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

INTERIM ORDER MO-2257-I

Appeal MA06-324

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:

> All records involving me and held by Toronto Police Services.
>
> Specifically, and limited to, any and all materials making mention of or reference to [different versions of requester's name]- described above via address and/or date of birth including in part and/or whole, but not limited to the following:
>
> > All notes, files, copies, memos, emails, faxes, case notes, memo books, records, documents, statements, evidence, photographs, video, audio, data and electronic information.
>
> Sources for the above materials include, but are not limited to the following [named] personnel, the following [named] departments, the following [named] databases, and the following associated references and, other individuals, offices, data resources – internal and/or external- that were contacted directly/ indirectly:
>
> [police officer #1 notes] from Oct 1/03- Present (on, or after, May 12/06)
>
> Including, but not limited to: memo books, emails, faxes, case notes, evidence, data and electronic information, etc… including any and all communication, of any type.
>
> Including but not limited to:
>
> - Residents at [address], TSCC [#] Directors, Group 4 [name] personnel, [name] Property Management personnel, [name] Property Management personnel, [name] maintenance/cleaning personnel, [name] personnel, [name] personnel, [name] personnel, Toronto Police personnel, OPP personnel, RCMP personnel, City of Toronto personnel, Government of Ontario personnel, Government of Canada personnel, [name], [name] office personnel, [name] personnel.
> - [Five named police officers' notes] regarding [the requester's] arrests on specified dates
> - [Two named police officers' notes] regarding a specific file [#] and specific dates
> - [Four named police officers' notes] regarding conversations prior to a specific date
> - [Seven police officers' notes] regarding three specific incidents
> - [Two police officers' notes regarding] a traffic stop
> - 22 Division
> - Professional Standards/Internal Affairs

- Major Fraud
- CPIC
- ECOPS
- MANIX
- CIPS
- Professional Standards database/computer information system

NOTE:

Include the following info:

- Logs of who accessed information about me – held in Toronto Police records (CPIC, ECOPS, MANIX, CIPS, Professional Standards database, etc…). Include name, badge number, date, time. From Jan 1/00- Present (on or after May 12/06)

- Disciplinary/Professional Standards record of [police officer #1]

The Police sought written clarification regarding portions of the request and advised the requester to contact directly the Ontario Provincial Police, the Royal Canadian Mounted Police or the City of Toronto, or the relevant Ministry of the Governments of Ontario or Canada to obtain copies of records within their custody or control.

The requester responded to the Police's request for clarification by resubmitting the original request. At the same time, the requester also sought the following additional information:

> Please provide to me the number of times [police officer #1] accessed information – as contained in Toronto Police Records (electronic and other) – about any individual who resided at [address] – from January 2000 through to and including August 9, 2006.
>
> I would like to stress that I am requesting non-identifying information in numeric form…

The Police located responsive records and advised the requester that partial access was granted to some of the responsive information, with severances made pursuant to sections 38(a) in conjunction with sections 8(1) (law enforcement), 9(1) (relations with other governments) and 13 (threat to health or safety) and section 38(b) in conjunction with section 14(1) (personal privacy) of the *Act*. In their decision letter, the Police advised the requester that:

- concerning the request for information relating to the residents at [address], the

Freedom of Information and Protection of Privacy Unit is not mandated to conduct investigations and cannot, therefore, know the identities of these residents. Moreover, even had the names of these persons been provided, the existence of records pertaining to other named individuals cannot be confirmed in accordance with section 14(1) of the *Act*.

- access cannot be provided to relevant memorandum book notes of [five named officers] for August 1, 2004, as such records do not exist.

- access cannot be provided to relevant memorandum book notes of [13 named officers] as such records do not exist.

- access cannot be provided to the memorandum books of [three named officers] because such records do not exist, and noted that memorandum books are currently retained for a period of eight years; however, the previous Metropolitan Toronto Police Record Retention Schedule (Municipality of Metropolitan Toronto By-Law No. 58-92) provided a retention period of seven years.

- the original copy of certain occurrences cannot be provided due to purging of records pursuant to the Toronto Police Service Record Retention Schedule (City of Toronto By-Law No. 689-2000); therefore, only a computer printout synopsis is available of such records.

- access cannot be provided to relevant notes of a named police officer for February 26, 2005, or notes of another named police officer (should such notes exist) as the memorandum book(s) cannot be located.

- in the absence of the specific information that the Police had previously requested from the requester, such as dates, subject(s), incident(s), to or from whom such correspondence has been directed, it is not possible for the Police to locate all notes, files, copies, memos, emails, faxes, case notes, memo books, records, documents, statements, evidence, photographs, video, audio, data and electronic information [including], but not limited to… and, other individuals, offices, data resources – internal and/or external – that were contacted directly/indirectly.

