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

ORDER MO-2007

Appeal MA-040383-1

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 eight enumerated categories of records relating to the requester's arrest and detention on a specified date. The requester asked for copies of any audio transmissions between the arresting officers and a specified Division and any video recordings which include his image, in addition to any written records relating to his arrest.

The Police advised the requester that they would not be providing access to audio-taped communications between police officers, because, pursuant to section 1 of Regulation 823, the production of these records would unreasonably interfere with their operations. The Police state that, with respect to audio-taped communications between officers and the Police Communications Centre, "due to the extreme volume of traffic, to search for the audio records would incur a hardship on the institution". In addition, the Police rely on the exclusionary provision in section 52(3) of the *Act* with respect to these records.

In their decision letter, the Police denied access to the remainder of the responsive records, relying on the discretionary exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with the discretionary exemptions in sections 8(1)(b) (law enforcement), (f) (right to a fair trial) and (l) (facilitate commission of a crime) of the *Act*. The Police indicated that these exemptions applied because there was an on-going public complaints investigation into the subject matter of the records that was initiated by the requester and that access to the records was being denied to prevent interference with that investigation. The Police also indicated that some information contained in police officer notebooks that were identified as responsive also contain information relating to other investigations that do not involve the requester and are, accordingly, not responsive to the request.

The requester, now the appellant, appealed the decision to deny access to the responsive records and also maintained that additional records ought to exist.

During the mediation stage of the appeal, the mediator advised the appellant that the Police had identified six pages of responsive records, consisting of three pages of notebook entries of one police officer, a Record of Arrest and two Supplementary Records of Arrest. The appellant contends that additional records beyond the six pages identified by the Police ought to exist, including videotapes of his booking and release, as well as videotapes from the holding cell area where he was kept overnight.

As a result of another search undertaken by the Police, they confirmed the existence of a videotape containing footage of the appellant's arrival at the station following his arrest, as well as his booking and subsequent release the next morning. The Police confirmed that this videotape contains only the personal information of the appellant. The Police denied access to the videotape, claiming the application of sections 8(1)(b), 8(1)(f) and 38(a) of the *Act*. Further, the Police indicated that there is no videotape of the appellant's time in a holding cell. Finally, during mediation, the Police confirmed that they were no longer relying on the exclusionary provision in section 52(1) to deny access to the records.

Further mediation was not possible and the matter was transferred to the adjudication stage of the appeals process. I sought and received the representations of the Police initially. I then provided a complete copy of the Police representations to the appellant, along with a Notice of Inquiry. The appellant also submitted representations in which he raised some concerns about the adequacy of the searches undertaken by the Police. I invited the Police to provide me with representations by way of reply relating to a specific issue involving the searches undertaken for responsive records. I received reply submissions from the Police which addressed these concerns.

In the circumstances of this appeal, I also solicited and received representations from the Ontario Human Rights Commission (the OHRC) because the events reflected in the responsive records are now the subject of a complaint by the appellant to the OHRC. The OHRC opposed the disclosure of the records to the appellant in their submissions.

RECORDS:

The records at issue in this appeal consist of a Record of Arrest dated July 25, 2005, a Supplementary Record of Arrest dated September 13, 2004, a second Supplementary Record of Arrest dated July 25, 2004, three pages of a police officer's notebook containing entries for July 25, 2004 and a Videotape.

DISCUSSION:

REASONABLE SEARCH

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 indicate that they conducted searches for the memorandum note books of the three officers identified in the request but were only able to locate one of them. The Police state that the notebooks of the officers for the date of the appellant's arrest could not be located in either the "area designated for storage of officers' memorandum books" or the individual officers' own personal clothing lockers and homes.

However, the appellant provided me with a copy of the "Report of Investigation" dated November 30, 2004 that was prepared by the investigating detective employed by the Police to examine and comment on the allegations made by the appellant concerning the events of the evening he was arrested. The appellant points out that in the Evidence and Exhibits Appendix to the Report, the investigator refers to the memorandum book notes belonging to the officers and does not mention in her narrative that two of the officers' notes were not available to her. In my view, the appellant has provided a reasonable basis for believing that the notebook entries he is seeking exist and were examined by the investigating detective as part of her review of the allegations made by the appellant against the subject officers.

In a Notice of Inquiry soliciting their reply representations, I requested that the Police provide me with the results of any searches undertaken of the record-holdings of the Professional Services Branch's investigating detective for copies of the subject officers' notebooks. In response, the Police indicate that the memorandum notebooks of the officers were not seized as part of the investigation and that the investigating detective "worked from photocopies of the memorandum book notes provided by the two officers". The Police maintain their position that a reasonable effort was made to locate the *original memorandum book notes* but appear not to have considered whether the photocopied versions that were used by the investigating detective are responsive to the request.

