



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

# **ORDER MO-2540**

**Appeal MA09-196**

**The Greater Sudbury Police Services Board**



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## **NATURE OF THE APPEAL:**

The appellant submitted the following request to the Greater Sudbury Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

This is my request for information that was obtained during the period that I was investigated as a result of the protocol adopted by the CAS [Children's Aid Society] and [the Police]. The protocol states that "police and CAS conduct joint investigations to maximize investigative potential for gathering evidence.

The requested information includes notes, period of surveillance and names of persons responsible for initiating the [Police] investigation into my daily affairs.

The Police clarified with the appellant that the scope of his request covers the time period from 2000 to the present.

The Police located 8 pages of records responsive to the request and granted partial access to them, withholding portions of the records pursuant to the discretionary exemption at section 38(a) (discretion to refuse a requester's own personal information), read in conjunction with section 8(2)(a) (law enforcement), and the discretionary exemption at section 38(b) (personal privacy) read in conjunction with the presumption at section 14(3)(b) (investigation into a possible violation of law) of the *Act*. The Police also stated in their decision letter that a certain named police officer does not have any notes pertaining to a given incident number. In addition, the Police indicated that they had severed information from two pages of the records that they deemed to be not responsive to the request. The Police enclosed an Index of Records with the decision letter.

The appellant appealed the Police's decision.

During mediation, the Police located 33 additional pages of records responsive to the request. Accordingly, the Police issued a supplemental decision letter granting partial access to them, withholding portions for the same reasons noted above. In addition, the Police indicated that portions of the records had been withheld as non-responsive to the request. The Police also enclosed a supplementary Index of Records.

During mediation, the appellant indicated that he is seeking access to all of the information that was severed from the records with the exception of the information identified by the Police as non-responsive to his request. Accordingly, the information that the Police have identified as not responsive is no longer at issue in this appeal. The appellant also asserted that additional records responsive to his request should exist. Therefore, the issue of whether the Police conducted a reasonable search is at issue in this appeal.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process for an inquiry.

The adjudicator previously assigned to this file sent a Notice of Inquiry, setting out the facts and issues on appeal, to the Police. The Police submitted representations in response.

The file was subsequently transferred to me to complete the adjudication process. After reviewing the submissions made by the Police, I decided to seek representations from the appellant, and provided him with a revised copy of the Notice of Inquiry along with the non-confidential portions of the submissions made by the Police. The Notice of Inquiry was revised to reflect the following activity that occurred during the inquiry stage.

The Police located two additional pages of records. The Police issued a supplementary access decision to the appellant regarding them, in which they indicate that the exemptions claimed for the other records similarly apply to the newly located ones. The newly located records were included as records at issue in this appeal. On these two pages, the Police have withheld some information on the basis that it is not responsive to the request. In accordance with the appellant's stated view regarding non-responsive information, the portions of the two newly located records that are marked as non-responsive are not at issue in this appeal.

The appellant did not submit representations in response.

## **RECORDS:**

There are a total of 39 pages of records at issue in this appeal. They consist of pages 1 to 6 identified in the Index of Records enclosed with the first decision letter issued to the appellant, pages 1 to 16 and 19 to 33 identified in the Index of Records enclosed with the supplementary decision letter, and the two newly located pages. The records consist of occurrence summaries, general occurrence reports, supplemental occurrence reports and police officers' notes.

## **DISCUSSION:**

### **SEARCH FOR RESPONSIVE RECORDS**

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]. A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909, see also: Order P-880).

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]. Moreover, a requester's lack of diligence in pursuing

a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

Although the appellant did not submit representations, his letter of appeal explains, to some extent, why he believes more records exist. Essentially, he considers the information that he has received to date to be inaccurate and incomplete. The appellant disagrees with the characterization of certain information contained in the occurrence reports. He questions how certain actions could be taken against him without reference being made to the situation. He believes that records should exist that contain information about who began an investigation which utilized a protocol between the Police and the CAS. The appellant also makes reference to a particular incident number. During mediation, the appellant referred to various contacts that he has had with named police officers, and expressed his belief that they should have records as a result of those contacts. As I indicated above, although provided with an opportunity to provide representations, particularly in light of the location and disclosure of additional records, and the explanation from the Police regarding the steps taken to search for responsive records, the appellant did not respond.

