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

ORDER MO-2285

Appeal MA07-297

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a form entitled, "Access/Correction Request." The word "access" was circled. The request form refers to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). On the form, the requester set out the following questions pertaining to a specific murder investigation:

1. Who collected DNA samples from suspects – specifically during the task force 1995 – 1998. Was it Police Officer(s) Lab(s) or both?
2. Where were the samples tested? More than 1 lab?
3. What kit(s) were used to produce DNA profile on suspects? Apparently in excess of 300 – more than 1 type of kit?
4. Who made the decision on what kit(s) to use?
5. What was the time line for testing? From when to when?
6. Who currently checks DNA profile from crime scene generated in 1995? Against profiles on file from other crime scenes or profiles in DNA data bank?

In a letter dated July 9, 2007, the Police acknowledged receipt of "the access request" and indicated that the Police analyst would only contact the requester "if she needs clarification of your file." There is no indication that any clarification of the request form was sought by the Police at any stage in their handling of this matter.

The Police then issued a decision letter under the *Act*, dated July 30, 2007. In that letter, the Police denied access to the requested information pursuant to the exemptions found in sections 8(1)(a), 8(1)(b), and 8(1)(c) of the *Act* (law enforcement). The requester (now the appellant) appealed the Police's decision to this office.

This office then requested documentation from the Police, including the records at issue. On September 12, 2007, the Police responded, advising that they would not be providing a copy of the records as they are voluminous and off-site. The Police also indicated that the search fees for locating responsive records could be substantial.

The appeal was then assigned to a mediator. During mediation, the mediator attempted to identify the nature of the records and obtain a copy of the records responsive to this appeal. These efforts were not successful.

Before the conclusion of mediation, on October 29, 2007, the Police issued a revised decision letter indicating that they need not reply to requests made under the *Act* when they are framed in the form of a question. The Police stated that "… it is not incumbent upon an institution to respond to questions." The Police advised the mediator that this decision replaces their earlier decision to refuse access pursuant to sections 8(1)(a), (b) and (c). As a result, the form of the request became the issue to be decided.

The appeal was then transferred to the adjudication stage, during which an adjudicator conducts an inquiry under the *Act*. In this case, I commenced the inquiry by sending a Notice of Inquiry to the Police, inviting them to provide representations. In particular, I specifically invited the Police to address two prior orders of this office (Orders M-493 and M-530) and to comment on

them in the context of the present appeal. Because I have decided this appeal in the appellant's favour, it was not necessary for me to invite responding representations from her.

The sole issue in this appeal is whether the appellant's request, in the form of questions, constitutes a proper request under the *Act*.

DISCUSSION:

FORM OF THE REQUEST

Several sections of the *Act* deal with the formalities of making an access request.

In this case, the right of access arises under section 4 of the *Act*, which states:

> (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 17 of the *Act* states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request for access in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; …
>
> (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).

In their representations, the Police acknowledge that a request in the form of questions may be acceptable in certain circumstances, particularly when an individual is seeking access to his or her personal information or if the information could attract the application of the public interest override found at section 16 of the *Act*.

Several previous orders have dealt with requests in the form of questions.

In Order 17, former Commissioner Sidney B. Linden commented on this issue as follows:

> At page 241 (Volume 2) of the [*Williams Commission Report*], the author addresses the question of to which kinds of information or documents access should be given:
>
> > "A common feature of the freedom of information schemes in place in other jurisdictions is that the type of "information" to which access is given is material which is already recorded in the custody or control of the government institution. **Thus, a right to "information" does not embrace the right to require the government institution to provide an answer to a specific question; rather, it is generally interpreted as requiring that access be given to an existing document on which information has been recorded.** This is not to say, of course, that the government should feel no obligation to answer questions from the public. Indeed, as we have indicated in an earlier chapter [13], the government of Ontario has committed substantial resources to establishing citizen's inquiry services with this specific objective in view. It would be quite unworkable, however, to grant a legally binding right of access to anything other than information contained in existing documents or records.
> >
> > For obvious reasons, most freedom of information schemes broadly construe the concept of "document" or "record" to include the various physical forms in which information may be recorded and stored. Thus, the right of access normally extends to all printed materials, maps, photographs, and information recorded on film or in computerized information systems."
>
> My conclusion is, therefore, that an individual's right of access to information under the Act relates to information already recorded, whatever its physical form. In the absence of existing recorded information, the Act does not require the creation of a new record.