In my view, the photocopied versions of the memorandum book notes are responsive to the request in the same way that the originals would have been. While it is unfortunate that the original memorandum book notes cannot be located, the Police clearly possess photocopies of them. I find that the Police have placed an unduly restrictive interpretation on what records might be described as responsive to the request. In my view, the photocopied memorandum book notes are responsive to the request and I will order the Police to issue a decision letter to the appellant respecting access to them.

To support his contention that additional videotape records exist, the appellant provided the mediator with excerpts from the same Investigation Report prepared by a Police detective in which various references are made to videotapes, particularly a "booking tape". In my view, the videotape which is one of the identified records in this appeal represents this particular piece of evidence. I have reviewed the videotape and find that it contains a brief segment showing the appellant arriving at the station with the escorting police officers through what is known as a "sallyport". The next segment consists of the appellant's booking by the Police staff on duty that evening and the interaction between the officers and the appellant. The final portion of the videotape consists of an audio-visual recording of the appellant's release from custody.

The Police indicate that this videotape was prepared by its Video Services Unit and was copied from the same master videotape that was used to prepare the videotape referred to in the Investigation Report dated November 30, 2004. Based on my review of the videotape and the description given by the appellant of his interactions with the Police on that evening, I am

satisfied that this videotape represents all of the appellant's encounters with the Police at the time of his arrival, booking and release from custody.

The appellant also believes that additional videotapes exist that record the 9.5 hours he spent in the holding cells. It is during this time that the appellant alleges that he was subjected to abusive language by the subject officers. The Police indicate that they have conducted a search for videotapes of the holding cells but such records do not exist. In addition, the Police submit that Procedure 03-02 governing the observation of individuals in the holding cells only requires that they be "monitored", and not necessarily videotaped, unless an emergency occurred, which is not the case here.

Based on the evidence provided to me by the Police, as well as Procedure 03-02 and my review of the booking area videotape, I am satisfied that the Police have conducted a reasonable search for any videotape that might have been made of the holding cell area at the time the appellant was incarcerated there. While the appellant indicates that there are cameras in the holding cell area and that he directly addressed comments to those cameras, I am satisfied that the Police have searched for any videotapes made of that time period but that none exist as the cameras were not, in fact, operating at that time.

PERSONAL INFORMATION

In order to determine whether 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) 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, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

I have reviewed the contents of the videotape and the six pages of responsive records and find that they contain the personal information of the appellant only. The information includes the appellant's name, address, telephone number, gender, date of birth, his actions at the time of his arrest and the circumstances surrounding that arrest. In my view, this information qualifies as his personal information under sections 2(1)(a), (d) and (h) of the definition of that term. I further find that none of the records contain the personal information of any other individual.

LAW ENFORCEMENT/DISCRETION TO REFUSE REQEUSTER'S OWN INFORMATION

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. In this case, the Police rely on section 38(a) in conjunction with sections 8(1)(b), (f) and (l), which state:

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

> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) 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.)].

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", 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* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Section 8(1)(b): law enforcement investigation

The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference

is with "potential" law enforcement investigations [Order PO-2085]. The institution holding the records need not be the institution conducting the law enforcement investigation for the exemption to apply [Order PO-2085].

The Police maintain that there is an ongoing law enforcement investigation relating to this matter as a result of a complaint by the appellant to the Ontario Civilian Commission on Police Services (OCCPS). They submit that although the complaint to OCCPS has been resolved, charges may be brought under the *Police Services Act* against an officer other than one of the officers named by the appellant in his complaint. In addition, the Police argue that "the premature release of records responsive to this request could reasonably be expected to have a detrimental effect on the investigations, the ultimate laying of charges, if such charges become warranted, and the eventual prosecution of the charged individual(s)."

In addition, the Police allege that the disclosure of the records to the appellant could reasonably be expected to interfere with an investigation into certain allegations of discrimination brought by the appellant to the OHRC. They rely on the decisions in Orders M-507 and 178 where it was found that the disclosure of records to one of the parties to an investigation made pursuant to the *Code* could reasonably be expected to result in interference with the investigation. The representations of the OHRC support this position and indicate that its investigation of the appellant's complaint is ongoing.

The Police have provided me with the following additional submissions on the potential for interference under section 8(1)(b) with the OHRC's investigation should the records be disclosed, stating:

> A cornerstone of any investigation is the ability of investigators to assess the evidence prior to rendering a determination on the facts of the matter. A key component of that assessment is the comparison of the complainant's original statements upon filing the complaint with those derived from the evidence during the investigation. This assessment tests the accuracy and veracity of the information provided to the investigators. The weight afforded to information supplied by a complainant can be severely diminished during the assessment stage of the investigation where the original information differs from information provided at a later time during the investigation.
>
> Premature release of information could provide an individual with the opportunity to change or tailor information being provided at a later time to fit the allegations originally made. Where subsequent 'altered' information is provided to investigators, the course of the investigation could be changed.
>
> An additional factor for investigators to consider when weighing the information is the fact that the appellant was originally arrested for being intoxicated in a public place. An intoxicated condition could most certainly have an impact on an individual's memory of events and thereby affect the quality of the information

> originally provided by the appellant. Any later amendment or alteration to these recollections, resulting from the premature release of information, could erode the investigators' ability to test the accuracy and veracity of the complaint.

