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

ORDER MO-2370

Appeal MA07-324

Toronto Police Services Board

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NATURE OF THE APPEAL:

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

> a copy of the Occurrence Report (specified report number) in accordance to the report I provided to [two named officers] while [one named officer] was taking down the facts.

And in a supplementary letter, the requester asked for:

> the pictures taken of my injuries (by the material officer during my visit at the [specified Police] Division for providing my report) in the event that they are not included as part of the Occurrence Report (specified report number).

The Police located the responsive records and issued a decision letter providing the requester access to one record, with two severances made under section 8(1)(l) (law enforcement), and one severance made under section 38(b) (personal privacy) in conjunction with section 14(1). The photographs were disclosed in full.

On receipt of the records, the requester submitted a request to the Police for correction of these records under section 36(2)(a) of the *Act*. The Police denied the request but indicated that his letter requesting correction, which outlined the points which the requester believed were incorrect, would be attached to the record.

The requester, now the appellant, appealed the decision.

During mediation, the appellant confirmed that he believed that his request included the notebooks of the two named officers who took down his statement at the station. The Police indicated that they did not agree, and suggested that the appellant would need to submit a new request for the police officers' notebooks. Accordingly, the scope of the request is an issue in this appeal.

The appellant confirmed that he is appealing the denial of his request for correction to the records, the exemptions applied to the records as well as the scope of his request.

No other mediation was possible and the file was moved to adjudication.

I initially sent a Notice of Inquiry to the Police setting out the facts and issues at appeal. The Police provided representations in response.

I then sent a Notice of Inquiry to the appellant along with a copy of the Police's representations. Portions of the Police's representations were withheld due to my concern about their confidentiality. The appellant provided representations in response.

RECORDS:

The record remaining at issue is the undisclosed portions of an Occurrence Report.

DISCUSSION:

SCOPE OF THE REQUEST

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

> (1) A person seeking access to a record shall,
>
> (a) make a request 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; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Representations

The Police submit that the appellant was unambiguous in his written submission to obtain a copy of the Occurrence Report and the related photographs of his injuries. The Police submit that these records were provided to the appellant with the exception of the withheld portions of the Occurrence Report.

The appellant submits that the Police failed to explain to him the difference between an Occurrence Report and officers' notebooks. The appellant argues that "occurrence report" is a technical term used by the Police which should have been explained to him as he was under the belief that when the officers were making notes in their notebooks they were making a report of the occurrence. The appellant argues that the Police's lack of explanation in this regard contributed to the necessity of him being requested to make a new request for the officers' notebook entries. Accordingly, the appellant submits that the Police narrowed the scope of his request.

Analysis and Findings

As stated above, the appellant's request regarding the Occurrence Report is as follows:

> I..request a copy of the Occurrence Report (My Report No. [specified report number]) in accordance to the Report I provided to [first named police officer and badge number] and [second named police officer and badge number] while [first named police officer] was taking down the facts.

I note that the above request was also followed by another request on the same day, and is described as a supplementary letter. In this supplementary letter, the appellant describes his request for the occurrence report as "letter regarding request for Occurrence Report" and he adds the request for the pictures taken of his injuries.

While I am sympathetic to the appellant's argument that he did not fully appreciate that his request for an "occurrence report" would be interpreted by the Police as "the occurrence report", I am unable to find that the Police unnecessarily narrowed the scope of the appellant's request. The appellant was extremely detailed in his request and provided the specific number of the occurrence report. The appellant did not use ambiguous or unspecific language in his request, nor did he request all records relating to him. I note that in the appellant's supplementary letter to his request, he describes his request as a request for the occurrence report. I am unable to find that the Police acted improperly by considering the scope of his request to include the specified occurrence report and the photographs of the appellant's injuries. Accordingly, I find that the appellant's request for the officer's notebook entries was not within the scope of his request. If the appellant is still interested in pursuing access to this information, he should make a new request to the Police for this information.

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 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].

