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

ORDER MO-2475

Appeal MA09-301

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Service (the Police) received a request on August 27, 2009 under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request consisted of 41 individual points and was very detailed in nature.

The records requested include various documents, handwritten notes, statements, audio and video recordings, telephone communications, e-mails, surveillance records, search warrants, wiretap authorizations and information from a particular police database. In addition, the requester asked for various policy and procedure manuals and jurisdictional boundary records.

The 41-point request related to numerous subjects, including: a particular civil action; numerous alleged incidents on multiple dates at various locations; certain investigations; various complaints; particular communications; identities and contact particulars of numerous individuals; and contacts between various individuals.

In response, on August 31, 2009, the Police wrote to the requester, advising as follows:

> In reference to your access request received on August 27, 2009, we wish to advise you that the time has been extended in accordance with section 20 of the [*Act*] for an additional 60 days to **November 25, 2009** [original emphasis].
>
> The reason for the extension is that the request necessitates a search through a large number of records, and meeting the time limit would unreasonably interfere with the operations of the institution.

On September 2, 2009, the requester (now the appellant) appealed the Police's time extension decision.

After requesting and receiving the appropriate appeal filing fee from the appellant, our office sent a Confirmation of Appeal to both the appellant and the Police on September 21, 2009. The Confirmation of Appeal indicated that I was the Mediator assigned to attempt to settle the appeal. It also stated that if the appeal was not resolved through mediation by October 9, 2009 I would issue a Notice of Inquiry in my capacity as acting-Adjudicator, asking the parties to submit their representations on the issue.

The appeal was not resolved through mediation.

On October 9, 2009, I sent a Notice of Inquiry to the appellant and the Police setting out the issue in the appeal. In response, I received representations from both the appellant and the Police.

DISCUSSION:

The sole issue for me to determine in this appeal is whether the extension of time claimed by the Police to respond to the appellant's request was made in accordance with section 20(1) of the *Act*.

Section 20(1) of the *Act* states:

> A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,
>
> (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
>
> (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

It appears from the wording used in the Police decision, that the Police are relying on section 20(1)(a) of the *Act*. There is no indication either in the Police's decision or in their representations that they are also relying on section 20(1)(b)of the *Act*. Accordingly, I will consider only whether the extension of time claimed by the Police to respond to the appellant's request was made in accordance with section 20(1)(a) of the *Act*.

In her letter of appeal the appellant stated, in part, as follows:

> The [Police] incorrectly alleges that complying with my request in a timely manner would "unreasonably interfere with the operations of the institution".
>
> … I have been actively involved in civil litigation against the [Police] regarding threats … that were made against me by a member of that police force. The [Police] has retained legal counsel. It is unbelievable for the [Police] to allege that its lawyers do not already have in their possession all of the documents and things that I have requested through my access to information request. [In] fact, their lawyers … likely [have] those documents and things since 2003 and when the events in question first occurred.
>
> I have *Charter* rights to protect my life, liberty and security of the person. At no time since these events happened … have I been provided with an Affidavit of Documents from the [Police] and no productions at all have been made by it to me. I have a right to identify the perpetrator such that I can protect my life and the security of my person. My Charter rights are of greater import than the delay sought by the perpetrators.
>
> Further, there is a pending medical assessment in the civil litigation mentioned herein. I will be significantly prejudiced by being compelled to proceed with a medical assessment in the absence of the sought after disclosure.

In a letter to this Office during the mediation process, the appellant advised, in part, as follows:

> The events in question that gave rise to the request for information began on [date]. All of the information that I have requested is or ought to have been in the possession of legal counsel for the [Police]. It is simply incredible to suggest that legal counsel for the [Police] would be retained and not possess and review documentation for the purposes of conducting the litigation, including drafting opinion letters and reporting letters to its clients. Accordingly, the information has or ought to have been culled many years ago and ought to be readily available to the [Police].

In another letter, the appellant reproduced what she felt were relevant portions from the Statement of Claim relating to the civil litigation referred to above.

