

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2658

Appeal MA10-389-2

London Police Services Board

October 19, 2011

Summary: The appellant sought access to records relating to two incidents which occurred on a specified date, in which the police were called to the appellant's residence. The police granted access to many of the responsive records and, on the basis of section 38(b), denied access to small portions of the records which contained the information of two affected parties. The withheld information contains the personal information of the affected parties, and the police decision to deny access to the withheld portions of the records is upheld. In addition, the police's search for records is found to be reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1), 14(1)(a) and (f), 14(2)(h), 14(3)(b), 17, and 38(b)

OVERVIEW:

[1] Officers from the London Police Service were called to the appellant's home on more than one occasion on a specified date in April of 2010 because of incidents that occurred at that address.

[2] The appellant subsequently made an access request to the London Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

On [the specified date in April], [the police were] called to my residence on 2 separate occasions. I am requesting under the Freedom of

Information Act, any and all available information, including names and badge #s, of all police officers involved in both incidents.

On [another specified date in May, 2010] [the police were] called to my residence. I am requesting any and all information, including names and badge #s of police involved on this occasion as well.

[3] Before responding to the request, the police notified a number of individuals whose interests may be affected by the disclosure of the records (the affected parties) of this request in accordance with section 21(1) of the *Act*, and sought their views regarding disclosure of the responsive records. Three parties consented to the release of their information, and one affected party did not provide consent.

[4] The police then issued an access decision to the appellant, granting access to portions of the records responsive to the first part of the request, and denying access to other portions on the basis of a number of exemptions under the *Act*. The police also stated that some portions of the records were not responsive to the request. The appellant appealed the police's decision.

[5] During mediation, the police located several additional records (police officers' notes) and issued a supplementary access decision disclosing portions of these records, and denying access to the remaining parts on the basis of identified exemptions. Also during mediation, the appellant confirmed that she is only appealing the denial of access to the information withheld under the personal privacy provisions in sections 38(b) and 14(1) of the *Act* in the withheld portions of pages 14, 15, 19, 24, 28, 32, 33, and 36 of the records.

[6] Also during mediation, the mediator contacted two affected parties identified in the records. These two parties did not consent to the disclosure of information relating to them.

[7] Furthermore, during mediation, the parties confirmed that issues relating to the second part of the request (the incident in May of 2010) were being addressed in a separate appeal, and any records relating to the second specified date are not at issue in this appeal. However, the appellant maintained that additional records responsive to the first part of the request exist, including records relating to an additional incident on that date, as well as notes of certain police officers who the appellant believes were in attendance on that date. As a result, the reasonableness of the search for records conducted by the police was added as an issue in this appeal.

[8] During the inquiry into the appeal, I sought and received representations from the police and from the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] In the discussion that follows, I reach the following conclusions:

- the records contain the personal information of the appellant and other identified individuals;
- the withheld portions of the records qualify for exemption under section 38(b); and
- the searches conducted for responsive records were reasonable.

RECORDS:

[10] The records remaining at issue consist of the withheld portions of General Occurrence reports and police officer's notebooks, consisting of portions of pages 14, 15, 19, 24, 28, 32, 33, and 36.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?
- C. Did the institution conduct a reasonable search for records?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[11] 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;

[12] The police state that the records at issue contain the personal information of the appellant as well as that of other identified individuals. They state:

The [police] investigated several incidents involving the appellant. During each incident, the [police] spoke to the appellant and other affected parties. Information such as addresses, telephone numbers, and dates of births, gender and statements were collected from these individuals. Clearly, the records at issue contain the personal information of several identifiable individuals, including the appellant.

[13] The appellant does not address this issue.

[14] On my review of the records, I find that all of the records contain the personal information of the appellant, as they include information relating to the incidents involving her, as well as other personal information about her (paragraph (h) of the definition).

