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

ORDER MO-2531

Appeal MA09-314

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 access to the following records:

> …memo books/notes + audio recordings + evidence of e-mails, audio recordings/faxes and statements from witnesses and/or staff of Seneca College obtained by Seneca College and [named individual] by [four named officers]. Occurrence ID [specified #].

The police located responsive records and provided the requester with a decision advising that the investigation concerning the incident which is the subject of the request has been re-opened. As a result, the police denied access to the records pursuant to the discretionary exemptions in sections 8(1)(a) and (b) (law enforcement) and sections 38(a) and (b) (invasion of privacy) of the *Act*. The Police also noted that some information has been removed from records as it was about events that are unrelated to the subject of the request. The police also advised the requester that he may resubmit his request "upon the conclusion of the investigation and disposition of charges which may be laid as a result of the investigation."

The requester, now the appellant, appealed this decision.

During mediation and at the request of the mediator, the police undertook a second search to ensure that all responsive records had been located as the notes of only one of the four named officers had been identified. The police advised that no additional records were found because any records obtained from Seneca College (the college) had been returned to it. Finally, the police confirmed with the mediator that the investigation which was the subject of the records remains ongoing.

The appellant advised the mediator that he was not satisfied with the results of the searches undertaken by the police for responsive records and asked that this issue also be canvassed in the inquiry. As further mediation was not possible, the appeal was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*.

I initially sought and received representations from the police, a severed copy of which was forwarded, along with a Notice of Inquiry (the notice) to the appellant. Portions of the police representations were not shared with the appellant owing to my concerns about their confidentiality. The appellant did not provide me with representations.

RECORDS:

The records remaining at issue consist of the responsive portions of 14 pages of notes recorded by one of the identified police officers.

DISCUSSION:

PRELIMINARY MATTER

Throughout the processing of this request by the police and the subsequent appeal to this office, the appellant was represented by an agent acting on his behalf. Based on my review of the correspondence and material relating to this matter, I find that they contain information that relates to both the appellant and his agent representative. Accordingly, in conducting my analysis of the issues before me in this appeal, I will consider the request to have come from both the appellant and his representative.

As noted above, the notice was sent to the appellant. Although the appellant's representative also requested a copy of the notice, I did not provide him with a copy as he refused to provide a mailing address to which it could be sent.

REASONABLE SEARCH

The appellant took the position at mediation that because only one of the four officers who are named in the request provided copies of his or her notes to the police FOI office in response to the request, the searches undertaken by the police were inadequate. In the notice, I requested that the Police provide me with evidence regarding the nature and extent of the searches undertaken for records maintained by each of the four officers identified by the appellant in the request and they did so.

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 and 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

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 [Order MO-2246].

In their representations, the police provided me with an affidavit sworn by the FOI analyst who conducted a second search for responsive records following an earlier search at the mediation stage of the appeal by another analyst. In her affidavit, the affiant attests to the steps taken to locate and identify any records maintained by the four identified officers that relate to the events described in the request.

The appellant did not provide any representations in response to the notice.

Based on the information provided to me by the FOI analyst, I am satisfied that a reasonable effort was made to locate and identify records maintained by each of the four officers who were listed in the request. The affidavit indicates that all four of the officers were contacted by the analyst and they provided her with explanations as to the nature and extent of the searches they undertook of their own records and the results of those searches. As a result, one officer located the 14 pages of notebook entries which constitute the records at issue in this appeal. Another officer indicates that "all emails were returned to" the college, while the other two officers identified that they did not record any notes of their involvement in this matter.

Accordingly, based on my review of the evidence tendered by the police, I find that the searches undertaken by the police for responsive records were reasonable and I dismiss this part of the appeal.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,

> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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 and 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 and MO-2344].

I have reviewed the contents of the records or parts of records at issue and make the following findings:

- pages 1, 3 and 6 of the records contain the personal information of the appellant, including his address and telephone number [paragraph (d)], his name and other personal information relating to him paragraph (h)];
- all of the records also contain the personal information of the appellant's agent, including his date of birth [paragraph (a)], his address and FAX number [paragraph (d)], the personal views or opinions of the appellant's agent [paragraph (e)], the views or opinions of another individual about the appellant's agent [paragraph (g)] and his name and other personal information relating to him [paragraph (h)];
- pages 3 and 4 of the records also contain the personal information of another identifiable individual consisting of her address and telephone number [paragraph (d)], as well as her name and other personal information relating to her [paragraph (h)]; and
- page 12 of the record also contains information that qualifies as the personal information of one of the investigating police officers, as it represents the personal views or opinions of this individual [paragraph (e)]. I find that the information passes into the personal realm because it describes his/her personal views regarding his/her own personal safety.

