Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3203

Appeal MA13-490

Toronto Police Services Board

May 27, 2015

Summary: The appellant requested records pertaining to a specified incident. The Toronto Police Services Board identified responsive records and granted partial access to them. The police relied on section 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(c), 8(1)(i) and 8(1)(l) (law enforcement) and 38(b) (personal privacy) of the *Act*, to deny access to the portion they withheld. In the course of mediation and adjudication a number of matters were resolved, leaving only the reasonableness of the police's search for responsive records and the withheld portion of a page of the records that the police claimed was exempt under section 8(1)(i) at issue in the appeal. This order upholds the reasonableness of the police's search for responsive records, but finds that section 8(1)(i) does not apply to the withheld information at issue. The police are ordered to disclose the withheld information at issue to the appellant.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 8(1)(i) and 17.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 3.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for

access to information pertaining to an incident involving the requester. In particular, the requester sought access to:

> All police records, including internal and external communications, officers notes (identified police officers) and correspondence with [specified University], related to [a specified file number] (this should be the incident number) at the 53rd division, Toronto Police. This is an incident I reported, as a victim of the incident.

[2] After issuing a fee decision, and receiving payment, the police issued an access decision in which they granted partial access to the records identified as responsive to the request. The police relied on sections 38(a) (discretion to refuse access to requester's own information), in conjunction with sections 8(1)(c), (i) and (l) (law enforcement), as well as section 38(b) (personal privacy) to deny access to the portions they withheld. In addition, the police advised the requester that:

> … [regarding] correspondence with [an identified police officer] of 53 Division, access to some investigative notes cannot be granted as they were destroyed in a water leak that occurred at the division. In addition, some emails were not retained when Toronto Police Service changed email services.

[3] The requester (now the appellant) appealed the police's decision. As set out in correspondence from the appellant to this office, she took issue with the denial of access to certain information, and also asserted that additional records ought to exist. Accordingly, the adequacy of the police's search for responsive records was added as an issue in the appeal.

[4] At mediation, the appellant advised that she was not taking issue with the police's characterization of certain withheld information being non-responsive to the request or to the police withholding the police codes contained in the records. She also advised the mediator that she is not pursuing access to the personal information of two identifiable individuals that appear in the records or to any references to her current husband. Accordingly, all of this information is no longer at issue in the appeal. She continued to maintain her request for access to certain other withheld information and her position that other responsive records ought to exist.

[5] In an effort to address some of the appellant's concerns with respect to the adequacy of their search, the police agreed to conduct a further search for responsive records in the Office of the Chief. The police located additional responsive records and in a supplementary decision letter granted the appellant access to them, in full.

[6] As set out in the Mediator's Report, however, the appellant was not satisfied with the results of the additional search and indicated that additional records ought to exist.

[7] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I commenced my inquiry by sending the police a Notice of Inquiry setting out the facts and issues in the appeal. The police provided responding representations in which they advised that they had located additional records and disclosed them to the appellant. The police also confirmed that the appellant was not seeking the personal information of two identifiable individuals that appear in the records or to any references to her current husband. In addition, they advised that they were no longer relying on certain claimed sections of the *Act* and that they were disclosing the withheld portions of pages 31 and 32 to the appellant. Finally, the police advised that page 39 "was addressed by the institution". Accordingly, only access to the withheld portion of page 38 of the responsive records remained at issue in the appeal. I then sent a Notice of Inquiry to the appellant along with the police's representations.

[8] In the Notice of Inquiry I wrote:

> I have reviewed Record 38 and in my opinion it does not contain the personal information of the appellant or any other identifiable individual. As a result, the application of the discretionary exemptions at sections 38(a) and (b) of the *Act* is no longer at issue in this appeal.

[9] The appellant provided responding representations. They included a copy of her complaint to the Office of the Independent Police Review Director (OIPRD) concerning "the failure of the Toronto Police Services to adequately protect and maintain their documents at the 53rd Division" and OIPRD's Investigative Report addressing her complaint. I determined that the appellant's representations raised issues to which the police should be given an opportunity to respond. Accordingly, I sent a copy of the appellant's representations to the police along with a letter inviting their reply submissions. The police responded with a letter setting out that:

> … the concerns the appellant raised have been investigated and closed by the Office of the Independent Police Review Director (OIPRD) on [a specified date]. The institution has nothing further to add.

