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

ORDER MO-2213

Appeal MA-050419-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> Each and every document containing [several variations of the requester's name] created since 1 November 2004 to present.
>
> Documents include, but are not limited to, paper and electronic media, letters, reports, incident reports, transcripts, notes, notations, memos, faxes, emails, handwritten notes, telephone conversation logs, dictations, Desk Sergeant notes & log page entries & decisions, decisions, datebook entries & notations, pages from notebooks, transcripts, hearing transcripts, tape recordings, digital tape recordings, recordings, videos, digital videos, any and all created computer files.
>
> References include, but are not limited to [a named] case file, [a named individual's] interviews referencing the appellant made in 2004 and 2005, [the requester's] interview made 24 July 2005, and [three specified] Incident Reports.
>
> Known Specifics
>
> Documents were created by, but not limited to the following:
>
> 14 Division
> Detective Office, Staff Sergeant,
> [Five named Det. Constables]
>
> 52 Division
> [a named] PC,
> [a named] Det. Constable.

The Police located some responsive records and denied access to them in full. In its decision dated November 14, 2005, the Police advised the requester that this matter is still before the courts and that access to the responsive information is denied pursuant to sections 8(1)(a) (law enforcement matter), 8(1)(f) (right to fair trial), 13 (danger to safety or health), 14(1) (invasion of privacy), with reference to the presumption in section 14(3)(b) (information compiled as part of a law enforcement investigation), 38(a) and 38(b) (right of access to one's own personal information) of the *Act*.

The requester (now the appellant) appealed the Police's decision.

During the mediation stage, following numerous unsuccessful attempts to contact the appellant's legal representative, the mediator closed the file and issued a mediator's report on May 31, 2006. However, on June 2, 2006, the appellant's representative sent a fax to the mediator, indicating that he had incorrectly noted the deadline for response and requested a telephone conference. During the subsequent teleconference, the representative indicated that he wished to re-open this appeal and proceed to adjudication. Although the Police initially objected to the re-opening of this file, after discussions with this office they agreed to proceed with the appeal. For ease of

reference, all actions taken by the appellant's representative will be referred to as the actions of the appellant.

With respect to the issues and/or records in dispute, the appellant advised the mediator that he wishes to pursue access to the records in their entirety, with the exception of any police codes or portions of the records identified by the Police as non-responsive. He also advised the mediator that he did not want any affected persons notified during the mediation stage of this appeal. Finally, the appellant advised the mediator that he wishes to pursue access to police officer's notes, as outlined in his request.

As the police officer's notes were not initially included as responsive records in this appeal, the Police undertook to obtain these records and agreed to issue a supplementary decision to the appellant upon receipt of any responsive records from the officers. The Police advised that a copy of the supplementary decision and any responsive records would be forwarded to the Commissioner's office so they can be included with this appeal. The supplementary decision and additional records were sent to this office on September 22, 2006 and have been incorporated into this appeal.

In its September 22, 2006 decision letter, the Police indicated that access was denied to the additional records, which consist of police officers notes and an audiotape, on the basis of the same exemptions. This office contacted both the Police and the appellant and re-confirmed that the appellant is not interested in pursuing those portions of the records to which section 8(1)(l) has been claimed (police ten-codes) or which are non-responsive to the request.

In earlier discussions with the mediator, the Police advised that the responsive records involve a matter that was then before the courts, and noted that the appellant's court date had been set for October 25, 2006 at Old City Hall in Toronto.

I decided to seek representations from the Police, initially, and sent a Notice of Inquiry on October 17, 2006. Prior to submitting representations, the Police notified this office that the charges against the appellant were withdrawn on October 25, 2006, and that the Police would likely provide additional disclosure to the appellant. The Police contacted this office on December 5, 2006 to advise that a second Supplementary decision would be issued to the appellant. The appeal file was placed on hold to await the results of the new Supplementary decision, issued by the Police on December 14, 2006. During this time, this office held conversations with both the appellant and the Police. Ultimately, the appellant was not satisfied with the response provided by the Police in their December 14, 2006 decision and the appeal proceeded.

One of the concerns raised by the appellant following receipt of the December 14, 2006 decision, apart from wanting to pursue additional disclosure, was the absence of documentation relating to one of the police officers named in the request, or any reference to him in this decision. This concern raises the issue of reasonableness of search, which was not originally identified as an issue.

Due to the developments that took place subsequent to the issuance of the original Notice of Inquiry, I revised the Notice of Inquiry to reflect changed and/or additional issues that had arisen. The Police were asked to disregard the first Notice that was sent to them and to provide representations based on the questions set out in the revised Notice. In reviewing this revised Notice, the Police were also asked to review the discussion under the "Records" heading and to respond accordingly.