In her representations in response to the Notice of Inquiry, the appellant stated as follows:

> I understand that the Statement of Claim was issued on [date] and the [Police] and its lawyers have been aware of my claims for many years now. The [Police] has made court appearances and filed a Statement of Defence based on the documentation that has been provided to its lawyers. Those lawyers have written opinion letters to insurance companies who pay their fees. They have reported to the Police Service Board. It is ludicrous to suggest that many of the documents that I seek are not already in the hands of those same lawyers. I have difficulty believing that a large firm … that has hundreds of lawyers employed acting for it and many more support staff members could be immobilized by my request for information that I am lawfully entitled to in the civil litigation in any event (and which I cannot access because of interlocutory procedures).
>
> I also confirm that since the date of my request for information, I have received absolutely no information from the [Police]. It is obvious that the [Police] could have provided me with partial information over time and its refusal to do so is telling.
>
> Also, it is no answer for the [Police] to state that it has run down the clock towards the date upon which it sought to delay the release of information and that therefore its request for the maximum possible delay ought to be granted. It is my position that wrongdoers ought not to be rewarded for the wrongful activities in which they engage. It is wrongful not to release the requested information and documentation that is in its possession.
>
> I have *Charter* rights to my life, liberty and security of the person. The legal posturing of the [Police] has caused me delay in obtaining health care … My life and my health are paramount and all issues of institutional delay are secondary. That is the constitutional law of this land by which the [Police] is bound.

> It is no answer for the [Police] to state that it can select when I receive health care based upon the date which it decides to produce the information.
>
> It also does not lie with the [Police] to state that there is no difference between obtaining health care on one date rather than a later date. The access to information coordinator of the [Police] is not a physician and that person is not my treating physician. He or she has no authority to make arguments based on the timing of the delivery of health care services to me.
>
> The earlier release of the information to me will permit me to advance my civil litigation against the [Police], which it obviously does not want to see happen. The request for an extension provision in access to information and privacy legislation ought not to be abused by public defendants in litigation as a vehicle by which to advance their own private law positions.

During mediation, the Police advised that only some of the points in the appellant's 41-point request relate to the ongoing civil litigation. They indicated that the majority of the requested records falls outside the scope of the litigation and would require separate searches to be conducted involving a large number of other Units throughout the Police and many police officers. The Police pointed out that many portions of the appellant's request would involve canvassing a large number of police officers as part of its search. The Police noted as well that recent staffing issues in the Access and Privacy Unit were contributing to difficulty in handling a request of this scope.

In their representations, the Police elaborate on their position as follows:

> The scope of the appellant's request for information is quite extensive. This institution required a time extension of 60 days to properly research each item outlined in the request [original emphasis].
>
> ….
>
> The appellant's request involved 41 (forty-one) separate items and/or records in which access is being sought. The sheer scope of this request necessitates this institution, not only to search through a large number of records (not maintained at this Unit) but to elicit the assistance of other Units within the institution in locating the requested materials in order to complete this request [original emphasis].
>
> ….
>
> The appellant also required the identities of numerous Toronto Police officers who were involved in various incidents i.e. points #5, #8, #9, #25, #32. Once the records have been requested and received, they will be reviewed for responsiveness and to identify other police officers who may have attended the

> various incidents. Despite utilising liaison officers at the various Divisions and Units, the schedules and shift work of the police officers would also make it difficult to obtain and search through the records in a timely manner.
>
> …
>
> This institution does not utilize Section 20 frivolously; and based on the above information, requests that our decision to extend the response date for an additional 60 days be upheld.

Having carefully considered all of the information provided to me by the appellant and the Police, and in the circumstances of this appeal, it is my view that the decision by the Police to extend the time limit by 60 days to November 25, 2009 is reasonable.

While I sympathize with the concerns raised by the appellant about her health situation, I am not satisfied that the decision to claim a time extension under the *Act* is an infringement of the appellant's *Charter* rights. The appellant has not made a credible connection between any delay in the access to information process under the *Act* and her ability to seek and obtain medical treatment, or whether or not she will be compelled to proceed with a medical assessment in the context of her civil litigation.

Moreover, my assessment of the time extension claim made by the Police must be based on whether the requirements for a time extension under section 20(1) have been met.

I agree with the Police that the scope of the appellant's request is quite extensive. I also agree that many of the points outlined in the appellant's request do not directly relate to the ongoing civil litigation which is referred to by the appellant in her submissions and would require searches involving other Units within the Police, including many police officers.

In her submission, the appellant takes the position that "many of the documents" which she is seeking should be readily available as part of the litigation records relating to the appellant's ongoing civil action against the Police. However, it is clear from the wording of the appellant's 41-point request, as well as the information she has provided regarding the civil action, that many of the points outlined in the request extend beyond that action.

In light of the above and in the circumstances of this appeal, I am satisfied that responding to the appellant's request necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the Police.

In addition to my findings above, I would like to address a number of statements made by the parties as part of their representations.

I will first address that appellant's arguments relating to the delays which may be caused to her civil litigation as a result of the Police's time extension to respond to her access request. In this regard I note that section 51 of the *Act* provides:

> (1) This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.
>
> (2) This *Act* does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

Former Commissioner Sidney B. Linden held in Order 48 that the *Act* operates independently of the rules for court disclosure:

> This section [section 64(1) of the provincial *Freedom of Information and Protection of Privacy Act*, which is identical in wording to section 51(1) of the *Act*] makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair ...

