Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2678

Appeal MA09-441

Waterloo Regional Police Services Board

December 20, 2011

Summary: The appellant sought access to all police records relating to a break-in at an identified school on a specified date. The police initially denied access to the records, though they subsequently granted partial access to them. The appellant filed an appeal, seeking access to the withheld records. During the mediation of the appeal, the appellant advised that he was no longer seeking access to those portions of the records which were denied access. The appellant appealed on the basis that further records exist. He also sought access to the film used in the investigation to lift a fingerprint from the school premises if it exists. Consequently, the remaining issues in this inquiry were whether the film that lifts a fingerprint is considered to be a responsive record and whether the police conducted a reasonable search. In this order, the adjudicator concluded that the film that lifts a fingerprint is a responsive record. In addition, the police's search is not found to be reasonable. The police are ordered to conduct a further search for fingerprint film(s) and to issue a decision letter to the appellant following the search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of "record"), 17.

Orders Considered: M-937, MO-1390, MO-1943, P-880, P-1551.

OVERVIEW:

[1] This order disposes of the issues raised from an appeal of an access request made to the Waterloo Regional Police Services Board (the police) under the *Municipal*

Freedom of Information and Protection of Privacy Act (the *Act*) for all records, documents and forensics, including fingerprint evidence, relating to a break-in at an identified school on a specified date.

[2] The police identified records responsive to the request and denied access to them, in their entirety, relying on the discretionary exemptions in sections 8(1)(d) and (l) (law enforcement) and the mandatory exemption in section 14(1) (invasion of privacy).

[3] The requester (now the appellant) appealed the decision to this office.

[4] During the mediation of the appeal, the police issued a second decision letter granting partial access to one of the responsive records, as they had received written consent from an affected party to disclose their personal information. The police relied on section 38(a) (refusal to disclose requester's own information), in conjunction with sections 8(1)(c), (d) and (l) (law enforcement) and 38(b) (personal privacy), to deny access to the portions of the record they withheld. After reviewing the records, the appellant advised the mediator that further responsive records should exist and also requested that the mediator obtain the consent of a second affected party to the release of their personal information.

[5] The second affected party subsequently provided consent to the release of some of their personal information. After the consent was received by the police, they conducted a further search and located additional responsive records. The police subsequently issued a third decision letter, granting partial access to the additional records, relying on sections 38(a) (refusal to disclose requester's own information) in conjunction with sections 8(1)(c), (d) and (f) and 38(b) (personal privacy), to deny access to the portions of the records they withheld.

[6] Upon reviewing the disclosed information, the appellant maintained his position that further responsive records should exist. Specifically, the appellant asserted that there should be a statement from the school's caretaker, as well as fingerprint evidence. In particular, the appellant argues that the film used to lift fingerprints from a window at the school is a responsive record. The police advised that no statement from a caretaker existed and that all the responsive forensic evidence had been disclosed to the appellant. The police advised the mediator that they did not consider the film that lifts a fingerprint from a crime scene to be a responsive record.

[7] The appellant advised that he is not pursuing access to the remaining withheld information, but takes issue with the adequacy of the police's search for responsive records and their position that the film that lifts a fingerprint is not a responsive record. Accordingly, the application of the exemptions claimed by the police and access to the information that the police withheld under those exemptions are no longer at issue in the appeal.

[8] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry.

[9] The adjudicator assigned to this appeal sought and received representations from the police and the appellant, which were shared in accordance with the IPC's *Practice Direction 7*.

[10] The appeal was then transferred to me to make a final disposition. For the reasons that follow, I find that the film that lifts a fingerprint from a crime scene is a responsive record, and I do not uphold the police's search with respect to the fingerprint film. I order the police to conduct a further search for fingerprint film(s) and to issue a decision letter to the appellant with respect to the fingerprint film(s).

ISSUES:

A. What is the scope of the request? What records are responsive to the request?

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

DISCUSSION:

A. What is the scope of the request? What records are responsive to the request?

[11] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
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> (a) make a request in writing to the institution that the person believes has custody or control of the record;
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> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
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> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] As stated above, the appellant's access request was for "all records/documents/forensics (including fingerprint evidence)" relating to a break-in at a named school on a specified date. During the mediation of this appeal, the appellant advised the mediator that he was seeking access to the film used by the police to lift a fingerprint from a particular window at the school. In turn, the police advised the mediator that they do not consider the film that lifts a fingerprint to be a responsive record.