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 record contains the personal information of the appellant and another individual. The appellant did not make representations on this issue.

From my review of the record, I agree that the record contains recorded information about the appellant and another identifiable individual in their personal capacity and as such contains personal information relating to the appellant and another individual.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

LAW ENFORCEMENT

In this case, the Police rely on section 8(1)(l) to withhold the two police operational code ("ten" codes) references in the record. Section 8(1)(l) of the *Act* reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

In the case of section 8(1)(l), where the words "could reasonably be expected to" are used, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Representations

The Police submit the following in support of their claim that section 8(1)(l) applies to the "ten" code information in the record:

> The use of ten-codes by law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning. In

> fact, the word "code" implies the intention that the information not be widely disclosed.
>
> Should the public at large know the ten-codes and their meanings, including those who have a criminal intent, their effectiveness would be compromised.
>
> …
>
> Should those engaged in criminal activity become aware of the meaning of certain ten-codes, this information could be used to determine the availability of police to respond to calls. Combining this information with the criminal intent of those individuals, they could cause a number of events to occur resulting in police attendance. By monitoring police radio transmissions, they could determine at what point the police no longer had any available officers, and thus commit the criminal activity from which they seek to evade detection, thus hampering the control of crime.
>
> The ten-codes referred to in the records do not, in isolation, provide a specific meaning, however, when read in the context of the records at issue, the corresponding meaning would easily be revealed. Thus, the security of those codes would be compromised if they were released and personal information regarding other persons in the report could be revealed.

The appellant's representations on this issue were not helpful.

Analysis and Findings

A number of decisions of this office have consistently found that police codes qualify for exemption under section 8(1)(l) of the *Act* (see for example Orders M-393, M-757 and PO-1665). These codes have been found to be exempt because of the existence of a reasonable expectation of harm to individuals (including police officers) and a risk of harm to the ability of the police to carry out effective policing in the event that this information is disclosed. I adopt the approach taken by the previous orders of this office. I find that the Police have provided me with sufficient evidence to establish a reasonable expectation of harm with respect to the release of this information. As a result, I find that section 8(1)(l) applies to the information withheld by the Police.

Accordingly, subject to my discussion on the exercise of discretion below, I find that the section 38(a) exemption applies to this information.

PERSONAL PRIVACY

As stated above, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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 not exempt under section 38(b). In this case, the only paragraph that applies is section 14(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

If section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this case, none of the exceptions in 14(4) apply.

If the presumptions contained in paragraphs (a) to (h) of section 14(3) apply, the disclosure of the information is presumed to constitute an unjustified invasion of privacy, unless the information falls within the ambit of the exceptions in section 14(4), or if the "public interest override" in section 16 applies [*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. As stated above, section 14(4) does not apply and the appellant has not raised the application of section 16.

In this case the Police have raised the application of section 14(3)(b). This section states:

> 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;

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].

Representations

The Police state that the appellant attended their office to report an incident of assault in which he was the victim, and as a result, an investigation into a possible violation of law was commenced. The Police submit that the personal information withheld in the record was compiled and is identifiable as part of this investigation into a possible violation of law. Finally, the Police submit that it is reasonable to expect that the individual will be identifiable if disclosure of the information is allowed.

The appellant's representations on this issue only relate to the "absurd result principle" which is discussed below.

Analysis and Findings

Based on my review of the record, I agree that the information at issue was compiled and is identifiable as part of an investigation into a possible violation of law, specifically allegations of assault under the Criminal Code. Accordingly, I find that section 14(3)(b) applies.

Subject to my application of the absurd result principle, I find that the personal information in the record falls under the section 14(3)(b) presumption and qualifies for exemption under section 38(b).

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].

Representations

The appellant submits that the information that is withheld in the record is clearly within his knowledge. The appellant states that he is aware of the information that was withheld and has provided me with clear evidence as to his knowledge of the personal information. Under the circumstances, considering the withheld information and the evidence presented by the appellant, I find that refusing to disclose the withheld personal information about the other identifiable individual would lead to an absurd result [Orders PO-1679 and MO-1755]. Therefore, I will order the Police to disclose this information.

