

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2732

Appeal MA11-396

Peel Regional Police Services Board

May 14, 2012

Summary: The appellant requested records pertaining to a specified incident. The police denied access to the records in their entirety pursuant to sections 14(1) and 38(b). The appellant appealed the denial of access and also believed that additional records should exist. The police were ordered to disclose portions of two records. The decision of the police to withhold the remaining records was upheld, as was its search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1), 2(2.1) (definition of personal information), 14(1)(f), 14(3)(b), 14(3)(d), 17, 38(b).

OVERVIEW:

[1] The appellant submitted a request to the Peel Regional Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a police officer's hand-written notes relating to a specified incident. The appellant provided the police with the occurrence report number and a police officer's name.

[2] The police located responsive records and issued a decision in which they denied access to them pursuant to the discretionary exemption at section 38(b) and the mandatory exemption at section 14(1)(f) (personal privacy), with reference to the presumption at section 14(3)(b) of the *Act*.

[3] The appellant appealed the decision.

[4] During the mediation stage of the appeal process, the appellant indicated that, in addition to the records that were denied, he was seeking access to an officer's notes on a different specified date when the police attended at his home, which the appellant believes relates to the incident in question. The police advised the mediator that there is no record of the police attending the appellant's home on that date and any other date relating to the incident identified by him, and therefore, no records exist.

[5] The appellant confirmed that he continues to appeal the exemptions cited in the decision letter, and he also takes issue with the reasonableness of the search conducted for the information regarding a police visit to his home.

[6] No further mediation was possible and the file was forwarded to the adjudication stage of the appeal process. During the inquiry into this appeal, I sought and received representations from the police and the appellant. The representations submitted by the police were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. The appellant did not submit representations in response to the Notice of Inquiry.

RECORDS:

[7] The records at issue consist of an "occurrence details" report, an incident history for that occurrence and an officer's notes. The search issue relates to any other records that may exist in relation to a police visit to the appellant's home on a specified date.

ISSUES:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

Issue B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

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

DISCUSSION:

A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

[10] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[11] 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.²

[12] 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.³

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[14] The police take the position that the records contain the personal information of individuals other than the appellant and include names, addresses, ages, dates of birth and telephone numbers, as well as statements made by these individuals. The police acknowledge that the records also contain the appellant's personal information, but submit that the information contained in the records is not severable for the following reasons:

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

A disclosure of information to the appellant could only take the form of providing his name and other personal identifiers already known to the appellant on template. It is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. A valid severance must provide a requester with information that is responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption. Because the appellant is not referenced in the record in a way that would provide any information of value, access to the record was denied.

[15] Having reviewed the records and considering the submissions made by the police, I make the following findings:

- Apart from page 1 of the police officer's notes, the records all contain the personal information of identifiable individuals other than the appellant, including their names, addresses, telephone numbers and other personal identifiers, as well as their statements to the police. The majority of the information in the records falls in this category;
- With the exception of page 1 of the police officer's notes, the records also contain references to the appellant, which qualifies as his personal information;
- Page 2 of the occurrence details report contains information that pertains only to the appellant, including his name and address. I find that this information is severable from the other information in the records. Contrary to the position taken by the police, I do not find this information to contain disconnected words and phrases. The information is a coherent whole that identifies the appellant in the context of a police investigation. As the information on page 2 of the occurrence details report pertains only to the appellant, sections 14(1) and 38(b) cannot apply to it. Accordingly, as no other exemptions have been claimed for this portion of the records, it should be disclosed to the appellant;
- The remaining information in the records pertaining to the appellant is intertwined with the personal information of other identifiable individuals and is not severable. As a result, I will determine whether this information is exempt under section 38(b);
- Page 1 of the police officer's notes, which is a cover page prepared by the police officer who made the notes, pertains only to the police officer. Apart from one reference on the record regarding his years of service, which constitutes his personal information, I find that the remaining

information pertains to the officer in his professional capacity as it contains his name, rank and refers to his professional duties. As no other exemptions have been claimed for this record, I find that the record should be disclosed to the appellant, with the exception of the reference to the officer's years of service. As this record does not contain the appellant's personal information, I will determine whether the small portion containing the police officer's personal information is exempt under section 14(1).

Issue B: Does the mandatory exemption at section 14(1) or 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 exemptions from this right.

[17] 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.

[18] 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. See below for a more detailed discussion of the exercise of discretion issue.

[19] Under section 14, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

[20] In both these situations, sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

[21] The police submit that the presumption in section 14(3)(b) applies to all of the records at issue. It appears that section 14(3)(d) also applies to the police officer's years of service. These sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) 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;

...

(d) relates to employment or educational history;

Section 14(3)(b)

[22] 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.⁵ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁶

[23] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.⁷

[24] The presumption can apply to a variety of investigations, including those relating to by-law enforcement [Order MO-2147] and violations of the Ontario Human Rights Code.⁸

[25] The police submit that the records were completed as part of the investigation into a possible violation of law. Based on my review of the records, I agree that they all pertain to an investigation conducted by the police into certain allegations of wrongdoing that fall within the *Criminal Code of Canada*. Accordingly, I find that the presumption in section 14(3)(b) applies to all of the information remaining at issue, and they qualify for exemption under the discretionary exemption at section 38(b), subject to my findings under the exercise of discretion.

