Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3216

Appeal MA14-476

Ottawa Police Services Board

June 30, 2015

Summary: The appellant requested access to general occurrence reports relating to "Notable Police Contacts" that were listed in the results of her police records check. These contacts related to the appellant having been apprehended under the *Mental Health Act*. The police denied access to the records under section 15(a) of the *Act* (information available to the public) on the basis that the appellant could request them under a "regularized process" for a fee of $51 per report. The adjudicator finds that section 15(a) does not apply because the records are available only to the appellant, not the general public, under the "regularized process." They are therefore not "published" or "currently available to the public" as required under that exemption. The adjudicator orders the police to disclose the records to the appellant with the personal information of other individuals severed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 15(a)

Orders and Investigation Reports Considered: Orders P-327, MO-1573.

OVERVIEW:

Background

[1] This appeal arises from an access request for general occurrence reports about mental health-related incidents involving the appellant. These incidents had appeared as "notable police contacts" in her police records check.

[2] Many police forces in Ontario follow the voluntary *Law Enforcement and Records Managers Network Record Check*[1] *Guidelines* (the "LEARN" guidelines), which were published by LEARN and the Ontario Association of Chiefs of Police in 2011. In June 2014, the LEARN guidelines were amended to the effect that in a Police Vulnerable Sector Check, information that is *not* to be disclosed includes "Any reference to incidents involving mental health contact."

[3] On June 3, 2015, the Minister of Community Safety and Correctional Services introduced Bill 113, *An Act respecting police record checks*, in the Ontario legislature. This bill proposes to limit the disclosure of information in police records checks to information authorized to be disclosed in the Schedule to the bill.[2] Authorized disclosures do not include information relating to incidents involving mental health. This bill has passed first reading but has not been enacted as of the present time.

The appellant's police records check and access request

[4] Prior to making her access request, the appellant applied to the police for a "police records check for service with the vulnerable sector" in support of an application to enroll at an educational institution.

[5] The records check produced a list of four "notable police contacts." This list was given to the appellant in connection with her request for the records check. For each "notable contact," the list shows the appellant's role, the general occurrence number, and the date. In each case, the contact relates to the appellant being apprehended under section 17 of the *Mental Health Act*. No criminal charges were laid in connection with these occurrences. No further information about these "notable police contacts" was provided to the appellant.

[6] Subsequently, on September 8, 2014, the appellant, with the assistance of a mental health support agency (the agency), made a request to the Ottawa Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for "a copy of the 'notable police contacts' on my record." She

[1] "LEARN"
[2] See section 9 of the bill.

also asked that the reports of non-criminal mental health related incidents be removed from the results of the police records check.

[7] The police denied the appellant's access request under the discretionary exemption found in section 15(a) of the *Act*, which refers to information that has been "published" or is "currently available to the public." In doing so, they relied on their practice of "routine disclosure" of general occurrence reports, statements and computer-generated reports at a cost of $51 per report. For the four incidents noted in the records check, the fee would therefore be a total of $204.

[8] The police also refused the appellant's request to reconsider the results of the police background check because the appellant had not submitted her request within sixty days after the date of the records check being conducted.

The appeal to this office

[9] The appellant, represented by the agency that assisted with her request, then submitted an appeal of the denial of access by the police under section 15(a). In her notice of appeal, she indicated that "the fees are excessive $51 per report."

[10] During mediation, the mediator held discussions with the police and the appellant. The police confirmed their position that section 15(a) applies to the records at issue. The appellant confirmed she is not seeking access to reports that are more than five years old. Therefore, one general occurrence report that dates from 2009 is no longer at issue in this appeal. The removal of this occurrence report would reduce the fee under the police's "routine disclosure" system to $153. As no further mediation could be conducted, the appellant indicated that the appeal for the remaining three records at issue should proceed to adjudication.

[11] The appeal was then transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. In conducting my inquiry, I invited the police and the appellant to provide representations, which were exchanged in accordance with Practice Direction 7, found in this office's *Code of Procedure*.

RECORDS:

[12] The records at issue consist of three general occurrence reports, which total 37 pages.

ISSUES:

[13] The sole issues in this appeal are (1) whether the records qualify for exemption under the discretionary exemption found in section 15(a) of the *Act* and (2) if so,

whether I should uphold the police's exercise of their discretion, in which they decided to apply the exemption and deny access under the *Act*.

DISCUSSION:

INFORMATION AVAILABLE TO THE PUBLIC

Does the discretionary exemption in section 15(a) of the *Act* apply?