The appellant argues that because he has been made aware of the Police version of the events surrounding his arrest and detention through the release to him of the November 30, 2004 Investigation Report by the Professional Standards Branch, "it makes no sense to allege that this would prejudice the OHRC investigation". He also points out that the criminal charges brought against him on the evening of his arrest were dismissed in March of 2005 so no interference with a criminal proceeding could result from the disclosure of the information to him.

In Order PO-2331, Adjudicator Stephanie Haly examined the application of the law enforcement exemptions in sections 14(1)(a) and (b), the equivalent provisions in the provincial *Freedom of Information and Protection of Privacy Act* to sections 8(1)(a) and (b) of the *Act*, with respect to records relating to a complaint before the OHRC. In deciding that some records fell within the ambit of section 14(1)(b), Adjudicator Haly stated:

> In order for a record to qualify for exemption under either section 14(1)(a) or (b), the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act* (Order P-324). It has been previously established that OHRC investigations meet this definition (Order 89 and many subsequent orders) and I adopt this finding for the purposes of this order.
>
> Furthermore, I find that proceedings before the Human Rights Tribunal are considered law enforcement proceedings within section 14(1)(b) and that until the Tribunal has rendered a decision or until the reconsideration process has been exhausted, the investigation is considered ongoing (Orders P- 178 and P-507).
>
> Nevertheless, I am not persuaded that disclosure of a number of records could reasonably be expected to interfere with an OHRC investigation. Records 5, 7, 8, 9, 12, 16, 18 and 23 are all correspondence from the OHRC to the lawyer for the corporate respondent in the appellant's human rights complaint. All of these documents, which I would describe as "cover letters", refer to information that is general and administrative in nature. I am unable to see how disclosure of these records would interfere with the ongoing investigation. Moreover, the OHRC has not provided me with detailed and convincing evidence that such harm could occur if these records were disclosed. As a result, I find that sections 14(1)(a) or (b) do not apply to Records 5, 7, 8, 9, 12, 16 and 18 and these records do not qualify for exemption under section 49(a).
>
> While Record 23 is also a cover letter, it contains a request by the OHRC investigation officer for specific information in the investigation of the appellant's complaint. I agree with the OHRC that disclosure of this information may

> interfere with the ongoing investigation under section 14(1)(b) and find it exempt [. . .]
>
> On the other hand, Records 3, 4, 17, 19, 20, 21, 22, 24 and 25 all contain specific information relating to the investigation of the appellant's human rights complaint. I agree with the OHRC that this information is "sufficiently linked to the actual investigation of the appellant's complaint" and as such qualifies for exemption under section 49(a) and 14(1)(b) of the *Act*.

In Order PO-2341, I adopted this approach to records of a similar nature pertaining to a complaint that was currently before the OHRC, finding that the disclosure of records relating to the nature of the complaint itself could reasonably be expected to interfere with a law enforcement investigation, in that case by the OHRC.

Similarly, in the present appeal, there is an on-going complaint before the OHRC relating to certain allegations made by the appellant about the manner in which he was treated by the Police. The appellant acknowledges that this complaint is currently before the OHRC. I accept the evidence tendered by the Police with respect to the potential for interference with the investigation by the OHRC should the information at issue in this appeal be disclosed. In accordance with my findings in Order PO-2341 and those of Adjudicator Haly in Order PO-2331, I find that the disclosure of the videotape and the paper documents comprising pages 1 to 6 of the records could reasonably be expected to result in interference with the law enforcement investigation currently underway with the OHRC. As such, I find that the information at issue qualifies for exemption under section 8(1)(b) and, because it contains the personal information of the appellant, is exempt under section 38(a). Because of the manner in which I have addressed the application of section 8(1)(b) to the records, it is not necessary for me to consider whether they also qualify for exemption under sections 8(1)(f) and (l).

The Police have also provided me with extensive and detailed representations respecting the manner in which they exercised their discretion not to disclose the requested information to the appellant under section 38(a). Based on those submissions, I am satisfied that the Police exercised their discretion in an appropriate fashion and I will not disturb it on appeal.

ORDER:

1. I order the Police to provide the appellant with a decision letter respecting access to the photocopied versions of the memorandum book notes in the possession of the Professional Standards Branch in accordance with the requirements of section 19 of the *Act*, using the date of this order as the date of the request and without recourse to a time extension under section 20 of the *Act*.

2. I uphold the decision of the Police to deny access to the other records identified as responsive to the request.

3. I reserve the right to require the Police to provide me with a copy of the decision letter referred to in Order Provision 1.

Original signed by: December 15, 2005
Donald Hale
Adjudicator