EXERCISE OF DISCRETION

I have upheld the Police's decision to apply section 38(a) in conjunction with section 8(1)((l) to the "ten" codes found in the record and will now review the Police's exercise of discretion in doing so. While section 38(b) is also a discretionary exemption, I have found the information relating to that exemption is not exempt under section 38(b). I will not be reviewing the Police's exercise of discretion to the personal information withheld in the record.

In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, this office may review the institution's decision to exercise its discretion to deny access. As section 38(a) is a discretionary exemption, I must review the Police's exercise of discretion to deny access to the withheld information. On appeal, this office may review the Police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Police erred in exercising its discretion where, for example:

- it did so in bad faith or for an improper purpose
- it took into account irrelevant considerations
- it failed to take into account relevant considerations

On its exercise of discretion under section 38(a), the Police submitted the following:

> One can clearly see by reviewing the document and photographs released to the appellant that his right of access to his own personal information was not compromised, the exemptions from the right of access were limited and specific, the privacy of individuals was protected and the historic practices of this institution with respect to requests for similar information was followed.

The appellant did not make representations on this issue.

Based on my review of the information remaining withheld, namely the "ten" codes, I agree with the Police that it was important to consider the historic practices of the institution for similar information. I find that the Police took into account relevant considerations and its exercise of discretion was proper in the circumstances, considering the nature of the information.

RIGHT OF CORRECTION

As stated above, the appellant made a correction request to the Police to correct a number of items in the Occurrence Report.

Section 36(1) gives an individual a general right of access to his or her own personal information held by an institution. Section 36(2) gives the individual a right to ask the institution to correct the personal information. If the institution denies the correction request, the individual may require the institution to attach a statement of disagreement to the information. Sections 36(2)(a) and (b) read:

> Every individual who is given access under subsection (1) to personal information is entitled to,
>
> (a) request correction of the personal information where the individual believes there is an error or omission therein;
>
> (b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made;

Where the institution corrects the information or attaches a statement of disagreement, under section 36(2)(c), the appellant may require the institution to give notice of the correction or statement of disagreement to any person or body to whom the personal information has been disclosed within the year before the time the correction is requested or the statement of disagreement is required.

Grounds for correction

For section 36(2)(a) to apply, the information must be "inexact, incomplete or ambiguous". This section will not apply if the information consists of an opinion [Orders P-186, PO-2079].

Section 36(2)(a) gives the institution discretion to accept or reject a correction request [Order PO-2079]. Even if the information is "inexact, incomplete or ambiguous", this office may uphold the institution's exercise of discretion if it is reasonable in the circumstances [Order PO-2258].

Representations

The Police submitted the following regarding the appellant's request for correction:

> The appellant submitted a statement of disagreement as he wished that some portions of the Occurrence Report be corrected. The information outlined in his statement of disagreement was not inexact, incomplete or ambiguous, and included information deemed to be opinion related material, along with information pertaining to a previous charge laid against the appellant. As such the appellant's request for correction was denied. In Order P-186, former Commissioner Tom Wright set out the requirements necessary for granting a request for correction as follows:
>
> 1. the information at issue must be personal and private information; and
> 2. the information must be inexact, incomplete or ambiguous; and
> 3. the correction cannot be a substitution of opinion

The Police refer to former Adjudicator Sherry Liang's finding in Order MO-1594 which reads:

> There is a difference in wording between sections 36(2)(a) and (b) which, in my view, is significant. Section 36(2)(a) indicates that individuals may **request** correction of their personal information, while section 36(2)(b) indicates that individuals may **require** a statement of disagreement to be attached to a record reflecting an correction requested but not made.
>
> In particular, because section 36(2)(a) only provides a right to **request** a correction, it gives the Police a discretionary power to accept or reject the correction request. I am reinforced in the view that section 36(2)(a) confers a discretionary power on the Police by the wording of section 36(2)(b), which compensates for the Police's discretion to refuse a correction request under section 36(2)(a) by allowing individuals who do not receive favourable responses to correction requests to **require** that a statement of disagreement be attached instead (see Order MO-1518). [emphasis in original]