[14] Section 15(a) states:

> A head may refuse to disclose a record if,
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> > the record or the information contained in the record has been published or is currently available to the public;

[15] For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.[3]

[16] To show that a "regularized system of access" exists, the institution must demonstrate that:

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information.[4]

[17] Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience[5] favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act*.[6]

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[3] Orders P-327, P-1387 and MO-1881.
[4] Order MO-1881.
[5] The balance of convenience is a factor in the exercise of discretion. See Orders P-170, MO-1573 and MO-1575-I.
[6] Orders P-327, P-1114 and MO-2280.

[18] Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include:

- unreported court decisions[7]
- statutes and regulations[8]
- property assessment rolls[9]
- septic records[10]
- property sale data[11]
- police accident reconstruction records[12]
- orders to comply with property standards[13]

Representations

[19] In their initial representations, the police submit that:

> . . . A formal Decision letter was sent to the Appellant['s] agent that the records are available through a regularized process. The appellant requested a "record" but the Ottawa Police Service has a process in place where as [sic] the involved parties or their representatives with consent can obtain copies of reports through the Release of Information Section for a fee of $51.00 per report. The reports that have been requested are information of the Appellant and only one report contained information regarding a call from a third party. Therefore because there is an alternative access mechanism that exists to enable "involved parties" to access occurrence reports upon payment of the required fee, the exemption in section 15(a) was applied.

[20] In its initial representations, the agency representing the appellant submits as follows:

> The appellant is seeking access to 3 reports . . ., costing a total of $153. This is impossible for her to pay due to her financial circumstances. . . . While the [*Act*] gives her the right to access records (in this case her own) which are in the public domain, she is effectively denied access because the cost makes it impossible due to her poverty. We therefore argue that this amounts to an effective denial of access. [Footnote omitted.]

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[7] Order P-159.
[8] Orders P-170 and P-1387.
[9] Order P-1316.
[10] Order MO-1411.
[11] Order PO-1655.
[12] Order MO-1573.
[13] Order MO-2280.

[21] In the portion of its initial representations addressing the exercise of discretion, the agency representing the appellant states that it is assisting the appellant and others:

> . . . to gain access to the Police Reports in their files and to obtain removal of the Notable Police Contacts listed on their Police Record Checks in the Vulnerable Sector. These Notable Police Contacts are not related to criminality but are due to their mental health status at the time of contact: they were apprehended under the Mental Health Act and brought to hospital for treatment due to their temporary mental health crisis.
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> . . .
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> The Ottawa Police Services knows and understands that [the agency] is supporting these appellants in their quest for access to and correction of their records. In previous letters of support with two other appellants, [the agency] has clearly stated that our clients live with serious mental illness and live in poverty. They are clearly aware that the individuals we support are far more likely to be arrested or apprehended by police than is the general public due to their mental health problems. We have asked the Ottawa Police Services to take into account the efforts that our clients are undertaking to be productive members of society by going back to school, finding a job, or doing volunteer work, and how the Notable Police Contacts listed on their Police Record Checks can effectively bar them from realizing these opportunities. Our Executive Director . . . has met with [the Chief and Director General] of the Ottawa Police to discuss these issues in order to resolve them for our clients. Despite all of these efforts, the Ottawa Police Services have not offered any opportunity to waive the fees for these appellants or to exercise their discretion in these complaint procedures.
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> We therefore feel, with regard to this particular appellant, that [the police] have failed to take into account the following relevant considerations:
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> > 1. Even though the appellant has a right of access to her personal information (as it is in the public domain), this access is being denied because she cannot pay the fee.
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> > 2. The appellant's right for her privacy to be protected is being denied because the Ottawa Police Services have refused to remove the Notable Police Contacts relating to her mental health from her file.

> 3. The Ottawa Police Services have a historic practice with respect to similar information: they have denied access to incident reports of another appellant for the same reasons and have continued to disclose their mental health information in the form of Notable Police Contacts on the individual's Police Check in the Vulnerable Sector. We clearly informed them of the discriminatory community and employer practices that resulted from this type of disclosure in previous letters with other appellants. In response the Ottawa Police Services indicated that they are not responsible for what the community does with the information they disclose.
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> . . .
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> In summary, in addition to the considerations pertaining to this particular appellant's case, we feel that persons who are vulnerable and who live in poverty should have as much a right to access their personal information as any other citizen. However, the fees associated with accessing this information make it impossible for most of these persons to exercise their right.

[22] In reply, the police confirmed that the fee for the three reports under their "regularized process" is $51 each, or $153. The police also indicate that they had no indication that the appellant could not afford the fee, and that fee waiver under section 45(4) of the *Act* is not available under the "regularized process."

