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

ORDER MO-2602

Appeal MA09-349-2

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 all notes of a named detective from August 2007 to June 2008 related to events described in a specific, numbered occurrence report.

The Police located responsive records and denied access to them on the basis that, pursuant to the exclusionary provisions in section 52(2)(3) of the *Act*, the information in the responsive records falls outside the scope the *Act*.

The appellant appealed that decision to this office and appeal MA09-349 was opened. That appeal was closed by Order MO-2504, in which Adjudicator Hale determined that the exclusionary provisions in section 52(3) did not apply to the records, and ordered the Police to provide the appellant with a decision letter respecting access to all of the responsive records.

As a result of Order MO-2504, the Police issued a revised decision to the appellant. In that decision, the Police indicated that access to the records was granted in part. With respect to the records or portions of records to which access was not granted, the Police relied on the exemption in section 38(a) (discretion to deny requester's own information) in conjunction with section 8(1)(l) (law enforcement), as well as the exemptions in sections 14(1) and 38(b) (personal privacy) with reference to the presumption in section 14(3)(b). In addition, some portions of the records were identified as non-responsive.

The appellant appealed the Police's revised decision, and this appeal was opened.

During mediation, the appellant advised that he was not appealing the decision that certain portions of the records are non-responsive and, as a result, this information is not at issue in this appeal. However, the appellant confirmed that he was appealing the decision on three points: 1) he is seeking access to the portions of the records withheld by the Police, 2) he wishes to view the original notebook entry for February 14, 2008, and 3) he believes that additional records exist.

With respect to the appellant's interest in viewing the original February 14, 2008 notebook entry for the named detective, the appellant indicated that he wished to view the original to compare it to the copy he received, as he had concerns about the actions of the Police. During mediation, the Police provided the appellant with a second copy of the notebook entry that they had re-photocopied to make the background more legible. The appellant maintained that he wished to view the original record.

With respect to the issue of whether additional records exist, the appellant maintained that additional notebook entries should exist for the named detective between November 2007 and June 2008. In its decision letter, the Police stated:

> You clarified in your representation that "I am not seeking the [entire investigation report] and definitely not records regarding the conduct of [the

> named detective] that was completed by the Professional Standards Unit (PRS)". You further clarified, "the records in requested [sic] in my appeal pertain to notes taken by [the named detective] of the Toronto Police Service in relation to his investigation of a criminal complaint …"

The appellant maintained that additional records responsive to his request exist. During mediation, the Freedom of Information Coordinator for the Police (the coordinator) reviewed the original notebooks of the named detective, and located two additional entries in the notebook that were not previously located. These additional entries were provided to the appellant; however, the appellant maintains that additional responsive records exist.

Mediation did not resolve these issues, and this appeal was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Police, initially, and the Police provided representations in response. I then sent the Notice of Inquiry, along with a copy of the representations of the Police, to the appellant, who also provided representations to me. I then shared one portion of the appellant's representations with the Police, and invited the Police to respond to one issue by way of reply representations, which they did.

RECORDS:

The records at issue consist of the severed portions of the named detective's notebook entries that were withheld on the basis of the identified exemptions (portions of pages 1, 7, 8, 13, 14, 16 and 17).

The record which the appellant seeks to view the original of is a notebook entry for February 14, 2008 (the responsive portions of pages 20 and 21).

DISCUSSION:

PRELIMINARY ISSUE: REQUEST TO VIEW ORIGINALS

As indicated above, the appellant seeks to view the original notebook entry for an identified date.

Section 37(3) of the *Act* reads:

> If access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner that indicates the general conditions under which the personal information is stored and used.

Sections 23(1) and (2) of the *Act* specifically address issues regarding copies of the record and access to original records. These sections read:

> Copy of record
>
> (1) Subject to subsection (2), a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.
>
> Access to original record
>
> (2) If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

Section 23(2) indicates an institution may decline to accept the request to examine the original record if it would not be reasonably practicable to comply with it. Some examples of why it might not be reasonably practicable to comply are:

- if a record is very large;
- if the reproduction of a record may be unduly burdensome on the institution; or
- if only part of the record is subject to disclosure and it is not feasible to allow inspection without disclosing the protected parts of the record as well.

Section 23(2) is a mandatory provision, subject only to the requirement of reasonable practicability. In other words, unless an institution has determined that it is not reasonably practicable to give the requester the opportunity to examine an original record, the head *must* do so, upon request [Order PO-1679].

As a result, the issue I must determine is whether it is reasonably practicable to permit the appellant to view the original record, which is the responsive portion of the detective's notes for February 14, 2008.