[10] The appellant subsequently provided additional submissions with respect to her position that the police failed to conduct a reasonable search for responsive records. She included materials relating to her request for a review of the investigation of her complaint to the OIPRD.[1]

[1] Public complaints made to the Independent Police Review Director and the investigation and review of complaints are addressed in Part V of the *Police Services Act*, R.S.O. 1990, c. P.15.

RECORDS REMAINING AT ISSUE:

[11] Remaining at issue in this appeal is the withheld portion of page 38 of the records disclosed to the appellant.

DISCUSSION:

Issue A: Did the police conduct a reasonable search for responsive records?

[12] 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.[2] 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.

[13] 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.[3] To be responsive, a record must be "reasonably related" to the request.[4]

[14] 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.[5]

[15] 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.[6]

[16] 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]

[17] The police take the position that they conducted a reasonable search for responsive records. In their representations, the police state:

> The appellant was advised that some investigative notes could not be granted as they were destroyed in a water leak that occurred at the

[2] Orders P-85, P-221 and PO-1954-I.
[3] Orders P-624 and PO-2559.
[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.
[7] Order MO-2246.

> division where the material was being stored. A further request was made to locate this material. This office was recently advised that the binder containing water damaged documents was located. The appellant and the Information and Privacy Commissioner's Office were notified of this and advised that additional records would be forthcoming. These records have since been provided. The binder did contain lined paper that *may* have contained written notes but this writing could no longer be seen and therefore was not provided. The appellant and/or Adjudicator are welcome to view the condition of the binder, as it has been stored at this office until this Notice of Inquiry has been resolved. [Emphasis in original]

[18] The appellant submits that the search process followed by the police "is defective and leaves ample room for undue manipulation and even destruction of documents, in bad faith or for an improper purpose." The appellant provided copies of her complaint about the water damaged records, the OIPRD Investigative Report and materials relating to her request to review the OIPRD investigation. She also made extensive submissions in support of her position that additional responsive records ought to exist, including the following:

- The binder was not found by the access and privacy office but rather a detective investigating a complaint the appellant made to the OIPRD regarding the police's initial position that the records were not available due to a water leak.

- Her comparison of the list of documents that accompanied the OIPRD report with the records she received "show that quite a number of documents have still not been produced."

- During a telephone conversation with the appellant, the author of the report was "unable to explain why [a named detective], the principal officer involved in the appellant's case, 'witness officer no 1' in [the author's] report, did not provide the full binder to Access and Privacy on the initial request for information.

- That no attempt was made by the police "to see whether the email records still exist through some form of common back-up or recovery system".

[19] The appellant states that the process "enables the officer whose work may be put under scrutiny through the request for access to information to consult with other officers on the case or the police hierarchy" and identify responsive records that avoids personal jeopardy or any questions "that could be troubling for the reputation of the police generally". The appellant submits it also provides an opportunity for tampering:

> … It is particularly troubling that, coincidentally, the documents cited as having been destroyed through water damage are not the documents in the binder that the appellant had herself provided to the police, but the more sensitive documents, namely the police officers' notes.

[20] The appellant asserts that the police narrative in the OIPRD Report is not consistent or credible. She takes issue with the basis for the OIPRD report findings and the conclusion that the damage to the records is the result of an "unfortunate accident", stating:

> However, no hard questions are asked and no recommendations are made. His report appears to be an exercise in whitewashing the police with respect to any inadequacies the present case illustrates about what could be considered to be all too convenient water damage to the officers' notes and police documents requested by the appellant.
>
> …
>
> Even if it presented a consistent and credible narrative, which it does not, [named detective's] report raises quite a few troubling questions about the attitude of the police towards record storage and about the possibilities for manipulation permitted by the search process that merit the close attention of the Information and Privacy Commissioner.