LAW ENFORCEMENT

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.

Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. [my emphasis]

Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. In this case, the police rely on section 38(a) in conjunction with sections 8(1)(a) and (b), which read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (a) interfere with a law enforcement matter;

> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", 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.)].

Section 8(1)(a) and (b): law enforcement matter/ law enforcement investigation

The matter in question must be ongoing or in existence [Order PO-2657]. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations [Order PO-2085]. The investigation in question must be ongoing or in existence [Order PO-2657].

In support of their position that the disclosure of the records would interfere with a law enforcement matter or an ongoing investigation, the Police provided me with an affidavit from the detective who was the investigating officer into whether the appellant's representative ought to be charged under the *Criminal Code* with criminal harassment as a result of the events described in the records. The affidavit indicates that because certain information surrounding the possible laying of charges had not yet been ascertained, "releasing any information would compromise the investigation."

As noted above, I did not receive any representations from the appellant or his representative.

In the present appeal, it clear that the investigation which is the subject of the records could give rise to the laying of criminal charges, though no charges have been laid to date. The Police have provided me with evidence to indicate that the investigation remains ongoing, despite the fact that the records date back to the period from May to August 2009.

In Order PO-2040, former Assistant Commissioner Tom Mitchinson made the following findings with respect to standard of proof required to be met in assessing whether disclosure could reasonably be expected to interfere with a law enforcement matter or an investigation as contemplated by section 14(1)(a) of *FIPPA*, the equivalent provision to section 8(1)(a) in the *Act*. He stated that:

> It is clear that the criminal prosecution matter to which the records relate satisfies the definition of the term "law enforcement" in section 2(1) of the *Act*, and that the law enforcement matter is ongoing. The only remaining issue is whether disclosure of the records, or any portion of them, could reasonably be expected to interfere with this matter.
>
> The Divisional Court has held that, under sections 14(1)(a) and (f) (which is not at issue in this appeal), it is not sufficient for an institution to proceed as if the interference is "self-evident from the record", or to take the position that a request for records relating to a continuing law enforcement matter constitutes a "*per se* fulfilment of the relevant exemptions". However, it is also important to note that in the same judgement, the court made it clear that the section 14(1)(a) law enforcement exemption claim 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 at 201-202 (Div. Ct.), upholding Order P-534). (See also *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 107 D.L.R. (4th) 454 (Ont. C.A.); leave to appeal to the S.C.C. refused 112 D.L.R. viii.)

Based on my review of the records themselves and the police's affidavit evidence regarding the current status of its investigation into whether criminal charges are warranted in this situation, I am satisfied that the disclosure of the records to the appellant could reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement proceeding within the meaning of section 8(1)(b). Because of the nature of the information contained in the records, I am unable to describe them in any detail in this order without revealing their content. Moreover, in light of the description in the records of the conduct of the individual who is a suspect in the investigation, I am satisfied that this is a case where I must be particularly sensitive to the application of the law enforcement exemption in section 8(1)(b).

Because I have found that the records contain the personal information of the appellant and his representative, they are exempt under section 38(a), taken in conjunction with the law enforcement exemption in section 8(1)(b).

EXERCISE OF DISCRETION

The section 8(1)(b) exemption is discretionary, and 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

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 in light of the circumstances surrounding the particular events and the nature of the original allegations made against the subject of the investigation, "the release of this material could compromise the integrity of the case". The police have also provided me with additional evidence of further contacts between the appellant's representative and the investigating officer following the receipt of the request in this matter. The events described in these additional materials are disturbing and bolsters the police arguments in favour of their decision not to disclose the subject records to the appellant and his representative.

In my view, the police have provided me with sufficient justification for their decision to exercise their discretion not to disclose the records to the appellant. I find that the police have not considered irrelevant or improper factors in deciding not to disclose the records, particularly given the conduct of the appellant's representative throughout the processing of the request and the appeal. As a result, I find that the police have appropriately exercised their discretion not to disclose the records and I will not disturb that decision on appeal.

ORDER:

1. I uphold the decision of the police to deny access to the records.

2. I uphold the police search for responsive records and dismiss that part of the appeal.

Original signed by: June 23, 2010
Donald Hale
Adjudicator