The Police take the position that it is not reasonably practicable to permit the appellant to view the original notebook entries. They refer to the fact that the appellant has been provided with "multiple copies" of the notebook entries, and also that, during mediation, the Mediator with this office assigned to this file attended Police headquarters and "physically held and viewed the memobooks at issue," and provided confirmation and explanation to the appellant. The Police state further that each page of the February 14, 2008 entry responsive to the appellant's request also contains information unrelated to the appellant, the disclosure of which would be an unjustified invasion of the privacy of the individuals referred to in those portions of the pages. In addition, the Police state:

> Both pages relating to February 14, 2008 entries had information removed in the beginning and the end of the entry as non-responsive - relating to other situations and individuals. The appellant cannot physically handle and view these entries

> without having direct access to these portions of unrelated entries, which contain personal information unrelated to the appellant. In light of the fact that several experienced employees of both this institution and your office have viewed the responsive notes and concur that he has received the complete recorded notes of [the named detective] for the two pages of entries on February 14th, the only information on the pages outstanding are firmly protected under the *Act* as personal information to which he is not entitled.

The appellant's representations on this issue focus on why he wants access to the originals. He refers to his concern that these records were not identified earlier in the appeal, and questions the actions of the coordinator. He also refers to a matter that was addressed in the mediation stage of this appeal regarding the quality of a copy of the record he had received. In addition, the appellant states that he would like to know the occurrence numbers of the entries prior to and following the item relating to him, and he states: "I wish to examine the condition of the notebooks to ensure that they are valid police notebooks." Lastly, the appellant states that it would not be difficult for the coordinator to simply cover the portions of the pages that the appellant is not entitled to view.

The issue I must address is whether it is reasonably practicable to permit the appellant to view the original record (the actual notebooks of the named detective) for the identified entry. The requested notebook entry at issue consists of portions of two pages of the detective's notes. Each of these pages includes information which has been disclosed to the appellant, and information which the appellant is not entitled to (notwithstanding his interest in obtaining some of this information). In my view, given that the record at issue is a police officer's notebook, and given that each of the requested pages contains information which the appellant is not entitled to, I find that it is not feasible to allow inspection of the notebook in the circumstances of this appeal. In my view, it is not reasonably practicable to allow inspection of the disclosed parts of the record without disclosing the protected parts of the record as well.

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 Police refer to paragraphs (c) and (d) of the definition, and take the position that the withheld portions of the records contain the personal information of the appellant, as well as other identifiable individuals. They also indicate that only very small portions of the records were withheld.

Following my review of the records, I find that all of the records remaining at issue contain the personal information of the appellant, as they include information relating to an investigation involving him, as well as other personal information relating to him (paragraph (h) of the definition).

I also find that the records contain the personal information of other identifiable individuals including their addresses and telephone numbers (paragraph (c)), their personal views and opinions (paragraph (e)) and their names along with other personal information relating to them (paragraph (h)).

DISCRETION TO REFUSE ACCESS TO APPELLANT'S OWN PERSONAL INFORMATION /LAW ENFORCEMENT

As set out above, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

The Police rely on section 38(a) to deny access to small portions of pages 7, 13, 14 and 16 of the records. Under section 38(a), an institution has the discretion to deny access to an individual's

own personal information in instances where the exemption in section 8 would apply to the disclosure of that personal information.

The Police claim that section 8(1)(l) applies to this severed information, which consists of police 10-codes. Section 8(1)(l) states:

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

The appellant's position on the application of these exemptions to the 10-codes relates primarily to the application of the absurd result principle, which I address below.

A number of previous orders have found that police codes qualify for exemption under section 8(1)(l), because of the reasonable expectation of harm which may result from their release (for example, Orders M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, and PO-2339). In the circumstances of this appeal, I am satisfied that the information that the Police have severed from the records on the basis of section 8(1)(l) could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

Therefore, I find that section 38(a), in conjunction with section 8(1)(l), applies to the police codes in the records. Specifically, the police codes severed from pages 7 (one 10-code), 13 (one 10-code), 14 (one 10-code) and 16 (two 10-codes) qualify for exemption under section 8(1)(l) and, as a result, are exempt under section 38(a) of the *Act*, subject to my finding on the Police's exercise of discretion.

Because the only remaining withheld portions of pages 7 and 13 were the police code information, I will not review the possible application of section 38(b) to these pages.