The Police submitted representations in which they addressed all issues raised in the revised Notice. The non-confidential portions of the representations were sent to the appellant along with a copy of the revised Notice. The appellant did not submit representations.

RECORDS:

In the original Notice of Inquiry, the records remaining at issue were identified as consisting of 75 pages of: records of arrest, supplementary records of arrest, case tracking documents, civilian witness lists, police witness lists, occurrence reports, records of summons application, supplementary records of summons application, case notes, police officers' notes and one audiotape (described as page 76).

The Police provided copies of the records that were disclosed to the appellant to this office. After reviewing them, I noted that the Police provided full disclosure to pages 4, 6, 7, 8, 9, 24, 25, 27, 43, 57, 64, 65 and 66. Therefore, these pages are no longer at issue. The Police withheld pages 44, 47, 48, 49, 54 and 76 in full. The remaining pages were withheld in part. Further, my review of the records reveals that all of the withheld information on pages 60, 61, 63, 67, 69, 70, 71 and 75 comprises either non-responsive information or references to the police ten-codes. The appellant has confirmed that he does not wish to pursue access to this information. Accordingly, these eight pages are not at issue in this appeal. Some of the severances made to the other records also comprise this type of information. Those portions are similarly not at issue in this appeal.

As I noted above, the Police initially claimed section 38(a), in conjunction with sections 8(1)(a), 8(1)(f) and 13, and section 38(b), in conjunction with section 14(1), with reference to section 14(3)(b). In the December 14, 2006 decision, the Police withdrew their reliance on sections 8(1)(f) and 13. Accordingly, these two discretionary exemption claims are no longer at issue in this appeal.

In light of the disclosures that have already been made and the removal of non-responsive information and information that falls under section 8(1)(l) of the *Act* from the scope of the appeal, the Police were asked to provide submissions only with respect to pages 44, 47, 48, 49, 54 and 76, in their entirety and to the relevant portions of pages 1-3, 5, 10-23, 26, 28-42, 45, 46, 50-53, 55, 56, 58, 59, 62, 68 and 72-74.

Finally, based on my review of the records disclosed to the appellant, I noted that there appeared to be a few discrepancies in the severances that were made to some of the records and asked the

Police to address them in their representations. The Police explained the apparent discrepancies in their submissions and have provided the appellant with amended copies of pages 30 and 31. The appellant was provided an opportunity to comment on this issue. Having received no submissions from the appellant regarding this issue, I am satisfied with the review undertaken by the Police in addressing any apparent discrepancies, and will not deal with this matter further.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

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. As I noted above, the appellant did not submit representations. Despite repeated attempts by this office to discuss the issues on appeal with the appellant during the Adjudication stage of the process, his participation in any meaningful dialogue was minimal. Nevertheless, based on the wording of his request and the records that were ultimately identified as responsive to his request, I noted in the revised Notice of Inquiry that was sent to the Police that:

> In his request, the appellant specifically named five Constables from 14 Division, and referred to an unnamed Staff Sergeant, as well as two Constables from 52 Division. In the first Supplementary decision, the Police identified notes from a number of police officers, most of who were not on the list provided by the appellant. In the second Supplementary decision, the Police indicated that access to the notes of five officers, some of who were on the list, could not be provided because such records did not exist.
>
> Although the appellant has only referred to one of the named police officers [in response to queries by a staff member from this office], the Police will be asked to explain the steps they took to search for responsive records pertaining to all of the police officers listed in the appellant's request.

The Police outline the steps they took to search for responsive records. Noting that the request was very broad, the Police indicate that they interpreted it as a request for "any [Police] records

concerning the appellant and another named individual contained in whatever form between November 1, 2004 and the present date (which was November 2, 2005)." A search of their databases resulted in the identification of telephone calls to 911, which resulted in officers being dispatched. Records were also identified which related to any occurrences and/or charges involving the appellant and the other named individual. The Police explain that only 911 calls are recorded, and any telephone calls made directly to or from divisions and/or individual members of the Police are not recorded. Further, the Police indicate that if an officer was dispatched as a result of a telephone call other than a 911 call, that dispatch would be recorded on the ICAD database.

In addition to these searches, the Police indicate that each division, unit and bureau of the Police has an individual assigned to locate and forward memorandum books and any other material requested by the Freedom of Information Unit. In this case, the contact persons at the relevant divisions were asked to forward for review the memorandum book notes of 20 officers who were assigned to 6 units/divisions during the relevant dates of nine incidents identified as a result of the database search.