[13] In their representations, the police submit that access was granted to officer notes, the occurrence report, witness statements and the forensic report. Physical evidence, the police argue, was not released nor considered to be responsive to the request. Physical evidence, the police submit, is used during prosecutions and is available to the charged person for examination. Upon conviction, the individual found guilty may seek an appeal, which, if granted, would permit further examination of the evidence.

[14] The police also submit that they are concerned that the inclusion of "evidence" as part of a freedom of information request could lead to the police having to provide DNA samples, blood samples, and semen samples, or physical objects used in the commission of a crime, such as a weapon.

[15] The appellant submits that, according to the police records, there had been an event at the school the weekend prior to the break-in, with approximately 300 people attending and that, during the event, items were passed in and out of a particular window at the school. The appellant argues that the police records go on to say that as a result of all of the activity around the window, the police did not "process" the window for fingerprints.

[16] The appellant states:

> The report, by ... the responding officer, indicates that, at first, there should be countless fingerprints on the window and throughout the premises, given the number of people who had access to the building. His report also indicates that no forensics were done on the window. That being the case, there should either be NO fingerprints at all because no one "processed" the window or there should be fingerprints from a large number of people. Yet, the "evidence" from the police at trial is that the ONLY fingerprints found throughout the entire school were [an affected party's].

[17] In the circumstances of this appeal, I must determine whether the film that lifts a fingerprint at a crime scene is a responsive record. My finding will require a two-part analysis. The first part of the analysis is whether a fingerprint film is a "record," as

defined in the *Act*. The second part of the analysis is whether, if it is found to be a "record" as defined in the *Act*, a fingerprint film is responsive to the appellant's request.

[18] Section 2 of the *Act* specifically defines a "record" as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
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> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, **a film**, a microfilm, a sound recording, a videotape, a machine readable record, **any other documentary material, regardless of physical form or characteristics**, and any copy thereof, and [emphasis added]
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

[19] The definition of a "record" has been construed broadly by this office in past orders. For example, in Order M-893 Inquiry Officer Anita Fineberg held that the use of the word "includes" in the definition demonstrates that the types of documents described are not exhaustive, but provide examples of "records" for purposes of the *Act*. In addition, Inquiry Officer Fineberg also held that once information is "recorded information" it meets the definition of a "record" as set out in the *Act*.

[20] In addition, previous orders of this office have made findings with respect to exemptions, which were claimed for responsive records, including fingerprint evidence.[1]

[21] In their representations, the police state that they are concerned that access to a film that lifts a fingerprint will result in future requests for, and access to, physical evidence such as DNA samples, blood samples, semen samples and weapons. However, in this appeal the appellant has not made a request for the actual fingerprints, if any, that were present on the window at the school. In other words, the appellant has not requested access to the window on which fingerprints may have been found. The appellant is requesting access to the recorded information, if any, concerning the fingerprints.

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[1] Orders M-937, P-1551, MO-1390 and MO-1943.

[22] The police have not provided any evidence that, or an explanation why, the film that lifts a fingerprint is not a "record of information however recorded" as set out in the definition of a "record," in section 2(1) of the *Act* other than to state that they are of the view that it is not a responsive record.

[23] Therefore, in the circumstances of this appeal, applying the definition of a "record" broadly, and in the absence of evidence from the police to the contrary, I find that the film that lifts a fingerprint is a "film" or "any other documentary material, regardless of physical form or characteristics," and, consequently, is a "record" as defined in part (a) of the definition of a record in section 2(1) of the *Act*.

[24] I also note that, with respect to the police's position that an accused individual can access physical evidence prior to their trial, the disclosure of evidence that takes place in the context of a criminal trial does not usurp or preclude the application of the *Act* to a freedom of information request. The two regimes exist concurrently.[2]

[25] Having found that a fingerprint film is a "record," as defined in the *Act*, I will consider whether the fingerprint film is responsive to the appellant's request. As stated above, the appellant's access request was for "all records/documents/forensics (including fingerprint evidence)" relating to a break-in at a named school on a specified date.

