



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2014

Appeal MA-050165-1

Niagara Regional Police Services Board



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NATURE OF THE APPEAL:

The Niagara Regional Police Services Board (the Police) received a two-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request relates to a civil action filed by the requester in the Ontario Superior Court of Justice (the Court). The requester provided details of the civil action and stated the access request as follows:

For my records would you kindly provide the name or names of the investigation officers involved in any or all investigations relating to this claim.

For my records would you also confirm how the investigation into the alleged second document was carried out or if the second letter as reported to yourselves was discovered as the copy was stolen from my apartment at this address.

In their decision letter, the Police address both parts of the request.

With respect the first part, the Police identified a General Incident Report as the sole responsive record. The Police granted partial access to this record, severing what they refer to as a “confidential police 900 code” from page one. In denying access to the withheld portion, the Police rely on section 38(a) in conjunction with section 8(1)(l) of the *Act*.

In regard to the second part of the request, the Police state that a thorough search for records was conducted and no responsive documentation exists.

The requester (now the appellant) appealed the decision regarding both parts of his request. In his letter of appeal, the appellant made reference to a motion before the Court involving what he believes to be the responsive documents with respect to the second part of the request.

During mediation, the appellant confirmed that he received the 3-page General Incident Report from the Police. In correspondence with the IPC mediator, the appellant stated his belief that additional records exist, specifically documentation about an investigation involving a matter before the Court, relating to the Ministry of Finance and the Financial Services Commission of Ontario.

During mediation, the Police sent a letter to the appellant reiterating that no further records exist with respect to the request as no investigation was carried out by the Police in relation to the alleged second document mentioned in the request letter. The Police letter further stated that the General Incident Report comprises the extent of the Police investigation and is the only record which exists in relation to this matter.

The appellant responded that additional records ought to exist, which have not been disclosed by the Police. He stated that he has personally submitted to the Police over 750 pages of documents related to the investigation.

Mediation did not resolve the appeal, which therefore moved to the adjudication stage.

The issues in this appeal are whether the Police conducted a reasonable search, and whether the appellant is entitled to access to the complete General Incident Report, in which only the 900 code was severed under section 38(a), in conjunction with section 8(1)(l) of the *Act*.

I sent a Notice of Inquiry to the Police, initially, outlining the facts and issues and inviting representations. The Police filed representations in response. I then sent a Notice of Inquiry, with a complete copy of the Police's representations, to the appellant. The appellant also provided me with representations.

RECORDS:

The sole record at issue consists of the withheld portion of the specified General Incident Report.

DISCUSSION:

REASONABLE SEARCH

In his representations, the appellant asserts that the Police should have more records than the three-page record partially disclosed to him. The appellant provided me with four large volumes of information in support of his arguments that additional records ought to exist.

The Police state:

A computer search was performed for all records which might be responsive to the appellant's request. Only one incident report was located which was subsequently supplied to the appellant. The investigating officer was contacted to determine if this report represented the extent of his investigation and of his contact with the appellant. The investigating officer advised that the report did represent the extent of his investigation. He did not do any further investigation and was not aware of any "second document".

I subsequently contacted a second officer named by the appellant in a letter from the appellant dated April 29, 2005. I asked this officer if he had any records involving the appellant. The officer advised me that he was aware that the appellant believed an investigation had been commenced by [the Police] regarding a second document. The officer had been served a motion to produce those records for court, however, as the only record which exists had already been supplied to the appellant through the Information and Privacy Unit, the officer did not respond to the motion. The only documents this officer possesses regarding the appellant are copies of motions that the appellant has forwarded to him.

In the Notice of Inquiry that I sent to the appellant, it was clearly noted that "[a]lthough 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." I have carefully reviewed the representations from the appellant. The appellant did not

provide me with any such reasonable basis: what the appellant did provide me with were the records he appears to be seeking, which consists of correspondence he apparently sent to the Police. Based on the representations which they provided to me, I am satisfied that the Police made a reasonable effort to identify and locate responsive records. I therefore dismiss the appeal as regards the appellant's claim that further records exist.

PERSONAL INFORMATION

In order to determine which sections 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) 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 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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

The request resulting in this appeal is for information concerning the appellant. I find that, because the record relates to an incident involving the appellant, it contains his personal information within the meaning of section 2(1) of the Act.

I will now consider the application of section 38(a) in conjunction with section 8(1)(l), to the withheld Police 900 code.

LAW ENFORCEMENT

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 exemptions from this right. Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if sections 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

Because section 38(a) is a discretionary exemption, even if the information falls within the scope of one of the listed exemptions, the institution must nevertheless exercise their discretion in deciding whether to disclose the information to the requester. I will review the exercise of discretion by the Police later in this order.

The portion of the record that was withheld was a 900 code. The Police claim that this portion of the record is exempt under section 38(a) in conjunction with section 8(1)(l). Because I have found that the record contains the appellant's personal information, I must review the Police's decision to deny access to the 900 code under section 38(a) in conjunction with section 8(1)(l).

Section 8(1)(l) reads:

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

facilitate the commission of an unlawful act or hamper the control of crime.

To establish the application of section 8(1)(l), 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. Goodis (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)].

In his representations, the appellant did not respond to the questions I set out in the Notice of Inquiry concerning this exemption.

The Police submit:

The Information and Privacy Commissioner has consistently found that section 8(1)(l) applies to "ten-codes" (see Orders M-393, M-757, PO-1665). The code withheld from this report is a 900 code which is in direct correlation to the ten-codes.

...

It is not the personal information of the appellant nor would there appear to be a need for the appellant to receive this information... It was severed for law enforcement reasons...

This office has issued many orders regarding the release of confidential Police codes. In Order MO-1715, Adjudicator Bernard Morrow provided a clear and succinct summary, stating:

This office has consistently found that section 8(1)(l) applies to "ten-codes" (see for example, Orders M-393, M-757, PO-1665). Based on these earlier orders and my review of the records and the Police's representations, I find that disclosing the ten-codes in this case could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. As Adjudicator Laurel Cropley stated in Order PO-1665, "disclosure of the 'ten-codes' would leave [...] officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of [...] officers who communicate with each other on publicly accessible radio transmission space."

I adopt this line of reasoning in the present appeal. I find that the 900 code that was severed for confidentiality is exempt under 8(1)(l), therefore it is also exempt under section 38(a).

POLICE'S EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under any of the *Act's* discretionary exemptions.

Because section 38(a) is a discretionary exemption, I must also review the Police's exercise of discretion in deciding to withhold the information.

The Police have made the following representations on this issue:

As stated, only a single 900-code was severed from this report. It is not the personal information of the appellant ... it was severed for law enforcement reasons; reasons which seem to me, to outweigh the appellant's right to receive such information. I believe this exercise of discretion should be upheld by your office.

I find that the Police properly exercised their discretion in refusing to disclose the information at issue under section 38(a). They took into account and appropriately balanced relevant considerations, including the appellant's right of access and the interests section 8(1)(l) seeks to protect. I also find that they did not rely on irrelevant considerations. I am satisfied that the Police properly exercised their discretion in reaching their decision in this case.

ORDER:

I uphold the decision of the Police.

Original signed by:
Beverly Caddigan
Adjudicator

January 30, 2006