DISCRETION TO REFUSE ACCESS TO APPELLANT'S OWN PERSONAL INFORMATION/INVASION OF PRIVACY

As identified above, 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 exceptions to this general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the Police must look at the information and weigh the appellant's right of access to his own personal information against the affected persons' right to the protection of their privacy. If the Police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the Police the discretion to deny access to the appellant's personal information.

In determining whether the exemptions in sections 14(1) or 38(b) apply, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 14(2) provides some criteria for the Police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

The Police take the position that disclosure of the withheld information on pages 1, 8, 14, 16 and 17 is presumed to constitute an unjustified invasion of the privacy of individuals other than the appellant under the presumption in section 14(3)(b) of the *Act*, which reads:

> 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;

In support of their position that the records were compiled and are identifiable as part of an investigation into a possible violation of law for the purpose of section 14(3)(b), the Police state:

> All responsive records were compiled and maintained due to an ongoing investigation involving the appellant.

The Police also refer to previous orders (M-198, MO-1853) in support of their position that section 14(3)(b) applies in these circumstances.

The appellants' representations focus on the possible application of the absurd result principle, which I address below.

Findings

The portions of the records which the Police claim qualify for exemption under section 38(b) include the identity of an individual on page 1 of the records, brief statements made by identified individuals on pages 8, 14 and 16, and the identity of an individual on page 17.

It is clear that the records at issue in this appeal were compiled by the Police in the course of the investigation of the matter involving the appellant. On the basis of the representations provided by the Police, I am satisfied that the personal information remaining at issue was compiled and is identifiable as part of the Police investigation into a possible violation of law, and falls within the presumption in section 14(3)(b).

Accordingly, I find that the disclosure of that personal information is presumed to constitute an unjustified invasion of the personal privacy of the identified individuals under section 14(3)(b) of the *Act*.

As set out above, the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) (*John Doe v. Ontario*). In addition, I find that section 14(4) does not apply, and the appellant has not raised the application of the "public interest override" in section 16. Accordingly, the records are exempt from disclosure under section 38(b) of the *Act*, subject to my review of the "absurd result" principle and the exercise of discretion, set out below.

Absurd result

In his representations the appellant has indicated that he ought to receive the information as he is aware of the severed information. He refers to the fact that some of the severed information was made available to him in the course of another proceeding. He has also referred to certain information which he believes is contained in the brief severances, and has in some instances attempted to "fill in' the severed portions of the records with the information he believes is contained in those severances, based on his recollection of the information he states that he has seen.

The appellant's representations raise the "absurd result" principle. Based on this principle, 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) and/or 14(1), 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, M-613]
- the requester was present when the information was provided to the institution [Order 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 in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

Although the appellant may be aware of some portions of the information at issue, in my view, in the circumstances of this appeal, this is a situation where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the appellant.

As stated by Senior Adjudicator Goodis in Order MO-1378, which dealt with a request for photographs:

> In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, [the exemption] may still apply. In similar circumstances, this office stated in Order M-757:
>
> > Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to [the exemption].
>
> In my view, this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.

As in Order MO-1378, I find that there is particular sensitivity inherent in the records at issue in this appeal, and that disclosure would not be consistent with the purpose of the exemption. The absurd result principle therefore does not apply, and I find that the portions of the records for which section 38(b) is claimed are exempt under that section.

Exercise of Discretion

The section 38(a) and (b) exemptions are discretionary and permit the Police to disclose information, despite the fact that it could be withheld. 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 (Orders PO-2129-F and MO-1629).

In their representations the Police identify that they considered and carefully weighed all factors, and decided that the disclosure of the personal information of persons other than the appellant was determined to be an unjustified invasion of personal privacy. They also identify that "very little information" was removed from the responsive records, and that they exercised their discretion to disclose much of the information, only severing those small portions which qualified for exemption.

I have reviewed the circumstances surrounding this appeal and the Police's representations on the manner in which they exercised their discretion. Based on this information, as well as on the fact that much of the information in the records was disclosed to the appellant, with only very small portions withheld, I am satisfied that the Police have not erred in the exercise of their discretion not to disclose the remaining information contained in the records.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Police will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statement.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Background and representations

As identified above, the request in this appeal was for access to all notes of a named detective from August 2007 to June 2008 related to events described in a specific occurrence report. The Police identified the records responsive to the request.

During mediation, the appellant maintained that additional notebook entries should exist for the named detective between November 2007 and June 2008. As a result, also during mediation, the coordinator for the Police reviewed the original notebooks of the named detective for that time

period, and located two additional entries in the notebook. Those entries were provided to the appellant; however, the appellant maintained that additional responsive records exist.