- only telephone calls to 911 are recorded by the Toronto Police Service – not calls to divisions or calls to or from police personnel to individuals and agencies.

- they are not obliged to create a record of the logs of those individuals who accessed information about the requester in the Police databases.

- any record that would form part of a Crown brief cannot be disclosed by the Toronto Police Service without the prior consent of the Attorney General of Ontario or a Court Order requiring production.

- the Disciplinary/Professional Standards record of police officer #1 as well as the file number in regards to an internal police investigation and the notes of named officers in regards to that investigation are excluded from the scope of the *Act* pursuant to sections 52(3)1, 2 and 3.

- portions of the police officer notes contained in the memorandum books were removed as non-responsive to the request.

On September 6, 2006, the Police issued a further decision in response to the request. The Police advised that partial access is granted to the memorandum book notes of one named police officer regarding a conversation with the appellant on a specific date. The Police noted that some information has been removed as it is not responsive to the request, and such non-responsive areas have been severed from the requester's copy.

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

During mediation, the appellant confirmed that he is:

- not appealing the Police's supplementary decision of September 6, 2006. Accordingly, records relating to that decision are no longer at issue in this appeal.

- not taking issue with the Police's statement that memorandum book notes of three named police officers do not exist for August 1, 2004.

- not pursuing the existence of records and/or the existence of additional records for 19 named police officers.

- not pursuing access to information held by other institutions in this appeal (such as the Ontario Provincial Police and records held by the Ministry of Consumer and Commercial Relations, etc.)

- not pursuing access to any Crown Disclosure Briefs or records relating to the Ministry of the Attorney General in this appeal.

- not pursuing access to the following pages of responsive records, and these have accordingly been removed from the scope of the appeal: 1-23, 42-50, 93-100, 130-135, 140-153, and 175-176.
.
- is pursuing access to the severed portions of the following pages of responsive records, which were denied in full or part: 24, 30-31, 33-34, 35, 38, 51-53, 55-57, 61-67, 69-70, 72-83, 85, 88-92, 101-129, 136-139, 154-166, and 168-174.

- is pursuing access to the portions of the record that were removed as non-responsive by the Police.

Furthermore, during mediation, the Police advised the mediator that the memorandum book(s) of police officer #8 for February 26, 2005 (the date of the appellant's arrest) have been lost and cannot be located. Accordingly, the existence of this police officer's memorandum book(s) for February 26, 2005, remains at issue in this appeal.

During mediation, the Police advised the mediator that there are no responsive records pertaining to police officer #1 and four other named police officers. The Police also advised that there are no additional records relating to police officer #2 (aside from pages 157-174). The appellant believes there should be responsive records pertaining to the five named police officers, as well as additional records pertaining to police officer #2, and accordingly, the existence of these additional records also remains at issue this appeal.

The appellant is pursuing access to records/logs of any officers who accessed information about him through any Toronto Police database from January 1, 2000, to the date of the request. He advised the mediator that he believes various officers accessed his personal information, and that there should be a way to track the log-in history of this. He believes the Police produce this type of information for internal audit review processes, so there should be a responsive record. The appellant is also pursuing access to the number of times and dates that police officer #1 accessed information from Toronto Police records databases in relation to a specified address. The Police advised the mediator that both of these requests would constitute an "off-line" search that would require them to create records. The Police indicated that they are not obligated to create records and this accordingly remains an issue in dispute.

As mediation was not successful in resolving the issues in this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Police, initially. I received representations from the Police. I sent a copy of the Police's representations, along with a Notice of Inquiry to the appellant. Portions of the Police's representations were withheld due to my concerns about their confidentiality.

I received representations in response to the Notice of Inquiry from the appellant. In his representations, the appellant withdrew his appeal concerning:

- the non-responsive information;
- the personal information that would identify third parties;
- the information that was severed by reason of section 38(a) in conjunction with section 9(1)(d);
- the police operational codes severed by reason of section 38(a) in conjunction with section 8(1)(l); and
- police officers' notes prior to October 22, 2004 and after December 8, 2005.

Therefore, I have removed from this appeal those records or portions of records containing:

- non-responsive information;
- police officers' notes outside of the date range of October 22, 2004 to December 8, 2005;
- any identifying information, including third party names, addresses, telephone numbers, employment history, sex, age and dates of births;
- the police operational codes; and
- the information severed by reason of section 38(a) in conjunction with section 9(1)(d).