I agree with the former Commissioner that the *Act* does not require institutions to create records in order to respond to requests in the form of questions. In my view, however, neither the extract from the *Williams Commission Report* nor the other comments of the former Commissioner suggest that a request may not be submitted in the form of questions. The issue in Order 17 was whether the creation of a new record (in the form of a transcript) was required.

In Order M-493, the appellant had requested information about probationary secondary school teachers. The Hamilton Board of Education had argued that the request was not a proper one because it was in the form of a question. I stated:

> … even if I agreed with the Board that the request is, for the most part, in the form of questions, I would not agree that, on this basis, the request is not a proper one under the Act. The Board has not provided any authority to substantiate this argument. Moreover, it would be contrary to the spirit of the Act to exclude a request on such a technical basis.
>
> In my view, when such a request is received, the Board is obliged to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked. Under section 17 of the Act, if the request is not sufficiently particular "... to enable an experienced employee of the institution, upon a reasonable effort, to identify the record", then the Board may have recourse to the clarification provisions of section 17(2).

In their representations, the Police attempt to distinguish Order M-493 by pointing to the possible public interest in its subject matter. This is not a relevant basis for distinguishing that appeal from the one before me. The form of a request is a fundamental issue, and in my view, is not impacted by the nature of the requested information. Where a request is framed as a question or series of questions, the institution must determine whether its record holdings contain information that would answer the question(s) asked.

In Order M-530, Adjudicator Laurel Cropley dealt with a request for the appellant's own personal information. She stated:

> The issue of the Form of the Request was addressed by Inquiry Officer John Higgins in Order M-493. With respect to a request in the form of questions, he stated:
>
> > In my view, when such a request is received, the Board is obligated to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked. Under section 17 of the Act, if the request is not sufficiently particular "... to enable an experienced employee of the institution, upon a reasonable effort, to identify the record", then the Board may have recourse to the clarification provisions of section 17(2).
>
> I agree with Inquiry Officer Higgins. I would add to this that once the Police have clarified the request with the requester, they are then obligated to search their record holdings to determine whether they contain information which would respond to the request.

In their representations, the Police seek to distinguish Order M-530 on the basis that it was a request for the appellant's own personal information. In that regard, they also refer to Order P-652, in which Adjudicator Donald Hale also dealt with a request for the appellant's own personal information. In his decision, Adjudicator Hale quotes the passage I have reproduced, above, from Order 17, and goes on to state:

> However, when a request for personal information is received by an institution under the *Act* in the form of a series of questions, it is incumbent upon the institution to seek clarification of the request under sections 24(2) and 48(2) of the *Act*… I find that the Ministry has taken all reasonable steps to clarify the nature of the appellant's request and to provide him with access to all records which are responsive to the request as originally and subsequently framed. [Order P-652]

The Police argue that, in this case, the appellant is not seeking access to her own personal information, and therefore Order M-530 is not determinative. Although both Orders M-530 and P-652 deal with access to the appellant's personal information, this fact does not logically lead to the conclusion that other types of requests may not be in the form of questions. As noted above, the form of a request is a fundamental issue and is not impacted by the nature of the requested information.

In short, institutions that receive a request for access that is in the form of a question or series of questions must determine what records they have that may be responsive to the questions and provide an access decision based on those records. This duty is the same regardless of the nature of the information sought.

If there are concerns about the clarity of the request, or whether it complies with section 17(1) (quoted above), section 17(2) compels the Police to contact the requester to clarify the request. This was not done in this case. If the Police found the request unclear, they should have contacted the appellant to clarify it. In that regard, I note that the Police have not indicated that the information provided by the appellant is insufficient to enable an experienced employee to conduct a search and, upon a reasonable effort, to identify a record, which is the standard set out in section 17(1)(b). In fact, the Police had initially provided an access decision which they later rescinded.

In the absence of evidence to the contrary, I am satisfied that the appellant's request for information, in the form requested, is a request for "recorded" information in the custody and/or under the control of the Police and, as such, constitutes a proper request under the *Act*.

ORDER:

1. I order the Police to issue an access decision in response to the appellant's request, treating the date of this order as the date of the request, in accordance with sections 19, 21 and 22 of the *Act*.

2. I further order the Police to send me a copy of the access decision issued to the appellant pursuant to Provision 1 of this order when the decision is issued to the appellant.

Original signed by: March 12, 2008
John Higgins
Senior Adjudicator