In their representations on the issue of whether additional responsive records exist, the Police refer to the process referenced in the Mediator's Report, in which the Police confirm that they conducted an extensive search for any notes from the named detective between November 2007 and June 2008. The Report also refers to the fact that, in order to address the appellant's belief that additional records for that period existed, the coordinator asked that the original notebooks of the named officer be provided to her office. The Police then confirm that the notebooks for that period were reviewed in their entirety and that, as a result, the two additional responsive notebook entries were located. In their representations the Police confirm that all relevant memobooks were hand-delivered by the detective and were "scrupulously reviewed" by the identified individual in the Freedom of Information office.

The appellant provides lengthy representations on the issue of whether additional responsive records exist. A number of his concerns relate to the coordinator's actions in the processing of this file, as well as his concerns about the manner in which information was or was not recorded by the detective. He also refers to decisions that were made about him, and states that notes of these decisions must exist, and he requests an explanation as to why they do not exist.

In addition, the appellant states:

> [The named detective's] investigation into [a numbered occurrence] began on September 13, 2007, yet I was only provided with his notes beginning on October 26, 2007. I want [the named detective's] notes from September 13, 2007 to October 25, 2007.

After I received the appellant's representations, I noted that his questions about the notes from September 13 to October 25 were not specifically addressed by the Police because, until the receipt of these representations, the appellant's concerns regarding the existence of additional records (as discussed during mediation and referred to in their representations) had focused on records from November 2007 to June 2008. In these circumstances, I decided to invite the Police to provide additional representations on the searches for the named detective's notebook entries from September 13 to October 25.

In response, the Police provided me, for my examination, with a complete copy of the named officer's notebooks covering the period of time from September 10, 2007 to October 25, 2007.

Findings

As set out above, in appeals involving a claim that responsive records exist, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the Police's search for responsive records was reasonable in the circumstances, the decision of the Police will be upheld. If I am not satisfied, I may order that further searches be conducted.

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]. In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

I adopt the approach taken in the above orders for the purposes of the present appeal.

As I have been provided with different information regarding two time periods included in this request, I will review these two time periods separately.

1) Notebook entries from November 2007 to June 2008

The primary focus of the adequacy of the search issue for records in this appeal relates to records covering the period of November 2007 to June 2008. Early in this appeal the appellant identified his concerns about responsive records covering this period, and the issue was addressed in mediation.

The Police have identified that, during mediation, the notebooks for the named officer for that period were "reviewed in their entirety." As a result of that review, two additional responsive notebook entries were located. The Police also confirm that "all relevant memobooks" for this time period were hand-delivered to the Freedom of Information office by the named detective and were "scrupulously reviewed" by an individual in the Freedom of Information office.

Although the appellant believes additional records ought to exist, and is concerned that the two additional responsive notebook entries were only located after the notebooks were provided to the Freedom of Information office, the appellant does not provide any additional evidence that additional records exist.

In the circumstances, based on the information provided by the Police regarding the fact that they obtained copies of the notebooks from the named detective and searched for responsive records, and because the appellant has not provided me with sufficient evidence to support a finding that additional searches ought to be conducted, I am satisfied that the Police's search for records covering the period of time from November 2007 to June 2008, was reasonable.

2) Notebook entries from September 13, 2007 to October 25, 2007

As identified above, the Police provided me with a complete copy of the named detective's notebooks covering the period of time from September 10, 2007 to October 25, 2007. I have carefully reviewed these notebook entries. Although the appellant is not named in any of these

notebook entries, there is a brief reference on page 7 of the notebook entries to the occurrence number identified by the appellant in his request. In my view, this brief entry (as well as information relating to the date, etc. of this entry), is responsive to the request, and I will order the Police to make an access decision regarding access to this information.

Based on my review of the remaining notebook entries, I am satisfied that the Police's search for records for the time period from September 13, 2007 to October 25, 2007 was reasonable.

ORDER:

1. I order the Police to issue a decision letter to the appellant in accordance with the requirements of the *Act* regarding access to the information relating to the item on page 7 of the notebook entries recently provided to me. The Police are to consider the date of this order as the date of the request.

2. I uphold the decision of the Police to deny access to the portions of the record on the basis of the exemptions in section 38(a) and 38(b).

3. I uphold the decision by the Police to decline the appellant's request to view the original February 14, 2008 notebook entries responsive to this request.

4. I find that the other searches conducted by the Police for responsive records were reasonable.

Original signed by: February 22, 2011
Frank DeVries
Adjudicator