RECORDS:

The records or portions of records and the claimed exemptions remaining as a result of the appellant's representations are described in the following chart:

Record #	Police page #	Description of Record	Page #s at issue	Exemptions claimed
1	37 - 40	Occurrence Report dated 2004-11-27	page 38	38(b) with 14(1); 38(a) with 8(1)(l)
2	51 – 57	Occurrence Report dated 2005-02-26	51- 53, 55	38(b) with 14(1); 38(a) with 13
3	58 - 91	Arrest of 2005-02-26 documents	62 – 67, 69 – 70, 72 – 80, 88 - 91	38(b) with 14(1); 38(a) with 13
4	104 - 106	Police officer #3 notes	106	38(b) with 14(1); 38(a) with 8(1)(l)
5	113 -115	Police officer #4 notes	114 - 115	38(b) with 14(1); 38(a) with 13
6	116 - 118	Police officer #5 notes	116 - 118	38(b) with 14(1); 38(a) with 13
7	119 – 122	Police officer #6 notes	121	38(b) with 14(1); 38(a) with 8(1)(l)
9	154 - 156	Police officer #7 notes	155	38(b) with 14(1)

10	157 - 174	Police officer #2 notes	158 – 161, 163, bottom of page 165, 166, 168, 170 – 171	38(b) with 14(1); 38(a) with 13
11		Records related to file [#] for police officer #1		52(3)1; 52(3)3;

DISCUSSION:

PERSONAL INFORMATION

I will first determine whether Records 1 to 10 contain "personal information" and if so, to whom it relates. The term "personal information" 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].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

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.)].

Representations

The Police submitted confidential and non-confidential representations on this issue. In their non-confidential representations they submit that the personal information in the records includes the names, telephone numbers, addresses and other personal details of identifiable individuals in their personal capacity.

The appellant submits that:

> In these present circumstances, many of the identifying characteristics in the records relate to address information that may be a privacy concern when disclosing to the world, however the requester has knowledge of the individuals within the building and therefore cursory recognizable 'personal information' would not amount to an invasion of privacy in this circumstance. However, redaction of what the police feel necessary is not contested. The information being sought is that pertaining directly to the [appellant].

Analysis/Findings

The records at issue contain the personal information of the appellant and other identifiable individuals. As indicated above, the appellant is not interested in receiving any identifying information, including third party names, addresses, telephone numbers, employment history,

sex, age and dates of births, and I have removed this information from the records at issue. I have reviewed the remaining information in each record to determine whether this information contains personal information of identifiable individuals. I find that once the identifying information is removed from Records 1 to 10, individuals may still be identified if the remaining information is disclosed. Accordingly, I find that there is personal information of the appellant and other identifiable individuals remaining in each of these records. As a result, the information that remains in these records still qualifies as personal information as the records contain the views or opinions of identifiable individuals other than the appellant or the views or opinions of the appellant (paragraphs (e) and (g) of the definition of "personal information" in section 2(1)).

PERSONAL PRIVACY

I will now determine whether the discretionary exemption at section 38(b) applies to the information at issue in Records 1 to 10.

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.

Under section 38(b), where a record contains 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.

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.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is it is not exempt from disclosure under section 38(b).

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The Police have raised the application of the presumption in section 14(3)(b). This section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Police submitted confidential and non-confidential representations on this issue. In their non-confidential representations they submit that:

> The information of other individuals exempted throughout this file has been exempted as it was collected by the police solely for the purpose of investigating complaints brought by, or against, the appellant. For example:
>
> > pages 51 to 91, comprise the investigation into and arrest of the appellant on 3 counts each of Mischief, interfere with property [Criminal Code] (C.C.) [section] 430(4), Criminal Harassment (threaten) C.C. [section] 261(1), (2)(d), and 1 count of Intimidation C.C. [section] 423(1) and contain the names, addresses and information of the victims of the complaint;

The appellant submits that:

> Any information that falls within [section] 14(3)(b) [of the *Act*] as an identifiable part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigations is not specifically requested.

Analysis/Findings

The Police have claimed that section 38(b) in conjunction with the presumption in section 14(3)(b) applies to all of the records at issue, except for Record 11 which they claim is excluded from the *Act* by reason of the application of section 52(3). Upon review of the records at issue, I agree with the Police that the records were compiled and are identifiable as part of an investigation into a possible violation of law, in particular various Criminal Code offences, including the offences referred to above by the Police in their representations.

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

In view of my finding that the presumption in section 14(3)(b) applies to the personal information in the records at issue, it is not necessary for me to consider the factors listed in section 14(2). Furthermore, as established by *John Doe*, cited above, the section 14(3) presumption can only be overcome if the personal information at issue is caught by section 14(4) or if a "compelling public interest", as contemplated by section 16, is established. The application of sections 14(4) or 16 has not been raised and, in my view, neither is available in the circumstances of this appeal.

As I have found that section 38(b) in conjunction with the presumption in section 14(3)(b) applies to Records 1 to 10, I will, now consider whether the absurd result principle also applies to any portion of these records.

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]

- the requester was present when the information was provided to the institution [Orders M-444, P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

The Police submit that:

> Withholding the personal information of other individuals contained in the records is in accordance with both the spirit and the letter of the *Act*. To release such information would constitute an absurd result and a direct abrogation of the privacy provisions of the *Act*.