[15] I also find that the withheld portions of 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)]. Specifically, I find as follows:

- the sentence severed from the bottom of page 14 and the top of page 15 contains information which would reveal the identity of an affected party;
- the information severed from page 19 contains the name, address, telephone number and statement made by an affected party, and disclosure of the statement would reveal the identity of the affected party;
- the sentence severed from page 24 contains information which would reveal the identity of an affected party;
- the information severed from page 28 contains the name, address, telephone number and brief statement made by an affected party, and disclosure of the statement would reveal the identity of the affected party;
- the information severed from the bottom of page 32 and the top of page 33 contains the name, address, telephone number and information given by an affected party, and disclosure would reveal the identity of the affected party;
- the information severed from page 36 contains the name and a brief statement made by an affected party, and disclosure would reveal the identity of the affected party.

B. Does the discretionary exemption at section 38(b) apply to the information at issue?

[16] 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.

[17] In determining whether the exemption in section 38(b) applies, sections 14(1), (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. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

Section 14(1)(a)

[18] Section 14(1)(a) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[19] In this case the police contacted a number of affected parties in an attempt to obtain consent to release their personal information. Some affected parties consented, and their information was disclosed to the appellant. Consent was not obtained from one affected party. Also, as identified above, during mediation the mediator contacted two affected parties, and again consent to the release of their personal information was not obtained.

[20] As a result, I find that section 14(1)(a) does not apply to the information remaining at issue, as the affected parties whose information is at issue did not consent to the disclosure of the information relating to them.

Section 38(b)

[21] Section 38(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy

[22] The police state that section 38(b) applies to the information remaining at issue. They also refer to the factor in section 14(2)(h) and the presumption in section 14(3)(b) in support of their decision.

[23] Section 14(2)(h) reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information has been supplied by the individual to whom the information relates in confidence;

[24] The police state:

... a reasonable assumption by any individual involved/interviewed by police, is that the information they are supplying to the police in relation to an investigation is supplied in confidence and will not be disclosed.... The [police] must be able to maintain the trust bestowed upon us by the public to protect the personal information we obtain from them during investigations....

[25] Section 14(3)(b) 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;

[26] The police state:

The police attended several incidents involving the appellant. As a result of the investigations, the police did not lay any criminal charges. Although the incidents did not result in charges, this does not negate the fact the police responded to calls for service and are ... prepared to investigate violations of the law

[27] The appellant does not address this issue in her representations. However, in earlier material provided to this office she refers to the reasons why she wishes to access the information. These reasons include her interest in obtaining the records to use in other processes, and also her concern about the accuracy of the withheld information.

Findings

[28] I have carefully reviewed the withheld portions of the records. I note that many of the responsive records have been disclosed to the appellant, and that the withheld portions consist of brief severances to the records. As indicated above, all of the withheld portions contain the personal information of identifiable individuals other than the appellant. Furthermore, disclosure of the severed portions of the records would reveal the identity of the affected persons to whom the information relates.

[29] The portions of the records which the police claim qualify for exemption under section 38(b) include the identity, address, telephone number and brief statements made by the affected parties.

[30] 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). In addition, I am satisfied that the personal information contained in the withheld portions of the records has been supplied to the police in confidence by the affected parties whose information it is.

[31] Because the factor in section 14(2)(h) and the presumption in section 14(3)(b) apply to the withheld information, I am satisfied that the disclosure of this information would constitute an unjustified invasion of the personal privacy of the affected parties. Accordingly, I find that the withheld portions of the records are exempt from disclosure under section 38(b) of the *Act*, subject to my review of the police's exercise of discretion.

Exercise of Discretion

[32] The section 38(b) exemption is discretionary and permits 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).

[33] In their representations, the police acknowledge that section 38(b) introduces a balancing principle, and that the records contain both the personal information of the affected parties, and the personal information of the appellant. The police then state that they weighed the appellant's right of access to the information with the privacy protection of the affected parties, and that the affected parties' personal privacy outweighs the right of access by the appellant for the brief portions of the records that were withheld.

[34] 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 to the appellant the remaining information contained in the records.

[35] Accordingly, I find that the withheld portions of the records qualify for exemption under section 38(b).

C. Did the institution conduct a reasonable search for records?

Introduction

[36] 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.

