating to the minutes of their meetings. The Committee submitted representations. On the strength of those representations I made a preliminary decision not to address the custody and control issue. The appellant submitted further representations on this issue and my final decision on custody and control is set out below.

RECORDS:

The following records are at issue:

- portions of the Policy, denied under sections 8(1)(c), 8(1)(e) and 13 of the *Act*
- minutes of the Committee meetings which the Police claim are not in their custody or control within the meaning of section 4(1) of the *Act*

DISCUSSION:

CUSTODY AND CONTROL OF RECORDS

Section 4(1) of the *Act* provides a right of access to records "in the custody *or* under the control of an institution" (emphasis added). Only one of these criteria needs to be satisfied (Order 41).

The Police acknowledge that minutes of the Committee meetings do exist for the period up to 2001. However, the Police argue that these minutes are not in their custody or under their control but, rather, in the custody and control of the Committee. On the other hand, the appellant asserts that these records are in the custody and control of the Police. The Committee states in its representations that the minutes "…are a matter of public record…", are in its possession and can be obtained by simply contacting the Committee's Administrative Co-ordinator directly.

In light of the Committee's position that the minutes are publicly available, I advised the appellant in writing that I saw no useful purpose in proceeding to decide the custody and control issue. I invited the appellant to provide me with written evidence by a specified date that he had tried unsuccessfully to obtain the minutes, upon the receipt of which I would reconsider my decision not to proceed on this issue.

The appellant provided the following representations regarding his efforts to obtain the minutes:

> I called the Committee's Administrative Co-ordinator and requested these minutes. So far I have been unsuccessful in obtaining the minutes.

In my view, the appellant has not provided sufficient written evidence to satisfy me that he has made a *bona fide* attempt to obtain the minutes. Most significantly, the appellant provides no details as to whether, in his telephone call, he spoke to anyone and if so, to whom he spoke and what the person said in response to his request for these records. I have no idea whether the Committee has agreed to provide the minutes and the appellant has just not received them, whether the Committee has simply declined to deliver the minutes to the appellant, or whether the appellant has been able or unable to speak to anyone at the Committee.

Under the circumstances, given the elusive nature of the appellant's representations and the Committee's explicit statement that the minutes are available to any member of the public, I have decided not to address the custody and control issue.

SEARCH FOR RESPONSIVE RECORDS

Introduction

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]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must 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.

The Police's representations were submitted by a Freedom of Information Analyst (the Analyst) on behalf of their Freedom of Information Co-ordinator (the Co-ordinator). The Analyst submits that she and a Staff Sergeant in charge of their Partner Assault Section conducted the searches in

response to the appellant's request. The Analyst states that all areas relevant to the appellant's request were searched.

The Analyst indicates that when the appellant's request was received she checked the policies on their in-house computer and the Policy was located. No further policies were located that were responsive to the appellant's request.

The Analyst states that the Staff Sergeant was contacted, who advised that he had responsive records. These were forwarded to the Co-ordinator's office. The Staff Sergeant also advised the Analyst of his responsibility to attend Committee meetings and to communicate to the Police any concerns voiced at these meetings regarding the Police.

According to the Analyst, during the mediation stage of this appeal, she had further contact with the Staff Sergeant to determine whether additional responsive records exist. The Staff Sergeant apparently checked his Committee file and located two additional responsive records. The Analyst indicates that these records were released to the appellant. Also located were the Staff Sergeant's copies of the Committee minutes; however, the Police declined to disclose these records on the basis that they were not in their custody and control.

The appellant indicates that the Police's representations fail to demonstrate that a "comprehensive, systematic search method" was used. In his view, it is not enough that the Police feel that they completed a reasonable search; they must explain and detail the search method they used.

The appellant suggests that the Police's search is "incomplete and not reasonable" since they did not engage the Chief of Police in their search. The appellant argues that since the name of the Chief of Police appears on the Committee's letterhead it would be reasonable to conclude that he might have knowledge of the locations of records and, therefore, he should have been consulted.