The appellant submits that:

> The information requested would be necessarily part of the criminal disclosure package that would be provided to the [appellant] in light of the criminal proceedings brought against him.

Analysis/Findings

I find that the absurd result principle only applies to certain records. In particular, this principle applies to the undisclosed personal information in the police officers' notes at page 155 of Record 9 (page 155 of Record 9 is the only page at issue in that record) and the information at the bottom of page 165 and at page 166 of Record 10. This information is clearly within the appellant's knowledge. Either the appellant supplied this information or the appellant was present when this information was obtained. No other exemptions have been claimed for these portions of the records. Therefore, I find that it would be absurd to withhold this information in the circumstances, and I will order the Police to disclose to the appellant the undisclosed information at page 155 of Record 9, and the information at the bottom of page 165 and at page 166 of Record 10.

EXERCISE OF DISCRETION

I will now determine whether the Police exercised their discretion in a proper manner concerning Records 1 to 8, and Record 10 (except for the bottom of page 165 and page 166). I have found these records to be subject to the discretionary exemption in section 38(b) in conjunction with the presumption in section 14(3)(b).

Section 38(b) permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Police submit that:

> Information was gathered from a number of witnesses; the information from each person is unique in that it provides individual perspectives of the action that cumulatively give a comprehensive idea of what happened. The requester has knowledge of the identity and location of some of the witnesses but does not know who said what to the police. The Police must be able to maintain the confidence of the public that we will protect the personal information that we obtain from them in the form of statements, etc., which assist an investigation…

> The information collected from third parties within the records at issue was supplied to the investigating officer(s) as a result of law enforcement activity. Police investigations imply an element of trust - trust that the law enforcement agency will act responsibly in the manner in which it deals with recorded personal information. Historically, police forces have been extremely cautious in releasing any personal information outside of wanted persons' information or information necessary to assist in resolving a police investigation. The personal information contained in these records does indeed relate and apply to the appellant; however, it also serves to identify the other parties involved. The information was supplied by the third parties in confidence and not intended to be disclosed to other individuals: especially not to the individual who was the subject of the investigation.

The appellant submits that the specific circumstances of this case were not properly canvassed. He relies on the findings of former Assistant Commissioner Tom Mitchinson in Order MO-1498, who stated that:

> In order to properly exercise discretion, the Police must consider the individual circumstances of the appeal, including factors personal to the appellant, and must ensure that decisions regarding access conform to the policies, objects and provisions of the *Act*. The same factors are not relevant in every circumstance, but it is important to recognize that all factors that are relevant receive careful consideration.
>
> It is not possible to properly exercise discretion without taking into account the particular and specific circumstances of an individual appeal. The Police cannot adopt a fixed rule or policy and apply it in all situations. To do so would constitute a fettering of discretion and would represent non-compliance with the Police's statutory responsibility when dealing with appeals stemming from requests for personal information under Part II of the *Act*.

Analysis/Findings

I find that the Police exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors, in denying the appellant access to the records for which they have claimed the section 38(b) exemption. In particular, the appellant does not have a sympathetic or compelling need to receive the information, the information is sensitive as it was gathered from witnesses and victims during law enforcement investigations and disclosure will not increase public confidence in the operation of the Police. In the circumstances of this appeal, the privacy rights of the victims or witnesses who supplied this information are significant. Accordingly, I uphold the Police's exercise of discretion and find that the records are properly exempt under section 38(b).

As I have found that section 38(b) in conjunction with the presumption in section 14(3)(b) applies to Records 1 to 8, and Record 10 (except for the bottom of page 165 and page 166), there is no need for me to consider whether the discretionary exemption in section 38(a) in conjunction with sections 8(1)(l) or 13 also applies, where claimed, to these records. Disclosure of the information in Records 1 to 8, and Record 10 (except for the bottom of page 165 and page 166) would constitute an unjustified invasion of the personal privacy of the identifiable individuals other than the appellant in these records and these records are, therefore, exempt.

SEARCH FOR RESPONSIVE RECORDS

I will now determine whether the Police conducted a reasonable search for the memorandum book(s) for February 26, 2005 of police officer #8, responsive records pertaining to police officers #s 1, 9, 8, 10 and 11 and additional records relating to police officer #2 (aside from pages 157-174).

