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

ORDER MO-2210

Appeal MA06-300

Peel Regional Police Services Board

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NATURE OF THE APPEAL:

The Peel Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "a complete copy of the Crown disclosure" concerning *Criminal Code* charges brought against the requester as a result of two specific incidents on separate dates in 2003.

The Police transferred the part of the request related to "Crown Disclosure" to the Ministry of the Attorney General (the Ministry) because the Police considered the Ministry to have a greater interest in the records, as contemplated by section 18 of the *Act*.

In discussion with the requester's representative, the Police also agreed to expand the scope of the request to include officers' notes, witness statements and occurrence reports relating to the charges referred to above.

In an interim decision letter, the Police provided a fee estimate and advised that they anticipated granting partial access to the responsive records, while denying access to specific portions, pursuant to section 38(b) of the *Act* (invasion of privacy), in conjunction with the presumption listed at section 14(3)(b) of the *Act*. The Police also informed the requester that additional police officers' notes might exist and that these would be forwarded upon receipt of the fee estimate deposit.

After notifying an individual whose interests might be affected by disclosure of certain records under section 21(1) of the *Act*, the Police issued a final decision letter shortly thereafter, granting partial access to the records, but denying access to certain portions based on the exemption in section 38(b). The Police included a list of all the responsive records in the decision letter, together with an explanation of the access decision, and also advised the appellant that some information in the records had been removed, as it was deemed to be not responsive to the request. A videotaped statement was also subsequently disclosed to the requester in a letter sent the following week.

The requester, now the appellant, appealed the Police's decision to this office.

During the mediation stage of this appeal, the Police issued a new decision letter, dated October 3, 2006, granting partial access to additional responsive records. In the decision, the Police informed the appellant of its view that the records prepared for Crown disclosure are considered to be the property of the Office of the Crown Attorney and confirmed that the portion of the request relating to those records had been transferred to the Ministry pursuant to section 18 of the *Act*. The appeal of the portion of the request transferred to the Ministry is being processed concurrently by this office under the *Freedom of Information and Protection of Privacy Act* as Appeal PA06-193.

The appellant's representative advised the mediator that he believes additional records related to one of the criminal charges should exist, including a search warrant or search warrant package, and a substance analysis report. Accordingly, the adequacy of the Police's search for responsive records was added as an issue in this appeal.

The appellant's representative clarified that he is not pursuing access to the severed portions of records containing the personal information of individuals other than the appellant, but is appealing the Police's decision to sever portions of the records as non-responsive to the request. Consequently, the only severed portions of the records that remain at issue in this appeal are those identified by the Police as non-responsive.

No further mediation was possible and this appeal was transferred to the adjudication stage of the appeals process where it was assigned to an adjudicator to conduct an inquiry. The adjudicator sent a Notice of Inquiry to the Police, initially, setting out the facts and issues in the appeal. The Police submitted representations, which were then shared, in their entirety, with the appellant. The adjudicator also received representations from the appellant. For administrative reasons, the file was then assigned to me for adjudication.

The sole issues remaining for my determination are whether the undisclosed portions of certain records contain information that is responsive to the appellant's request and whether the searches undertaken by the Police were reasonable in the circumstances of this appeal.

RECORDS

The records remaining at issue consist of those portions of five pages of notebook entries taken by four police officers that the Police have deemed to be not responsive to the request.

DISCUSSION:

SCOPE OF THE REQUEST/RESONSIVENESS OF RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
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> (a) make a request in writing to the institution that the person believes has custody or control of the record;
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> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
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> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's

favour [Orders P-134, P-880]. To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The Police have provided me with extensive representations in support of their position that the undisclosed portions of 5 pages from 4 officers' notebooks contain information that is not responsive to the appellant's request as they are concerned with events and investigations that do not relate in any way to the appellant or the incidents referred to elsewhere in the notes. The Police have delineated exactly what portions of these records involve other unrelated investigations and matters and have clearly described the time periods for which these notes were taken by each officer on the day in question. This information was shared with the appellant during the inquiry process.

The appellant's submissions do not address this aspect of the appeal.

Based on a careful review of the severed portions of the subject records, I conclude that the information set forth therein does not relate in any way to the appellant or the incidents which gave rise to the police investigations described elsewhere in the notebooks of the officers. I find that the undisclosed portions of the 5 pages of notebook entries are not reasonably related to the request. Rather, these notebook entries pertain only to other investigations or police matters in which the officers were involved on that day. As a result, I find that the information contained in the undisclosed portions of the 5 pages of notes is not responsive to the request and, accordingly, falls outside its scope.