In addition, with respect to the Policy, the appellant states that the Police have taken the position that this document was developed in partnership with the Committee and revised with the input of the Lesbian and Gay Committee. Therefore, the appellant suggests that earlier versions of this document must exist in Police records.

As stated above, the Police were given an opportunity to submit reply representations and chose not to do so.

In my view, the Police have not provided a sufficiently detailed and credible explanation of the efforts they undertook to locate responsive records. To use the appellant's words, the Police have not demonstrated, through their representations, that they used a comprehensive and systematic method in performing their searches. Aside from indicating that the Analyst was directly involved initially in conducting a search of the Police's in-house computer and that the Staff Sergeant was also involved in undertaking searches, very little detail is provided regarding the places searched, the individuals contacted in the course of their searches (aside from the Analyst and Staff Sergeant), the types of files searched and finally, the specific results of the

searches. The Analyst gives no indication that the Co-ordinator was contacted to review and/or approve the results of the searches. In addition, while there may be a reasonable explanation for why the Chief of Police was not contacted directly, the Police have failed to address this issue, in reply.

Accordingly, I find that the Police's search was not reasonable and I will order the Police to conduct a further search for responsive records.

LAW ENFORCEMENT

Introduction

The Police claim the discretionary exemptions at sections 8(1)(c) and (e) to deny access to the withheld portions of the Partner Assault/Partner Conflict Policy. These sections 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;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;

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.)].

Section 8(1)(c): investigative techniques and procedures

For section 8(1)(c) to apply, the Police 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.)].

Previous orders of this office have established that in order to constitute an "investigative technique or procedure" the institution must demonstrate that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. However, the exemption will not normally 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).

The Police submit that the information at issue sets out techniques and procedures that have been put in place and are to be followed by victims and members of the Police in order to protect and safeguard victims of domestic assault. The Police state that releasing this information would allow alleged offenders to circumvent theses techniques and procedures and possibly cause harm to victims and officers.

The appellant argues that Police policy should be a matter of public knowledge and discussion. He sees a distinction between policy, which should be publicly available, and investigative techniques. It is his understanding that the Policy is a "policy" document and that procedures and investigative techniques exist in a separate document. In the appellant's view, community policing requires open policies that are available to the public. He argues that if the Policy sets out procedures that victims need to follow, as suggested by the Police, then victims need to be informed of them.

Based on my review of the parties' representations and the information at issue, I find that portions of the information qualify for exemption under section 8(1)(c) while others do not.

The withheld information at pages 2-3 of the record describes techniques used to address domestic violence. I view this information as representing an enforcement technique, not an investigative technique or procedure. Therefore, this information is not exempt under section 8(1)(c). I address the application of section 8(1)(e) to this information below.

The withheld information at page 4 of the record sets out the interview procedure that police officers are required to follow when investigating domestic assault cases. I am satisfied that this information constitutes an investigative technique or procedure. However, in my view, this procedure is fairly generic in nature and is already within the public domain. Therefore, I find that it does not qualify for exemption under section 8(1)(c). However, I will address the application of section 8(1)(e) to this information below.

The withheld information at pages 6-7 details investigative techniques and procedures that the Police are to follow when attending at a victim's residence to investigate an allegation of domestic assault. In my view, this information is clearly "investigative" in nature and the techniques and procedures described are not generally known to the public. Accordingly, I find that section 8(1)(c) applies to exempt this information from disclosure.

The information at pages 11-12 describes some of the roles and responsibilities of call takers (dispatchers) who receive calls from victims. Some of this information has been disclosed to the appellant. The withheld information describes the steps to be followed upon receiving and responding to a call. I am satisfied that the withheld information documents investigative techniques and procedures that are unique to investigations of domestic violence. Accordingly, I find that section 8(1)(c) applies to exempt this information from disclosure.

The withheld information at page 14 of the record forms part of a section dealing with the duties of the "Victim Crisis Manager". This information is administrative in nature. It does not contain information that is "investigative" in nature. Therefore, I find that section 8(1)(c) does not apply

to this information. However, I will consider below whether section 8(1)(e) may apply to exempt it from disclosure.