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 were asked to provide a written summary of all steps taken in response to the request. In particular, the Police were asked to respond to the following, preferably in affidavit form:

1. Did the Police contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the Police did not contact the requester to clarify the request, did the Police:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did

> the Police inform the requester of this decision? Did the Police explain to the requester why the Police was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The Police submit that:

> …[it did] contact the appellant for additional clarification and although additional correspondence and communication resulted from that contact, clarification did not.
>
> The Freedom of Information Unit of the Toronto Police Service has a contact person in each division, unit and bureau of the Service. When a request for memorandum book notes or other divisionally held material is received, a request for the relevant records is sent to the contact person of that division. The contact person then undertakes a search for the requested record(s). Photocopies of the records are then forwarded to the Freedom of Information unit for dissemination pursuant to the strictures of the *Act*.
>
> In this instance, searching for records was rendered extremely difficult due to the broad time frame given by the appellant. Due to the sheer volume of memorandum books dictated by this request, it was not possible for the divisional contact people to search the records for relevant material. Therefore, the original memorandum books which were able to be located, for all the incidents which could be located and all the officers named by the appellant for all the years encompassed by the request, were delivered to the Freedom of Information Unit…
>
> Insofar as was possible, given the lack of specificity of the request, any and all material which could be related to the requester was then located, copied and included in the records considered for release.
>
> In some instances, the appellant's belief that a record must exist is based on an illogical presumption. For example, the appellant's contention that one officer should have a record of him in his memo book was based on the premise that

> since that individual had been the officer in charge of the division on a particular date he must have made note of him (although he had not had any contact with that officer). This is roughly the equivalent of believing that the manager of a bank must have made a record of every customer every day.
>
> It should be noted that [Procedure No. 13-17] does not require an officer to record every moment or every contact with every individual every day. To require more than the recording of facts of arrests, investigations and significant events would impose not only an impracticable obligation on officers, but result in peace officers making notes continually rather than enforcing laws.
>
> As the appellant would not be any more specific about the date(s) on which he had contact with the officers in his list or why, it is not possible to provide definitive affidavits (i.e. an officer could have written the appellant a parking ticket. Although officers do not routinely record parking tickets in their memorandum books, it is possible such contact could have been noted.).
>
> It would impede the operations of the institution for every officer on the appellant's list to re-read 2-3 years worth of memorandum books and research every ticket they wrote, every individual with whom they may have spoken in any incident investigated, simply in order to be able to state (albeit - as noted previously - not definitively, since officers need not record every event every day) that they did or did not have contact with the appellant…
>
> In this instance, not merely a reasonable effort, but an extensive effort has been expended in locating and attempting to locate the records sought by the requester.

The appellant submits that:

> The Police did contact [the appellant] requesting clarification. However, the Police later claim, via their representations, that the requested clarification was never provided. However, if the Police did not have clarity they took no further action to remedy the situation since they did not follow up with [the appellant] and seek further clarification.
>
> This may perhaps have led to the limited production of records that were disclosed. Subsequent to the provision of clarification…, no further attempts were made and [the appellant] was left in a position whereby he believed he had adequately satisfied the institution as to the scope of the records at issue.
>
> In light of the mediator's report and the police representations, this was obviously not completed satisfactorily. In regards to the [police officer #8] notes for the day of my arrest, it is inconceivable that the particular notes for that day would be lost… To simply state that specific notebooks, for a specific date are 'lost' is not in keeping with this duty imposed upon the institution.

Analysis/Findings

The appellant claims that there should exist memorandum book(s) for February 26, 2005 of police officer #8, responsive records pertaining to police officers #s 1, 8, 9, 10 and 11 and additional records relating to police officer #2. The Police claim that they did not have sufficient detail in the appellant's request to locate these records.

I note that the appellant did specifically ask for police officer #8's notes from his February 26, 2005 arrest. I have reviewed the records concerning the appellant's February 26, 2005 arrest. Police officer # 8 is listed as an arresting officer, along with police officers #s 2, 7 and 12. The Police have produced the memorandum books (police officer notes) for the date of this arrest for police officer #s 2, 7 and 12. The Police have not provided specific detail in their representations as to what efforts were made to locate the memorandum books that would contain police officer #8's notes from the date of the appellant's arrest on February 26, 2005. As a result, I will be ordering the Police to conduct a further search for police officer #8's memorandum book that would contain his notes of the appellant's February 26, 2005 arrest. However, the appellant has not provided a reasonable basis to allow me to conclude that any other additional records concerning police officer #8 exists.

Record 11 contains the documents relating to a Professional Standards Bureau (PSB) investigation that was conducted by police officers #10 and 11 concerning the appellant's complaint about police officer #1. The Police have claimed that these records are excluded from the application of the *Act* by reason of section 52(3). I will deal with these records later on in my order. The appellant has not provided a reasonable basis to allow me to conclude that additional records, outside of the PSB investigation, concerning police officers #1, 10 and 11 exist.

The appellant sought in his request the notes of police officer #9 concerning his February 26, 2005 arrest. The appellant has not provided a reasonable basis for me to conclude that this officer was personally involved in the appellant's arrest. Therefore, I will not be ordering the Police to conduct another search for this officer's notes.