In explaining the steps taken to search for responsive records, the Police note that they have a "Standard Operating Procedure for conducting thorough searches." The Police attached a copy of this procedure to its representations, and then outlined the steps taken by the Release of Information Co-ordinator (the Co-ordinator) in accordance with that procedure. The Co-ordinator indicates that, upon receipt of the appellant's request, she contacted the appellant to clarify exactly what information he was seeking. She then queried his name on the "NICHE" system, printed out a list of incidents involving him and then determined which of them were responsive to his request, namely investigations arising as a result of the protocol between the Police and the CAS from 2000 to the present. The Co-ordinator indicates that only two incidents (neither of which include the occurrence number referred to by the appellant) pertained to his request. The Co-ordinator then contacted the supervisors of the officers identified in the reports and obtained the officers' notes pertaining to the incidents. The Co-ordinator believed that the records initially located responded to the appellant's request, as worded.

During the mediation stage of the appeal, the Co-ordinator reviewed the records she had located that involved the appellant, and decided to expand the scope of the appellant's request to include incidents in which the CAS was involved, even though the protocol was not used. The Co-ordinator explains that it came to her attention at the time of preparing the representations that one officer did not receive her memo asking for his notes. She states that the notes were obtained and a severed copy of them was provided to the appellant. The Co-ordinator asserts that any involvement of the appellant from 2000 to the present would be found in the NICHE system.

Although the appellant has raised a number of concerns about his interactions with the Police, and various contacts that he has had with different officers, as I noted above, the *Act* does not require the Police to prove with absolute certainty that further records do not exist. It is sufficient that they provide evidence to show that they have made a reasonable effort to identify and locate responsive records, which includes having the search conducted by an experienced

employee expending reasonable effort to identify any records that are reasonably related to the request. Based on the submissions provided by the Police and the Co-ordinator's explanations of the steps she took to locate responsive records, I am satisfied that the search conducted by the Police was reasonable in the circumstances.

## **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. Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. 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]. Nevertheless, 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.)].

The Police submit that the records contain the personal information of individuals other than the appellant. The Police note further that information pertaining to police officers has been disclosed to the appellant.

On review of the records at issue, I find that they all contain the appellant's personal information as they pertain to matters involving him. The records also contain information about other identified and/or identifiable individuals. Although some of the information relates to certain individuals in their professional capacity, I find that it qualifies as their personal information because it reveals something of a personal nature about them, that being the nature of their involvement in the matters identified in the records.

I note that much of the information in the records has been disclosed to the appellant, notably, information about himself and that which could be reasonably severed relating to the incidents in which he was involved, as well as information about the various police officers involved in each matter. I find that the withheld information pertains directly to individuals other than the appellant or is so intertwined with that of the appellant that it is not severable.

## **PERSONAL PRIVACY**

### **General Principles**

I have found that the records contain the personal information of the appellant and other identifiable individuals. 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 presumptions contained in paragraphs (a) to (h) of section 14(3) apply, 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].

The Police submit that the presumption at section 14(3)(b) applies to the withheld portions of the records. This section states that:

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].

As I indicated above, the records are comprised of occurrence summaries, general occurrence reports, supplemental occurrence reports and police officers’ notes. All of the records relate to matters in which the Police responded to complaints. The records describe the complaints, the actions taken by the Police in responding to and investigating them. I am satisfied that the personal information contained in these records was compiled and is identifiable as part of an investigation into a possible violation of law. Accordingly, I find that the presumption at section 14(3)(b) applies to the personal information of the individuals other than the appellant that are identified in the records. As a result, the records at issue qualify for exemption under section 38(b) of the *Act*.

### **Exercise of Discretion**

The section 38(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)].

Due to confidentiality concerns, I am unable to fully describe the factors that the Police took into consideration in responding to this access request. In brief, the Police indicate that the appellant is known to them and that they took this background into consideration in exercising their discretion to withhold portions of the records.

Taking into consideration the amount of information that the Police have disclosed to the appellant, I am satisfied that they have properly exercised their discretion in withholding the remaining portions.

Accordingly, because the disclosure of the personal information in the records is presumed to constitute an unjustified invasion of personal privacy, I find that the records are exempt from disclosure under section 38(b).

### **ORDER:**

1. The search conducted by the Police was reasonable and I dismiss this portion of the appeal.
2. I uphold the Police's decision to withhold access to the records.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_  
June 30, 2010