Section 14(3)(d)

[26] The reference to the years of service of the officer who attached his notes relates to his employment history and, therefore, falls within the presumption in section 14(3)(d). Accordingly, I find that the reference to the years of service of the officer is exempt under the mandatory exemption at section 14(1).

⁵ Orders P-242 and MO-2235.

⁶ Orders MO-2213, PO-1849 and PO-2608.

⁷ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

⁸ Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.

Exercise of discretion

[27] 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.

[28] 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.

[29] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ This office may not, however, substitute its own discretion for that of the institution.¹⁰

[30] In their representations, the police note that the information in the records pertains primarily to the affected parties, with only peripheral references to the appellant. In particular, the police state that, “[n]one of the substance of the record as requested by the appellant relates to the appellant.”

[31] The police indicate further that it is their view that the appellant is specifically seeking information about the other identifiable individuals; information which falls within the presumption at section 14(3)(b). In the circumstances of this appeal, the police submit that in balancing the rights of the appellant and the affected parties, his right to access, given the limited references to him in the records, should not take precedence over the privacy rights of the affected parties.

[32] I find that the police have properly exercised their discretion to withhold the information under section 38(b), taking into account relevant considerations and not considering irrelevant considerations. Accordingly, I find that, except for the information that contains only the personal information of the appellant, as identified above, the remaining information in the records is exempt under section 38(b).

[33] For clarity, I will highlight the non-exempt information on page 2 of the occurrence details in yellow and the exempt information on page 1 of the officer’s notes in green on the copies of these records that I will provide to the police along with this

⁹ Order MO-1573.

¹⁰ section 43(2).

order. The portions highlighted in yellow should be disclosed to the appellant and the portion highlighted in green should be withheld.

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

[34] 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 17.¹¹ 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.

[35] 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.¹² To be responsive, a record must be "reasonably related" to the request.¹³

[36] 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.¹⁴

[37] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.¹⁵

[38] 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.¹⁶ During mediation, the appellant indicated that police came to his home on a specified date in June, 2010 (which is a date prior to the matter referred to in this order). He indicated that they were not in uniform and that they arrived in a beige-coloured car. Also during mediation, the police conducted a further search for records pertaining to this date and contacted all of the officers involved in the original matter. The officers all confirmed that they did not attend the appellant's home.

[39] A requester's lack of diligence in pursuing an access 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.¹⁷ Apart from the

¹¹ Orders P-85, P-221 and PO-1954-I.

¹² Orders P-624 and PO-2559.

¹³ Order PO-2554.

¹⁴ Orders M-909, PO-2469, PO-2592.

¹⁵ Order MO-2185.

¹⁶ Order MO-2246.

¹⁷ Order MO-2213.

above information provided by the appellant during mediation, the appellant has not provided any further evidence to establish that the police attended his home in June, 2010.

[40] In their representations, the police take the position that:

[a] detailed search by a qualified staff was made and that all records relating to the requested occurrence was gathered as well as all officer notes and related information. This search was conducted on the name provided by the appellant and the Occurrence number provided...

[41] The police indicate that a search was conducted of its Records Management Systems by an experienced police officer and that all of the officers involved in the investigation were contacted and confirmed that they had no contact with the appellant regarding the investigation in question, and that they had no additional records pertaining to him.

[42] As I noted above, during mediation the police conducted a further search for records pertaining to the appellant for the June, 2010 date he provided, and no responsive records were located.

[43] As I indicated above, the *Act* does not require the police to prove with absolute certainty that further records do not exist. Rather, the police are only required to provide sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records. Based on the representations submitted by the police and the details provided by the appellant of the date he believes the police came to his home, I am satisfied that the police have conducted a reasonable search for responsive records. The search was conducted by experienced staff in the locations that records would reasonably be expected to be located. In addition, the police contacted the individuals involved in the matter, who all confirmed that they did not have contact with the appellant. Accordingly, I find that the search conducted by the police was reasonable and this part of the appeal is dismissed.

ORDER:

1. I order the police to provide the appellant with a severed copy of page 2 of the occurrence details and page 1 of the police officer's notes by **June 19, 2012** but not before **June 14, 2012**. I have highlighted the non-exempt information on page 2 of the occurrence details in yellow and the exempt information on page 1 of the officer's notes in green on the copies of these records that I am providing to the police along with this order. The portions highlighted in yellow should be disclosed to the appellant and the portion highlighted in green should be withheld.

2. I uphold the decision of the police to withhold the remaining records from disclosure.
3. The search conducted by the police for responsive records was reasonable and this part of the appeal is dismissed.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the police of provide me with a copy of the records that have been disclosed in accordance with order provision 1.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ May 14, 2012