The Police then state:

> In this circumstance, the officer was summarizing the events being relayed by the appellant, and as such, the officer's interpretation and opinion of these events are reflected, but do not alter the accuracy of the information provided by the appellant. In Order MO-1594 Adjudicator Sherry Liang further states:
>
> > Even if there are portions of the record which might be said to be "inexact" or "ambiguous" when viewed in isolation…, when

> considered in the context of the whole record these portions are not misleading and do not alter the substance of the information presented.
>
> Further, in a letter dated September 21, 2007, the appellant was advised that his statement of disagreement had been attached to his Occurrence Report [specified number], thus satisfying 36(2)(b).

The appellant does not make representations on this issue however I reviewed the information he supplied in his correction request to the Police.

Analysis and Findings

I have reviewed the appellant's correction request to the Police as well as the information in the Occurrence Report. The appellant's correction request refers to his personal information except for the parts of the request relating to the weather and information which was withheld by the institution's exemption claim. As the right of correction may apply only to the personal information of the appellant, I will not consider whether the Police's decision with respect to correcting the information regarding the weather conditions was proper. Furthermore, I have already made my finding with respect to the personal information of the other individual claimed exempt by the Police.

I must now consider whether the information that the appellant requests corrected is inexact, incomplete or ambiguous. Secondly, I must consider whether the appellant's request is for a substitution of opinion. For the purposes of this appeal, I adopt the findings of Senior Adjudicator John Higgins in Order MO-2258, where he stated:

> In Order M-777, I dealt with a correction request involving a "security file" which contained incident reports and other allegations concerning the appellant in that case. The nature of the records is similar to those at issue here, in which the Police have recorded allegations and information reported to them. I stated:
>
> > … the records have common features with witness statements in other situations, such as workplace harassment investigations and criminal investigations. If I were to adopt the appellant's view of section 36(2), the ability of government institutions to maintain whole classes of records of this kind, in which individuals record their impressions of events, would be compromised in a way which the legislature cannot possibly have intended.
> >
> > In my view, records of this kind cannot be said to be "incorrect" or "in error" or "incomplete" if they simply reflect the views of the individuals whose impressions are being set out, whether or not these views are true. Therefore, in my view, the truth or falsity of

> these views is not an issue in this inquiry…
>
> In my view, the occurrence report and record of arrest in this case represent factual records of allegations received by the Police, the investigation they conducted...
>
> Accordingly, based on the interpretation of section 36(2)(a) developed in the orders cited above, I find that the records are not "inexact, incomplete or ambiguous", and I find that section 36(2)(a) does not provide any basis to order them corrected.

I find that the information at issue in the Occurrence Report is the opinion information of the police officers who interviewed the appellant. This is not information that is "incorrect" or "in error" or "incomplete", as it simply reflects the views of the individuals whose impressions are being set out in the report. Therefore, I uphold the decision of the Police not to correct this information under section 36(2)(a) of the *Act*. However, I note that the Police have advised the appellant that his correction request has been attached as a Statement of Disagreement to his Occurrence Report, thus satisfying section 36(2)(b) of the *Act*.

ORDER:

1. I order the Police to disclose to the appellant by **January 7, 2009**, but not earlier than **December 30, 2008** the personal information in the record. For ease of reference, I have highlighted the portion of the record that should be disclosed to the appellant on the copy of the record sent to the Police that accompanies this order.

2. I uphold the decision of the Police to deny access to the Police codes.

3. I uphold the Police's decision to deny the appellant's correction request.

4. In order to verify compliance with the terms of this order, I reserve the right to require the Police to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original Signed By: November 27, 2008
Stephanie Haly
Adjudicator