[26] Previous orders of this office have established that to be responsive, a record must be "reasonably related" to the request. In Order P-880, former Adjudicator Anita Fineberg stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request. (See also Order P-1051)

[27] Adjudicator Fineberg also made the following general statement regarding the approach an institution should take in interpreting a request, which was cited with approval by Commissioner Ann Cavoukian in Order PO-1730:

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[2] Section 51(1) of the *Act*.

> ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

[28] In addition, as identified by Adjudicator Fineberg in Order PO-880, the request itself "sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request." Accordingly, the request itself must be reviewed to determine its parameters.

[29] I have reviewed the request and the representations of the parties and I find that fingerprint films are not only reasonably related to the appellant's request, which was for all records, documents and forensics of fingerprint evidence taken as part of the investigation of the break-in at the school, but are directly related to the request. Consequently, I will order the police to issue an access decision with respect to the fingerprint film(s).

Issue B: Did the institution conduct a reasonable search for records?

[30] 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.[3] 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.

[31] 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.[4] To be responsive, a record must be "reasonably related" to the request.[5]

[32] 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.[6]

[33] 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.[7]

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[3] Orders P-85, P-221 and PO-1954-I.
[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Orders M-909, PO-2469, PO-2592.

[34] The police submit that they conducted a reasonable search. Upon receipt of the request, an experienced and trained records clerk in the records branch of the police department completed the first search for the occurrence report. This first search took three minutes and the records were provided to the FOI unit. The appellant was denied access to these records.

[35] The police also state that during the mediation of this appeal, the mediator brought to the FOI co-ordinator's attention the fact that the appellant was of the view that records were missing. During discussions with the mediator, the police conducted a "quick search" of their electronic system and discovered that there were additional records responsive to the request. The police state that they concluded that an error had been made during the initial search and, as a result, the FOI co-ordinator requested a complete search of all records responsive to the request and directed the FOI unit to treat this as a new request, to ensure that a thorough search would be conducted.

[36] As a result of the second search, additional records were located and disclosed, in part, to the appellant by way of the third decision letter.

[37] The police state that they are confident that the records that have been produced are the complete records responsive to the request. With respect to the appellant's belief that there should be a statement from the school's caretaker, the police submit that a search was conducted in their electronic systems and in the officer's notebooks, but that no witness statement from the caretaker was located.

[38] The police submit that officers keep the original copy of witness statements they compile and then either send a copy to the records department or dictate the content of the statement into the police's system. Therefore, the police argue, any time a witness statement is taken, there would be at least one hard copy along with the dictated version or two hard copies of the statement. In this case, the police submit, they have conducted two searches and have not located any statements made by the school's caretaker either in hard copy or dictated form.

[39] The police suggest that it is possible that the caretaker may have made a statement to someone other than the police, such as directly to the Crown Attorney after the police investigation was concluded.

[40] The police also submit that fingerprint evidence was "never sought," as it was not considered a record responsive to the request.
The appellant submits that he has requested a copy of any statement made by the school's caretaker, but that the police have been "unwilling" to disclose it to him.

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[7] Order MO-2246.

[41] With respect to fingerprint evidence, the appellant submits that there should have either been no fingerprint evidence, as the window was not "processed," or fingerprint evidence from a large number of people.

[42] As previously stated, during the mediation of the appeal, the appellant took the position that a further responsive record ought to exist, specifically a witness statement made by the school's caretaker. However, in his representations, the appellant has provided no evidence about the manner and nature of the searches conducted by the police for the witness statement, other than to say that he believes that the statement exists and has been withheld from him by the police.

[43] I have carefully reviewed the representations provided by the parties on this issue, and based on the representations received from the police, I am satisfied that the second search for the witness statement conducted by the police was reasonable in the circumstances of this appeal.

[44] However, I find that the search for fingerprint evidence, including fingerprint film(s) was not reasonable. While the police corrected their initial error by conducting a second search for records, as stated in their representations, they did not conduct a search at any time for fingerprint evidence, including fingerprint film(s), which I have found to be responsive to the request.

[45] Therefore, I will order the police to conduct a further search for fingerprint evidence, including fingerprint film(s) and to provide the appellant with an access decision should any such records be located.

ORDER:

1. I order the police to conduct a further search for fingerprint evidence, including fingerprint film(s).

2. I order the police to issue a decision letter to the appellant with respect to fingerprint film(s) treating the date of this order as the date of the request.

Original signed by: December 20, 2011
Cathy Hamilton
Adjudicator