[21] The appellant seeks the following:

> The appellant respectfully request that the IPC holds that the police have not made a reasonable search for records, have failed to respect its obligation to maintain and protect records and has set up a search procedure that allows for undue manipulation and withholding of records.

[22] The appellant also requests other relief with respect to the water damaged records and asks this office to urge the police to change the timeframe for the police's retention of records.

[23] In reply, the police state that the concerns the appellant raised were investigated by the OIPRD and the police have nothing to add.

Analysis and finding

[24] The issue before me is whether the search carried out by the police for records responsive to the appellant's request was reasonable in the circumstances. That is the issue that I will be addressing in this section of my order.

[25] As set out above, the *Act* does not require the police to prove with absolute certainty that the records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. 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. In my view, the employee who conducted the search for responsive records is an experienced employee, who is knowledgeable in the subject matter of the request. Based on the evidence before me, which includes the extensive Investigative Report of the OIPRD explaining in detail the searches that were conducted, why the emails are no longer in digitized form and how the water damage occurred, I am satisfied that the police conducted a reasonable search for any responsive record pertaining to the appellant's request.

[26] Accordingly, I find that the police have provided me with sufficient evidence to demonstrate that they have made a reasonable effort to identify and locate responsive records. However, no additional responsive records were found.

[27] Accordingly, while it is unfortunate that records were damaged by water, I am satisfied that the police conducted a reasonable search for records that are responsive to the appellant's request.

B: Does the discretionary exemption at section 8(1)(i) apply to the information at issue?

[28] In this appeal, the police claim that section 8(1)(i) applies to the withheld portion of page 38.

[29] Section 8(1)(i) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonable required.

[30] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[8]

[8] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[31] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[9] The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[10]

Section 8(1)(i): endangerment to security

[32] Although this provision is found in a section of the *Act* dealing specifically with law enforcement matters, it is not restricted to law enforcement situations and can cover any building, vehicle or system which requires protection.[11]

[33] The police submit that:

> … releasing information about the security and the procedure established by [specified] University could be expected to endanger the security of the building and perhaps the parties inside. [Specified] University advises the public that they have 660 CCTV cameras strategically placed across the campuses and are used for investigative purposes. They have not posted the retention of the camera footage or the location of the cameras. The appellant was advised to contact [specified] University directly with any questions she may have in regards to records held by their institution.

[34] The appellant submits that the police have not provided "detailed and convincing evidence" to establish a "reasonable expectation of harm".

Analysis and finding

[35] I agree with the appellant. While the police allege that harm will result from disclosure they do not go the extra step to advise what harm could reasonably be expected to arise. It is not enough to simply allege that the specified University has not posted the retention of the camera footage or the location of the cameras, without providing "detailed and convincing evidence" to demonstrate what type of harm could reasonably be expected to result from disclosure of the withheld information. I pause to note that this office typically requests evidence of retention schedules in a Notice of Inquiry addressing the reasonableness of a search for responsive records[12], this office's

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[9] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[11] Orders P-900 and PO-2461.
[12] As was done in the Notice of Inquiry sent to the parties in this appeal.

Guideline for the Use of Video Surveillance Cameras in Public Places urges institutions to develop written policies on the use and retention of recorded information[13] and that the specified University has a Common Records Schedule available on the internet that addresses Filing Guidelines pertaining to CCTV images.

[36] In all the circumstances, and applying the standard set out in in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*[14], I find that the police have not provided me with sufficiently detailed and convincing evidence to establish a reasonable expectation of harm under section 8(1)(i) if the withheld information on page 38 is disclosed.

[37] Accordingly I find that section 8(1)(i) does not apply to the withheld information in page 38 and I will order that it be disclosed to the appellant.

ORDER:

1. I uphold the reasonableness of the police's search for responsive records.

2. I order the police to disclose to the appellant the withheld information on page 38 by sending it to her on or before **July 2, 2015**.

3. In order to verify compliance with paragraph 2 of this order, I reserve the right to require the police to provide me with a copy of page 38 as disclosed to the appellant.

Original signed by: May 27, 2015
Steven Faughnan
Adjudicator

[13] At page 8 of the Guidelines.
[14] 2014 SCC 3.