[23] The police also submit:

> Where a request is made under a formal MFIPPA [the *Act*] Request for reports, notes, statements and the reports contains [sic] the information of third parties then the request will be processed for the $5.00 fee and the police do not rely on section 15(a) *as the report under the regularized process would only provide information on the requestor*. [Emphasis added.]
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> . . .
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> *When a request is made through the regularized process by an individual or representative with consent from the individual, the information that is provided is only the information in regards to the individual*. In the event that the individual is requesting information about a third party, or any information that has been deleted from a police report that they have received or any other police documents, the individual is advised that they

> can make a formal request for this information as outlined in [the *Act*]. [Emphasis added.]
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> . . .
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> The fee of $51.00 is charged for all General Occurrence reports. . . .

[24] In its sur-reply representations, the agency representing the appellant affirms that she only seeks access "to the information in the reports that related to her and the incident and not third party information."

Analysis and Findings

[25] In order for a record to be exempt under section 15(a), ". . . *the record, or the information contained in it, must either be published or available to members of the public generally*, through a regularized system of access, such as, for example, a public library or government publications centre."[14] [Emphasis added.]

[26] It is clear that the records have not been "published." Therefore, in order to be exempt under this section, they must be available to the public generally.

[27] The appellant's initial representations make two references to the reports being "in the public domain." However, the reply representations of the police make it clear that this is not the case: where an individual's request is dealt with under the "regularized process," the police have stated that only that individual's information is disclosed.

[28] In other words, if individual A makes a request under the "regularized process" for occurrence reports whose subject is Individual B, the request would be denied, and Individual A would be advised to make a request under the *Act*, with its scheme of exemptions including sections 14(1) and 38(b), whose purpose is the protection of personal privacy. Only individual B would be entitled to receive the information under the "regularized process."

[29] Accordingly, I find that the records at issue, which are occurrence reports about the appellant, are not available "to members of the public generally" as would be required in order for them to be exempt under section 15(a).

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[14] Orders P-327, P-1316. These orders are made under section 22(a) of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent of the *Act*, which applies to ministries and other provincial government entities. Like section 15(a) of the *Act*, section 22(a) permits an institution to deny access where "the record or the information contained in the record has been published or is currently available to the public. . . ."

[30] This view is reinforced by Order P-327, which found that the parallel exemption in section 22(a) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") did not apply where the institution had offered to provide the requested record to the appellant, while denying it to the public generally.[15]

[31] I also note that the records at issue in this appeal are distinguishable from police accident reconstruction records, which were found to be part of a regularized system of access in Order MO-1573. In that case, former Senior Adjudicator David Goodis found that the regularized system of access "would apply to any member of the public who sought access."

[32] In summary, section 15(a), by its wording, requires that "the record or the information contained in the record has been published or is currently available to the public." Making occurrence reports available only to the subject of each report, and not to others, is completely inconsistent with these records being "available to the public." This is not to suggest that such information ought to be widely available, as this would be inconsistent with the protection of individual privacy under the *Act*. Rather, the consequence of this analysis is that the requirements of section 15(a) have not been met.

[33] Accordingly, I find that the records are not exempt under section 15(a) of the *Act*.

[34] This straightforward and relatively simple analysis means that I do not need to consider the exercise of discretion by the police, as extensively referenced by the parties in their representations. However, if I had found that the exemption applied, I would have ordered the police to re-exercise their discretion. In my view, the situation faced by the appellant, and her inability to access the very records that are the basis of the notations in her police records check because of the higher fees under the regularized process, are relevant factors that should be considered.

Remedy

[35] As section 15(a) does not apply, and the police have not claimed other exemptions, I will order them to disclose the records at issue to the appellant, subject to the severance of the personal information of other individuals, to which the appellant states she does not seek access.

[36] Given that the records contain the appellant's personal information, the fee structure under section 45(1) of the *Act* and section 6.1 of Regulation 823 would permit the police to charge for photocopies. The amount permitted for photocopies under

[15] See footnote 14 for a further explanation of the terms of section 22(a) of FIPPA.

Regulation 823 is 20 cents per page. The records at issue comprise 37 pages, which would result in a fee of $7.40 under the *Act*.

[37] In the circumstances of this appeal, I would encourage the police to grant access without charging any fees.

ORDER:

I order the police to disclose the records at issue to the appellant, with the personal information of other individuals severed. This information must be disclosed not later than **July 22, 2015**.

Original signed by: June 30, 2015
John Higgins
Adjudicator