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

# ORDER MO-1920

## Appeal MA-040322-1

## Toronto Police Services Board

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## NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to the events surrounding the appellant's arrest that involved an identified Staff Sergeant.

In response to the request, the Police located responsive records and denied access to them, in their entirety, on the basis that they were exempt under section 38(a) (discretion to refuse requester's own information) in conjunction with the discretionary exemption in section 8(1)(a) (law enforcement) and under section 38(b) (invasion of privacy) in conjunction with the presumption in section 14(3)(b) of the *Act* (information compiled as part of an investigation into a possible violation of law).

The requester, now the appellant, appealed this decision.

No issues were resolved through mediation, and the file was transferred to the inquiry stage of the process. After the file was transferred to the inquiry stage, the Police forwarded a letter to this office providing a description of the records responsive to the request. The Police also identified that some of the responsive records are also at issue in a concurrent file involving the appellant which was being processed by another Adjudicator.

I sent a Notice of Inquiry to the Police initially, inviting the Police to address the issues. The Police submitted representations in response to the Notice. I then sent a Notice of Inquiry, along with a copy of the Police's representations, to the appellant. The appellant also provided representations to me.

The responsive records total 51 pages and include the Record of Arrest, supplementary reports, memorandum book notes, charge list and witness lists.

## DISCUSSION:

### PRELIMINARY ISSUES

#### Process issues

In his representations the appellant provides significant background information regarding the processing of this file as well as other, connected files. He identifies a number of concerns he has regarding the manner in which he was charged, the lack of information provided to him at that time and the inadequate disclosure of information to him.

The appellant also reviews the history of the requests which led to the request in this appeal, and identifies concerns he has regarding the manner in which the earlier requests were dealt with by the Police. In particular, the appellant takes the position that, as a result of referring to an inaccurate badge number, the appellant was delayed in receiving certain requested information. The appellant further identifies a number of ways in which, in his view, the Police's response to his request resulted in an abuse of process, including a delay in the processing of this appeal.

The appellant submits that the Police responded to his previous request for the records of the identified staff sergeant by identifying responsive records, notwithstanding that the badge number referenced by the appellant was incorrect. He takes the position that this raises questions regarding the accuracy of other information provided to him.

Finally, the appellant requests that further searches be conducted for responsive records. The appellant argues that, because the identified officer endorsed a specified document, by doing so he would have reviewed other identified documents, and any such documents would also be responsive to the subject request.

I have carefully reviewed the history of the request resulting in this appeal. Furthermore, as both parties have referred to a concurrent appeal with this office involving them, I have also reviewed the facts and issues in that appeal. That appeal arose as a result of the appellant's earlier request for information relating to the identified staff sergeant, but referencing a different badge number. The issues raised by the appellant in this appeal concerning the mis-identification of the badge number were also identified by him in the concurrent appeal with a different adjudicator. In addition, the interim and final order addressing the issues raised in that appeal also address the issues raised in twelve connected appeals involving the appellant and the Police. As requested by both parties, I have also reviewed the circumstances in those other, connected appeals in order to address the issues raised in this appeal.

In the circumstances of this appeal, I am satisfied that the actions taken by the Police in responding to this request do not require a further review by the Commissioner's office. Although I accept the appellant's position that there was some delay in the Police's response to the request, a number of factors contributed to this delay. Some of these factors include the complexity and amount of material generated by the numerous requests made to the Police by the appellant for similar information. Furthermore, in my view some of this delay was a result of the mis-identification of an officer's badge number by the appellant in an earlier request. Accordingly, I am satisfied that the actions taken by the Police in responding to this request do not require further review.

In addition, I am not satisfied that the appellant has provided me with sufficient evidence to review whether the search for responsive records was reasonable. Previous orders have established that, although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). I am not satisfied that the appellant has provided a reasonable basis for concluding that additional records exist in the circumstances of this appeal.

As set out above, the appellant identifies a number of concerns he has regarding the nature of the searches conducted by the Police for responsive records, and identifies questions he has about the searches – particularly about supporting documentations the identified officer may have referenced. The records at issue, however, do include some documents that the officer may have

referred to, as they do not include the officer's name. With respect to other possible records, the appellant does not suggest that this information exists in a recorded form. Previous orders of this office have addressed the issue of whether or not an institution is obliged to respond to requests for access to information within "an individual's knowledge or memory". In Order M-33, former Commissioner Tom Wright stated:

> I have previously examined the issue of the extent to which the *Act* covers information not recorded in any tangible form. In Order 196, I indicated that, in my view, the *Act* does not impose a specific duty on an institution to transcribe oral views, comments or discussions. Similarly, it is my view that the *Act* does not require an institution to produce information from an individual's memory or knowledge.

I adopt the approach taken to this issue by former Commissioner Tom Wright. Accordingly, in the circumstances of this appeal, I am not satisfied that the appellant has provided me with a reasonable basis for concluding that additional records exist, and I will not review whether the search for responsive records was reasonable.

**Records at issue in concurrent files**

As identified above, the Police take the position that some of the responsive records are also records at issue in a concurrent file involving the appellant that is with another Adjudicator.

I have carefully reviewed the records at issue in this appeal. The Police have identified 51 records responsive to the request for access to records related to the appellant's arrest that involved an identified staff sergeant.

The Police have referred to records at issue in Appeal MA-040104-1, which was dealt with by Adjudicator Hale as part of Orders MO-1908-I and MO-1916-F. Because of the issues raised by the parties and the reference to the concurrent file, I have reviewed the records at issue in MA-040104-1. There were 15 records at issue in that appeal, and those 15 records are also records at issue in this appeal.