[37] 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).

[38] I agree with Acting-Adjudicator Jiwan's statement.

[39] 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.

[40] 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

[41] As identified above, the portion of the request at issue reads:

On [the specified date in April], [the police were] called to my residence on 2 separate occasions. I am requesting under the freedom of

information act, any and all available information, including names and badge #s, of all police officers involved in both incidents.

[42] As indicated above, the police located responsive records and issued a decision letter. During mediation, the appellant took the position that additional responsive records exist, in particular, the notebook entries of some of the officers mentioned in the records. The police subsequently located several police officers' notes and issued a supplementary access decision disclosing, in part, the notes of three named police officers. The police also advised that one additional officer did not have any responsive notes. The police forwarded to this office a copy of this officer's notebook for the date in question, showing that none of this officer's notes recorded on the identified date contained responsive information.

[43] The police took the position that no further responsive records exist. The appellant maintained that further records do exist, including records relating to a third incident on the date identified in the first part of her request, and the police notes of certain police officers who the appellant believes were in attendance on that date. The appellant also confirmed that she was not taking issue with the searches conducted for any records relating to other incidents which had occurred on other dates, including the day following the date of the incidents.

Representations

[44] I invited the parties to provide representations on the reasonableness of the searches conducted by the police.

[45] The police take the position that they conducted a reasonable search for responsive records. They state:

... no record exists for a third incident on the identified date. The appellant originally requested access to two incidents [on the date]. Both of these records were located and were included in the initial decision issued by the police.

[46] The police also state that during mediation the appellant identified that a record relating to a third incident on the identified date should exist. As a result of this claim, the police indicate that, during mediation, further searches were conducted by the Freedom of Information Analyst, and by the Freedom of Information Coordinator, and that these searches did not locate any records relating to a third incident on the identified date. The police also identify that these additional searches were documented and that, after further communication with the mediator, the coordinator conducted an additional search, which also failed to locate any responsive records. The police then state:

The search for the additional record for [the identified date] has been exhausted. The other records at issue are duty book notes. The appellant took issue with the existence of duty book notes for two female officers who were to have attended at this third call on [the identified date]. As no record exists for that third call, no duty book notes exist either. The appellant also took issue with duty book notes for two other officers relating to the [reports for the identified date] that were released to her. The first officer in question, has no record in their duty book. A search was conducted by [the Freedom of Information Analyst] by way of physically receiving and reviewing the duty book. No record exists. The second officer in question, as named by the appellant, was contacted by [the Freedom of Information Analyst] and it was confirmed this officer did not attend this call; the officer was off duty at that time and therefore has no duty book notes. No record exists.

[47] The representations of the police were shared with the appellant. In response, the appellant refers to a CPIC search which was conducted on the appellant on the date following the identified date. The appellant also identifies that she obtained a copy of the CPIC search results in another proceeding, and that she wishes to have certain information corrected. She also provides me with a copy of the results of the CPIC search.

Findings

[48] 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.

[49] 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.

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

[51] In this appeal, the police located records relating to the two incidents which occurred on the identified date, and subsequently located the police officers' notes relating to those incidents. When the appellant indicated her belief that an additional incident occurred on that date, the police conducted further searches. These searches were conducted by different individuals at the Freedom of Information office of the police, and occurred on different dates. The police also contacted certain named officers and confirmed that these officers were not involved in incidents relating to the appellant on the specified date. Furthermore, the police confirm that there was no third call or incident involving the appellant on the identified date.

[52] The appellant's representations do not provide additional information about a third incident on the identified date. The information provided by the appellant in her representations relates to a CPIC entry which she obtained. I note that this CPIC entry, which the appellant provided to me, is dated the day following the identified incident date.

[53] In the circumstances, based on the information provided by the police regarding the searches conducted and the explanations provided, 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 responsive to the request was reasonable.

ORDER:

I uphold the decision of the police, and dismiss this appeal.

Original signed by: _____
Frank DeVries
Adjudicator

_____ October 19, 2011