The Police located the notes of police officer #2 from the date of the appellant's arrest and for February 23, 24, 27 and 28, April 1 and 29, 2005. The appellant has not provided a reasonable basis to allow me to conclude that additional records concerning police officer #2 exists. Therefore, I will not be ordering the Police to conduct another search for this officer's notes.

In conclusion, based on the submissions of the Police and the appellant's failure to provide a reasonable basis to conclude that additional records should exist, I find that the Police have conducted a reasonable search for responsive records, except for police officer #8's memorandum book that would contain his notes of the appellant's February 26, 2005 arrest. I will order the Police to conduct a further search for this record.

Does the request require the Police to create a record?

The appellant is pursuing access to records/logs of any officers who accessed information about him through any Toronto Police database (including CPIC, ECOPS, MANIX, CIPS, Professional Standards Database, etc.) from January 1, 2000 to the date of the request. The appellant advised the mediator that he believes various officers accessed his personal information, and that there should be a way to track the log-in history of this.

The appellant is also pursuing access to the number of times and dates that police officer #1 accessed information from the Police databases in relation to a specified address. He believes the Police produce this type of information for internal audit review processes, so there should be responsive records. The Police take the position that, as these records do not exist, responding to these requests would require the creation of records. The Police indicated that they are not obligated to create such records.

In particular, the Police submit that:

> …the parameters of the request are so broad as to make creating such a record a practical impossibility.

The appellant submits that:

> …for the Police to discharge their duty under [section] 17 it is essential that a reasonable search and not just an explanation as to the difficulties of obtaining the material be undertaken. No evidence is provided to that effect.

Section 2 of the *Act* defines a record as:

> …any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

Section 1 of Regulation 823 under the *Act* states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

The Divisional Court, in the recently released case of *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2442 (Div. Ct.) (application for leave to appeal filed), ruled on a similar issue concerning a request to the Toronto Police Services Board for certain electronic data. The databases at issue in that case were two of the same databases at issue in this appeal, namely, the Criminal Information Processing System (CIPS) and in the Master Name Index (MANIX).

In granting the judicial review application, Mr. Justice Carnwath for the Court, concluded that that the words "normally used by the institution" in section 2(b) qualify both "by means of computer hardware and software" and "any other information storage equipment and technical expertise".

He further held that an analysis of section 2(b) requires:

> 1. a finding there is a "record" capable of being produced from a machine-readable record;
>
> 2. a finding that such a "record" is under the control of the institution; and,
>
> 3. a finding that the "record" can be produced "by means of computer hardware and software or any other information storage equipment and technical expertise **normally used by the institution**". [Emphasis added by the Court.]
>
> If requirement three is not satisfied, that is the end of the matter. If it is satisfied, there remains the requirement established by s. 1 of O. Reg. 823 that the "producing" must not unreasonably interfere with the operation of the institution.

In this case, I asked the Police in the Notice of Inquiry to identify whether the records responsive to the appellant's database questions are "capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution". In that regard, I specifically asked the Police to address the following questions, which are essential in deciding this issue:

- Is the information requested by the appellant contained in a machine readable record? If so, how is it so stored? If not, what parts of it are not so stored?

- Is there information contained in the machine readable record which contains unique information for each individual entered in the database? If so, what is this information? How does the computer hardware or software distinguish the unique information for each individual?

- If there is information contained in the machine readable record which contains unique information for each individual entered in the database, is it possible to replace this unique information with a unique number? If so, how? If not, why not?

- If it is possible to replace this unique information with a unique number, could the record be considered to have been "produced" from the machine readable record?

- If the record could be considered to have been "produced" from the machine readable record, would the means required to produce the record be means "normally used by the Police"?

- If the record could be considered to have been "produced" from the machine readable record, would the process of producing it unreasonably interfere with the operations of the Police? If so, how?

The Police did not respond to these questions. As a consequence, I do not have sufficient information to decide the issue pertaining to the appellant's request for records/logs of any officers who accessed information about him through any Toronto Police database and his request for the number of times and dates that police officer #1 accessed information from the Police databases in relation to a specified address. I will therefore order the Police to respond to these questions, following which I will issue a further order on this aspect of the appeal.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

I will now determine whether section 52(3) excludes all of the records from the *Act* that relate to the appellant's request for the disciplinary/professional standards records concerning police officer #1 and the notes of police officers #10 and 11 in regards to that investigation. These records are all contained in the Police's Professional Standards Bureau (PSB) internal investigation file [#] (Record 11). Record 11 was created in response to the appellant's complaint against police officer #1.