Furthermore, of the 36 other records identified as responsive to the request for records "related to the appellant's arrest that involved an identified staff sergeant", 35 of those records do not refer specifically to the identified staff sergeant. These records do, however, refer specifically to another identified officer. All records of this other identified officer were requested by the appellant in the request resulting in appeal file MA-040099-1, and the 3262 pages of investigation records responsive to that request were also dealt with by Adjudicator Hale in Orders MO-1908-I and MO-1916-F. Accordingly, I find that the 35 records at issue in this appeal which involve the other identified officer were therefore also dealt with by Adjudicator Hale in Orders MO-1908-I and MO-1916-F.

Under certain circumstances, this office will dismiss a matter that is not within its jurisdiction or where it is decided that the matter should not proceed. One such circumstance relates to appeals, or specific issues in appeals, where there is no useful purpose to proceeding with the appeal or the identified issue (Order PO-2175).

In light of the above, in my view there is no useful purpose served in proceeding with issues regarding access to the 50 records which were at issue in previous appeals. Issues surrounding access to those records were resolved in Orders MO-1908-I and MO-1916-F. Accordingly, I will not review issues regarding access to the 50 records that were the subject of those orders.

The sole record remaining at issue is a copy of a page from the notebook of the staff sergeant specifically mentioned in the request. This record was not at issue in Appeal MA-040104-1, and I have no information as to whether or not it was a record at issue in any of the other previous appeals involving the appellant and the Police. I will therefore consider whether the appellant is entitled to access to this record.

## RECORD:

The record remaining at issue is a copy of a page from the notebook of the staff sergeant specifically mentioned in the request. The responsive portions of the record are seven lines of the notebook entry of the identified staff sergeant.

## DISCUSSION:

### PERSONAL INFORMATION

In order to determine whether the exemption at section 38(a) of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1). The definition states, in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (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,
> ….
>
> (h) the individual's name if 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 identify the responsive records (including the sole remaining record) as records relating to the appellant. The Police therefore take the position that the record remaining at issue contains the personal information of the appellant.

I have reviewed the record remaining at issue. The appellant's name, albeit in misspelled form, appears two times in the record, and I am satisfied that the portions of the record which contain his name contain personal information about him including information relating to his criminal history (paragraph (b)) and other personal information relating to him (paragraph (h)).

I also find that the record does not contain the personal information of any other identifiable individuals.

As the record does not contain the personal information of any individuals other than the appellant, it is not necessary for me to review the possible application of sections 38(b) and/or 14(1). The sole remaining issue is whether the record qualifies for exemption under section 38(a).

**DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(a), IN CONJUNCTION WITH SECTION 8(1)(a), APPLY TO THE RECORD?**

**General principles**

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

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

Because section 38(a) is a discretionary exemption, even if the information falls within the scope of section 8, the institution must nevertheless consider whether to disclose the information to the requester.

In this appeal, the Police rely on section 38(a) in conjunction with section 8(1)(a), which reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > interfere with a law enforcement matter;

The term "law enforcement," which appears in sections 8(1)(a), 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.)).

Under section 8(1)(a), an 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*, above).

In order for section 8(1)(a) to apply, the "law enforcement matter" in question must be specific and ongoing. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters (Orders PO-2085, MO-1578).

**Representations**

The Police submit that the record qualifies for exemption under section 8(1)(a) as follows:

> The criminal charges for which the [Police] created an investigative file, the contents of which form the basis of a crown Brief, are currently before the Ontario Court of Appeal and, therefore, the requested documents relate to an ongoing law enforcement matter.
>
> The Police rely on the application of section 8(1)(a) … to refuse to disclose the responsive records. The premature release of information, by [the Police], which has been lawfully withheld by the Crown pursuant to his/her obligations … may interfere with the prosecution of the matter. For example, the release of information which the Crown has determined to be not relevant impairs the Crown's ability to limit the scope of a trial to relevant matters and otherwise properly conduct the prosecution on behalf of the state.

The appellant provided representations in support of the position that the records do not qualify for exemption under section 8(1)(a).

**Findings**

I have carefully reviewed the responsive portions of the record, which consist of seven lines of notebook entries by the identified staff sergeant. Although I recognize the difficulty of predicting future events in a law enforcement context, in my view the disclosure of the relevant portions of the record at issue could not reasonably be expected to interfere with a law enforcement matter. I find that the Police have not provided evidence which is sufficiently "detailed and convincing" to establish a "reasonable expectation" that the disclosure of this record could interfere with the law enforcement matter. The information at issue relates to what appear to be relatively innocuous administrative details. In my view, the disclosure of these portions of the record could not reasonably be expected to interfere with a law enforcement matter, particularly as the relevant portions of the record relate solely to administrative matters concerning the appellant (Order MO-1908-I).

Accordingly, I find that the responsive portions of the record do not qualify for exemption under section 8(1)(a). As the exemption in section 8(1)(a) does not apply to the relevant portions of the record, they do not qualify for exemption under section 38(a). I will therefore order the Police to disclose those portions of the record to the appellant.

## ORDER:

1. I order the Police to disclose the responsive portions of the record remaining at issue to the appellant by **May 13, 2005**. For greater certainty, I have highlighted the responsive portions of the record which is to be disclosed on the copy of the record sent to the Police along with this order. To be clear, the Police are to disclose only the *highlighted* portions of the record to the appellant.

2. In order to verify compliance, I reserve the right to require the Police to provide me with a copy of the record disclosed to the appellant pursuant to the above provision, upon request.

Original signed by: April 22, 2005
Frank DeVries
Adjudicator