With respect to the individual police officers named or otherwise identified in the request, the Police note that the references to "Detective Officer" and "Staff Sergeant" did not include a name. Accordingly, the Police submit that their identities could not be determined. The Police indicate, however, that no Staff Sergeants were named in any of the records identified from 14 Division. Similarly, two of the police constables referred to in the request were not properly identified by the appellant. The Police indicate that one person on the list was identified only by a first name and this name did not appear in any of the records. In addition, there was no officer employed by the Police that had the name given for one of the other individuals listed.

The Police note that the appellant did not identify which incident each officer had been involved in. Nevertheless, they undertook to determine when each officer had possible involvement with the appellant. After reviewing the memorandum books for these dates, the Police indicate that the non-exempt portions of one officer's notes have been disclosed to the appellant. The Police indicate further that the notebooks for three other officers for the relevant dates did not contain any entries pertaining to the incidents involving the appellant and the other named individual, and one officer advised that his only involvement in an incident was to enter the occurrence onto the database and that he had no notes concerning the matter.

The Police explain the possible reason notes may not have been made with respect to particular incidents. Referring to a regulation pertaining to "Memorandum Books", the Police note that only *significant* events need be recorded. Speaking to the manner in which memorandum books are used, the Police indicate that not all events are recorded, some officers' notations are only added to the occurrence report itself or, especially in the case of follow-up calls or paperwork, only a general notation is made, without elaboration.

The Police note that the dates being requested are relatively recent and no documents would have yet been destroyed.

On a final note, the Police indicate that efforts to contact the appellant were made on at least three occasions. Messages were left, but the calls were not returned by the appellant. It is apparent that the appellant's lack of diligence in pursuing this request has hampered the ability of the Police to respond in any other way. In the absence of representations or any other assistance from the appellant during the processing of this appeal, I am satisfied that the steps taken by the Police to respond to his request were reasonable. Accordingly, I dismiss this portion of the appeal.

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 if 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 where 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.)].

The Police submit that the records contain personal information about the appellant and another identifiable individual primarily, although they also contain identifying information of other individuals in a more peripheral context. Referring to Order M-84, the Police note that witness information, including their name and the information they provide, qualifies as their personal information. Further, the Police cite from my decision in Order MO-1224, where I state:

> It is apparent that the appellant and the other individuals in the records are all known to one another. Therefore, even if names were removed from the records, the appellant would be able to identify the other individuals by the other information contained in the records.

Findings

I find that the records all contain the personal information of the appellant and other identifiable individuals. The personal information of the appellant and the other identifiable individuals in the records includes their names along with other personal information about them (paragraph (h) of the definition of that term in section 2(1)). I find further that the appellant's personal information is so intertwined with that of the other individuals identified in the record that it is not severable, except as has already been done.

INVASION OF PRIVACY

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 exceptions to this general right of access.

Section 38(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

In this case, I have determined that the records contain the personal information of the appellant and other individuals.

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767], though it can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption. (See Order PO-1764)

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

In addition, if any of the exceptions to the section 14(1) exemption at paragraphs (a) through (e) applies, disclosure would not be an unjustified invasion of privacy under section 38(b).

In this case, the Police have decided to deny access to the records, on the basis that they are exempt under section 38(b), in conjunction with the presumption at section 14(3)(b).

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

The Police submit that the records were created and compiled as part of a police investigation into various criminal misconduct allegations. They submit further that the information contained in the records was taken by the Police in order to determine whether the incidents were of a civil

or criminal nature. They note that the information was collected from the individuals referred to in the records by the investigating officers as a result of a law enforcement activity. The Police also note that the appellant was subsequently charged with a criminal offence.

Findings

On their face, the records clearly reflect and describe the actions taken by the police officers involved in investigating various complaints for the purpose of determining whether a crime had been committed. They contain information provided by the appellant and the other individuals referred to in the records, as well as information about these individuals provided by one or more of the other individuals mentioned. As noted above, the appellant was initially charged with a criminal offence in relation to the matter. The fact that the charges were subsequently withdrawn at trial has no bearing on the issue, since section 14(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849). Accordingly, I find that the information at issue in the records was compiled and is identifiable as part of a law enforcement investigation pursuant to the presumption in section 14(3)(b) of the *Act*.

I note that the appellant has been provided with a considerable amount of information. In denying access to the remaining portions of the records, I find that the Police exercised their discretion under section 38 in a proper manner, taking into account all relevant factors and not taking into account any irrelevant factors.

Consequently, I conclude that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of the individuals other than the appellant who are identified in them. As result, I conclude that they are properly exempt under section 38(b) of the *Act*.

Because of this decision, it is not necessary for me to consider the possible application of sections 38(a) and 8(1)(a).

ORDER:

1. The search for responsive records was reasonable and this portion of the appeal is dismissed.

2. I uphold the Police's decision to withhold access to the records at issue.

Original signed by: July 25, 2007
Laurel Cropley
Adjudicator