In their representations, the Police rely on sections 52(3)1 and 3, which state:

> Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 52(3)1: court or tribunal proceedings

For section 52(3)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

The Police submit that:

> [The] basis of the appellant's complaint is that [police officer #1] unlawfully conducted database checks of the appellant. The Professional Standards Unit commenced investigation of that complaint of misconduct.
>
> It is incumbent upon the [Police's] management to ensure that all members adhere to the rules, regulations, and procedures of the Toronto Police Service. The allegation was thorough[ly] investigated and determined to be unsubstantiated. Nevertheless, almost a year after that determination, the appellant has succeeded in having OCCPS [the Ontario Civilian Commission on Police Services] review both the investigation and its determination.
>
> When OCCPS has completed its review, it may concur with the findings of the Police or it may send the matter back to the Police to investigate further. Should the latter course eventuate, the reinvestigation by the [Police] may again find the allegations unsubstantiated or may charge the officer with a breach of the Rules, Policies or Procedures. If the officer should be so charged, the matter would then come before the Toronto Police Trials Office for a disciplinary hearing.
>
> It therefore follows that the requested records, concerning the lodging of this complaint and its investigation are clearly related to [police officer #1's] employment by the [Police]. As such, these records no longer fall within the auspices of the *Act*.

The appellant submits that:

> The information that was collected arose solely out of a complaint made by the [appellant] pertaining to [police officer #1]. As such, this material is specifically pertaining to the resolution of a complaint brought against this particular officer... The section itself is created to address specifically 'labour relations' referring to collective bargaining or analogous relationships…, as well as employment matters arising between an institution and its employees referring to human resource or staff relations issues... A publicly filed complaint alleging wrongdoing is of a distinctly different nature…
>
> The anticipated court, tribunal or other proceedings would also have to be of this nature. This review was brought about by a publicly filed complaint, and therefore cannot be said to have been prepared, maintained, or used in relation to proceedings or anticipated proceedings before a court, tribunal or other entity in this context.

Analysis/Findings

Requirement 1 - Were the records collected, prepared, maintained or used?

I find that the records at issue were collected, prepared, maintained and used by the Police in relation to the complaint the appellant has filed pursuant to section 56(l) of the *PSA* (*Police Services Act*). In particular, these records were collected, prepared, maintained and used by the Police's Professional Standards Bureau for purposes in relation to the investigation of the appellant's *PSA* complaint and subsequent OCCPS review.

Therefore, I find that Requirement 1 has been satisfied as the records were collected, prepared, maintained and used by the Police in relation to the appellant's *PSA* complaint.

Requirement 2 - Was the collection, preparation, maintenance or usage of the records in relation to proceedings or anticipated proceedings?

The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223, PO-2105-F].

For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223, PO-2105-F].

The word "court" means a judicial body presided over by a judge [Order M-815].

A "tribunal" is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or obligations [Order M-815].

"Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity", the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue [Order M-815].

In Order P-1223 former Assistant Commissioner Mitchinson stated the following in regard to the meaning of "proceedings" for the purposes of section 65(6)1, the equivalent section to 52(3)1 in the *Freedom of Information and Protection of Privacy Act*:

> ...I am of the view that a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, binding agreement or mutual consent, the power to decide the matters at issue would constitute "proceedings" for the purposes of section 65(6)1.

In Order PO-1797 former Assistant Commissioner Mitchinson stated:

> …proceedings stemming from complaints made under the *PSA* are properly considered proceedings for the purposes of section 65(6)1 (Order M-835).

The appellant made a complaint to the Police pursuant to section 56(l) of the *PSA* in regard to the conduct of police officer #1. Section 56(l) of the *PSA* reads:

> Any member of the public may make a complaint under this Part about the policies of or services provided by a police force or about the conduct of a police officer.

The appellant's complaint was investigated by the PSB. Following the investigation of this complaint, the PSB advised the appellant that his *PSA* complaint was unsubstantiated.

The authority for this determination by the PSB derives from section 64(6) of the *PSA*, which reads:

> If, at the conclusion of the investigation and on review of the written report submitted to him or her, the chief of police is of the opinion that the complaint is unsubstantiated, the chief of police shall take no action in response to the complaint and shall notify the complainant and the police officer who is the subject of the complaint, in writing, together with a copy of the written report, of the decision and of the complainant's right to ask the Commission (OCCPS) to review the decision within 30 days of receiving the notice. 1997, c. 8, s. 35.

The appellant subsequently asked OCCPS to review the decision of the PSB. Section 72(8) of the *PSA* provides that:

> Upon completion of the review, the Commission may confirm the decision or may direct the chief of police, detachment commander or board to process the complaint as it specifies…

The Ontario Civilian Commission on Police Services (OCCPS) is an independent, civilian, quasi-judicial agency that reports to the Minister of Community Safety and Correctional Services. OCCPS is responsible for ensuring the adequacy and effectiveness of policing services. The mandate of OCCPS also includes overseeing Ontario's system for the handling of public complaints about police policies, services or officer conduct. Chiefs of Police, members of Police Services and Police Services Boards are ultimately accountable to the public through OCCPS [Order PO-2512].