Section 8(1)(e): danger to life or physical safety

The standard of proof that an institution is required to meet under section 8(1)(e) is less rigorous than that under section 8(1)(c). In the case of section 8(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

As I have found that section 8(1)(c) applies to exempt the withheld portions of the record at pages 6-7 and 11-12, I am concerned only with the possible application of section 8(1)(e) to the withheld portions of pages 2-3, 4 and 14.

As stated above, the Police assert that the release of the withheld information would allow alleged offenders to circumvent the techniques and procedures put in place and possibly cause harm to victims and officers. The Police fear that by releasing the severed information victims of domestic violence would be at risk of harm. In addition, the Police state that if this information is released victims would have no confidence in the ability of the Police to protect them and they may live in fear of future assaults.

The appellant states that he doubts whether any portion of the withheld information, if released, would pose a risk to an individual police officer or another person. He challenges the Police to provide detailed and convincing evidence of any link to harm of an individual.

With respect to the Police's representations on the application of section 8(1)(e) the issue is not whether the information constitutes an investigative technique or procedure. This issue was addressed above in my discussion of section 8(1)(c).

After reviewing the parties' representations and the remaining information at issue, I am satisfied that the Police have established a reasonable basis for believing that endangerment will result from the disclosure of the withheld information at pages 2-3 and 14. The position of the Police with respect to this information is neither frivolous nor exaggerated. Contrary to the appellant's position, the Police are not required to specify individuals who may be impacted by disclosure. It is sufficient that some unknown person or persons could reasonably be expected to be endangered in the future as a result of disclosure. Accordingly, I find that section 8(1)(e) applies to exempt the remaining information from disclosure.

However, with respect to the interview procedure set out at page 4, in my view this information would be self-evident to any person with even a limited knowledge of police investigation procedures acquired through personal experience, the media, the movies or commercial television. I cannot see how revealing this information could reasonably be expected to result in

endangerment to a police officer or any other person. In other words, I find the position of the Police to be exaggerated with respect to this information. Accordingly, I find that section 8(1)(e) does not apply to the information withheld from page 4. However, I will consider the application of section 13 below to this information.

Exercise of discretion

As indicated above, section 8(1)(c) and (e) are discretionary exemptions. Therefore, once it is determined that information qualifies for exemption under one of these sections, the Police must exercise their discretion in deciding whether or not to disclose it.

In this case, the Police have disclosed substantial portions of the Policy and have withheld limited sections of it. The Police submit that they have properly exercised their discretion in withholding certain portions of the Policy. The Police state that they withheld these portions of the record due to concerns that its release would allow alleged offenders to use the information to cause harm to victims of domestic violence and undermine the level of confidence that victims would have in the Police to protect them from further acts of violence.

The appellant does not offer any submissions on this issue.

In the circumstances, I am not persuaded that the Police have erred in exercising their discretion.

THREAT TO SAFETY OR HEALTH

Section 13 states:

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

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

The test under section 13 is similar to the one under section 8(1)(e). The Police's representations are identical to those they have raised for section 8(1)(e). Therefore, I have no difficulty finding that section 13 does not apply to exempt the remaining withheld information at page 4 of the record.

ORDER:

1. I order the Police to disclose the record to the appellant by **May 19, 2004** in accordance with the highlighted version of the record enclosed with the Police's copy of this order. To be clear, the Police are *not* to disclose the highlighted portions.

2. I order the Police to conduct a further search for records responsive to the appellant's request.

3. I order the Police to communicate the results of their search to the appellant, in writing, on or before **May 19, 2004**.

4. If the Police identify any additional records responsive to the appellant's request, I order them to provide the appellant with a decision letter regarding access to these records in accordance with section 19 of the *Act*, treating the date of this order as the date of the request, without recourse to a time extension.

5. I order the Police to provide me with copies of the correspondence referred to in provisions 3 and 4, as applicable, by sending a copy to me when they send this correspondence to the appellant.

Original signed by: April 28, 2004
Bernard Morrow
Adjudicator