In Order MO-1109, former Assistant Commissioner Tom Mitchinson commented on this section as follows with respect to the obligations of an institution under the *Act*:

> The obligations of an institution in responding to a request under the *Act* operate independently of any disclosure obligations in the context of litigation. When an institution receives a request under the *Act* for access to records which are in its custody or control, it must respond in accordance with its statutory obligations. The fact that an institution or a requester may be involved in litigation does not remove or reduce these obligations.
>
> The Police are an institution under the *Act*, and have both custody and control of records such as occurrence reports. Therefore, they are required to process requests and determine whether access should be granted, bearing in mind the stated principle that exemptions from the general right of access should be limited and specific. The fact that there may exist other means for the production of the same documents has no bearing on these statutory obligations.

I agree with the above comments. In this case, the fact that I have upheld the Police's decision to extend the time in which to respond to the appellant's access request under the *Act*, should not interfere with the appellant's ability to obtain the relevant information through the disclosure mechanisms available to her in a civil proceeding.

I will now address a number of statements made by the Police as part of their submissions.

Although, as noted above, the Police conclude their representations by requesting that their decision to extend the response date for an additional 60 days be upheld, they also make the following statement within their submissions:

> … In addition to the initial extension, this institution raised the possibility that we might be unable to respond to the appellant's request, even with the 60-day extension for various reasons. One, not so insignificant reason being the amount of time and effort exerted by the Analyst through the mediation/negotiation process.

The Police also point out that:

> the appellant has also requested personal contact information of third parties, whom once their involvement in each incident is confirmed, would be subject to the notice provisions under section 21 of the *Act*. As such, this institution may require a further extension in order to meet compliance as we feel this appellant may bring forth a deemed refusal action.

It appears from the above statements that the Police are requesting a further time extension in order to process the appellant's request.

I am mindful of the concerns raised by former Commissioner Tom Wright regarding the use of two time extensions. In Order P-234, the former Commissioner upheld the total time claimed but indicated that he had concerns about the use of two separate extensions, stating that:

> …[g]enerally speaking, it is my view that an institution, when assessing the time and resources it will need to properly respond to a request, must decide within the initial 30 day time limit for responding to the request, the length of any time extension it will need.

This approach was subsequently considered and adopted by Senior Adjudicator John Higgins in Order M-581 where he did not uphold the second time extension. I agree with this approach and adopt it for the purposes of this appeal.

Under the circumstances of this appeal, though the Police have satisfied me that a time extension to November 25, 2009 is reasonable, I am not persuaded that this time should be extended beyond this date.

With respect to the timing regarding the possible notification of affected parties, I note the following.

Section 21 of the *Act* states, in part:

> (1) A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,

> (a) that the head has reason to believe might contain information referred to in subsection 10(1) that affects the interest of a person other than the person requesting information; or
>
> (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 14(1)(f).
>
> (2) The notice shall contain,
>
> (a) a statement that the head intends to disclose a record or part of a record that may affect the interests of the person;
>
> (b) a description of the contents of the record or part that relates to the person; and
>
> (c) a statement that the person may**,** within twenty days after the notice is given, make representations to the head as to why the record or part should not be disclosed.
>
> (3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received **or, if there has been an extension of a time limit under subsection 20(1), within that extended time limit** [emphasis added].
>
> (4) A head who gives notice to a person under subsection (1) shall also give the person who made the request written notice of delay, setting out,
>
> (a) that the disclosure of the record or part may affect the interests of another party;
>
> (b) that the other party is being given an opportunity to make representations concerning disclosure; and
>
> (c) **that the head will within thirty days decide whether or not to disclose the record** [emphasis added].

In light of the above, given that I have upheld the Police's time extension to November 25, 2009, if the Police determine that notice to affected parties is required, they must give this notice within this extended time limit in accordance with section 21(3). The Police will then have 30 days to issue its final access decision to the appellant, pursuant to section 21(4)(c) of the *Act*. I will address this further as part of my order provisions below.

ORDER:

1. I uphold the Police's decision to extend the time limit to **November 25, 2009**.

2. Where notice to third parties is required to be given pursuant to section 21 of the *Act*, I order the Police to give such notice no later than **November 25, 2009** and to issue a **final** decision on access to the appellant and the third parties no later than **30 days** following this notification.

3. With respect to those records that do not require third party notice to be given, I order the Police to issue a final decision on access to the appellant by **November 25, 2009**.

Original Signed by: November 5, 2009
Leslie McIntyre
Mediator