Based on my review of the records, the *PSA* and the submissions of the Police and the appellant, I find that the records were collected, prepared, maintained and used by the PSB in relation to the investigation of the appellant's *PSA* complaint and subsequent OCCPS review. Therefore, I find that Requirement 2 has been satisfied as the records were collected, prepared, maintained and

used in relation to proceedings or anticipated proceedings before two entities, the PSB and the OCCPS.

Requirement 3 - Did the proceedings or anticipated proceedings relate to labour relations or to the employment of police officer #1?

Requirement 3 stipulates that the relevant proceedings, i.e., those referred to in Requirement 2, must relate to labour relations or to the employment of a person by the institution.

The Police take the position that the records at issue were prepared, collected, maintained and used by Police in relation to anticipated disciplinary proceedings relating to the employment of police officer #1 under Part V of the *PSA*.

I find that "disciplinary hearings under Part V of the *PSA* relate to the employment of a person by the institution" for the purposes of section 52(3)1. I adopt the findings of former Assistant Commissioner Tom Mitchinson in Order M-835 where he found that the penalties which follow the discipline of police officers pursuant to the *PSA* "can only reasonably be characterized as employment-related actions".

I find that the investigation of the appellant's complaint could lead to disciplinary proceedings against police officer #1 whose records are at issue in this appeal. These proceedings relate to the employment of this officer by the Police. This officer could be subjected to the employment-related penalties enunciated in section 68(1) of the *PSA*, at either the PSB or OCCPS stage of the proceedings.

Therefore, I find that Requirement 3 has been satisfied as the preparation, collection, maintenance and use of the records by the Police was in relation to proceedings or anticipated proceedings concerning the employment of police officer #1.

In conclusion, I find that section 52(3)1 applies as the Police have established that:

1. the records in issue were collected, prepared, maintained and used by the Police;

2. this collection, preparation, maintenance and usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity;

3. these proceedings or anticipated proceedings relate to the employment of police officer #1, whose records are at issue, by the Police.

As section 52(3)1 applied at the time the records were prepared, collected, maintained and used, it did not cease to apply at a later date. "Once effectively excluded from the operation of the *Act*, the records remain excluded" [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507]. Therefore, the section 52(3)1 exclusionary provision still applies even though there

may not be further disciplinary proceedings against police officer #1 whose PSB records are at issue in this appeal.

Accordingly, I find that all three parts of the test under section 52(3)1 of the *Act* have been met and, subject to my findings concerning section 52(4), the records contained in the PSB file of police officer #1 are excluded from the operation of the *Act* under that section. Therefore, there is no need for me to determine whether these records are also excluded under section 52(3)3.

Section 52(4): exceptions to section 52(3)

If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

I find that the records, which are various notes, emails, correspondence and memos concerning the investigation of the appellant's complaint do not fall within any of the exceptions listed in section 52(4). Therefore, section 52(3)1 applies to these records to exclude them from the *Act*.

ORDER:

1. I order the Police to disclose to the appellant the information at page 155 of Record 9, and the information at the bottom of page 165 and at page 166 of Record 10 by **January 23, 2008**.

2. I order the Police to conduct a new search for police officer #8's memorandum book(s) that would contain this officer's notes of the appellant's February 26, 2005 arrest and to

provide the appellant with a decision letter in accordance with the provisions of sections 19, 21 and 22 of the *Act*, treating the date of this order as the date of the request, without recourse to a time extension under section 20 of the *Act*. I further order the Police to provide me with a copy of this decision letter to the appellant.

3. I order the Police to answer the following questions concerning the appellant's request for records/logs of any officers who accessed information about him through any Toronto Police database and his request for the number of times and dates that police officer #1 accessed information from the Police databases in relation to a specified address and to provide me with their answers by **January 14, 2008**:

- Is the information requested by the appellant contained in a machine readable record? If so, how is it so stored? If not, what parts of it are not so stored?

- Is there information contained in the machine readable record which contains unique information for each individual entered in the database? If so, what is this information? How does the computer hardware or software distinguish the unique information for each individual?

- If there is information contained in the machine readable record which contains unique information for each individual entered in the database, is it possible to replace this unique information with a unique number? If so, how? If not, why not?

- If it is possible to replace this unique information with a unique number, could the record be considered to have been "produced" from the machine readable record?

- If the record could be considered to have been "produced" from the machine readable record, would the means required to produce the record be means "normally used by the Police"?

- If the record could be considered to have been "produced" from the machine readable record, would the process of producing it unreasonably interfere with the operations of the Police? If so, how?

I remain seized of this remaining issue in this appeal.

4. I uphold the remainder of the Police's decision.

5. In order to verify compliance with provision 1 of this Order, I reserve the right to require the Police to provide me with a copy of the records disclosed to the appellant.

Original signed by: December 21, 2007
Diane Smith
Adjudicator