REASONABLE SEARCH

The appellant takes the position that because the search undertaken by the Police did not locate copies of a search warrant, or search warrant package, and a substance analysis report, the search was inadequate and not sufficiently thorough. The Police respond by submitting that these records were not located in the course of its searches and may have been destroyed in accordance with its records retention by-laws.

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 submit the following with respect to the nature and extent of the searches they undertook to locate the search warrant (or search warrant package) and substance analysis report sought by the appellant:

> The search warrant and substance analysis report would have been included in the package with the Crown Brief which is provided to the Courts for use during the trial. At the completion of the trial, the Crown Confidential Envelope, which is the property of the Ministry of the Attorney General, is returned to the Police Service for filing purposes. The documents contained in the Crown Confidential Envelope consist of documents which are the property of the Crown. Upon clarification of the Appellant's initial request, the portion of the request dealing with the Crown Brief was transferred to the Ministry of the Attorney General, along with the Crown Confidential Envelope. During the mediation conference call it was suggested to the appellant that he should contact the Ministry of the Attorney General to ascertain whether or not the search warrant and substance analysis report were included in the Crown Confidential Envelope.
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> As a result of the expansion of the request to include the search warrant and substance analysis report, the Freedom of Information Analyst contacted [a named police officer], the officer in charge of the investigation which is the subject of the appellant's request. As the investigating officer, [the named officer] would have been responsible for the inclusion of the documents in question into the package prepared for the Crown. He would not be required to keep a copy. [The named officer] advised in his e-mail message to the Freedom of Information Analyst, [a specified individual], that after conducting a thorough search he was unable to locate a copy of the search warrant or substance analysis report.

The Police go on to refer to specific provisions in the Regional Municipality of Peel's By-law Number 25-96 governing the treatment of warrants (at Item 74) and Confidential Crown Instructions (at Items 21 and 23), which they submit would also govern the retention of substance analysis reports. The Police conclude that the records retention schedule for documents of the sort which are the subject of this request, including any search warrant package or substance analysis reports, is one year following the conclusion of the court proceedings.

Based on my review of the records, it appears that charges relating to one incident involving the appellant were resolved by way of a guilty plea in October 2004, while those relating to the other incident were completed in December 2003. Consequently, the Police argue that in accordance with its Records Retention By-law, the records sought by the appellant are no longer maintained and are no longer available as they have been destroyed.

The Police contacted the investigating officer in this matter who also conducted a search of the record-holdings of the Police for the requested search warrant package and substance analysis report. The officer indicates that he did not locate copies of these documents in "my bankers boxes in the storage rooms at 22 Division". He further indicates that he "checked corporate imaging, however; the cell sheets are the only documents attached to this occurrence."

The appellant's submissions do not address this aspect of the appeal.

I have reviewed the representations of the Police, including the Records Retention By-law and the e-mail from the investigating officer. Based on the information provided in their representations, it would appear that the information sought by the appellant, specifically the search warrant package and/or the substance analysis report, may be located in the Crown Confidential Envelope. I also note that the Police have apparently transferred the portion of the appellant's request dealing with the Crown Brief, *as well as the records responsive to that part of the request*, to the Ministry of the Attorney General, pursuant to section 18 of the *Act* based on their belief that the Ministry has a greater interest in these particular records.

My reason for concluding that this is the case is based on the contents of a letter dated June 6, 2006 from an analyst with the Police Freedom of Information and Privacy Unit to the Freedom of Information and Protection of Privacy Co-ordinator for the Ministry of the Attorney General. The Police did not maintain a copy of the records which they forwarded to the Ministry on June 6, 2006. In addition, the Police only became aware of the appellant's interest in the search warrant package and substance analysis report during a mediation conference call held on October 16, 2006, several months after the date that the Crown Confidential Envelope was physically transferred to the Ministry.

As a result, I am satisfied that the Police no longer have copies of the warrant package or the substance analysis report, as that information was likely included in the materials sent to the Ministry at the time that a portion of the request was transferred. The Police, through the investigating officer, also undertook a search of the investigation record-holdings and were unable to locate the information sought by the appellant relating to the warrant package and the substance analysis report.

Based on the information provided to me by the Police, I am satisfied that the searches which they conducted for this information were reasonable in their scope and extent.

ORDER:

1. The information contained in the undisclosed portions of the 5 pages of notes is not responsive to the request.

2. I find that the Police have conducted a reasonable search for responsive records and I dismiss that aspect of the appeal.

Original Signed by: July 3, 2007
Donald Hale
Adjudicator