

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3655

Appeal MA15-246

Brantford Police Services Board

September 6, 2018

Summary: The appellant made an access request under the *Act* to the police for records relating to a homicide investigation and the appellant's subsequent prosecution and conviction. After receiving the request, the police transferred it to the Ministry of the Attorney General (the ministry) under section 18(3) of the *Act*. The police took the position that the ministry had a greater interest in the records than the police. The appellant appealed the police's decision. In this order, the adjudicator finds the ministry does not have a greater interest in the records and orders the police to issue an access decision to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 18(2), (3) and (4).

Orders and Investigation Reports Considered: Order PO-2494.

OVERVIEW:

[1] The appellant filed a number of requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) and its provincial counterpart, the *Freedom of Information and Protection of Privacy Act*, with various law enforcement agencies seeking access to records relating to the investigation into the death of an individual and the appellant's prosecution and subsequent conviction. The request at issue in this appeal was sent to the Brantford Police Services Board (the police). In his request, the appellant sought access to the following:

... general records and [the appellant's] own personal information in relation to an investigation into the death of [a named individual] in 1983, the prosecution of the [appellant] for this death and [the appellant's] 1986's conviction.

... [the appellant is] requesting access to all records, information and documents in your file relating to the homicide investigation and conviction noted above.

[2] The police issued a decision letter to the appellant advising him they were transferring the request to the Ministry of the Attorney General (the ministry) pursuant to section 18 of the *Act*. According to the Mediator's Report,

The police issued a decision letter to the requester advising that it was transferring the request to [the ministry] pursuant to section 18 of the *Act* as this institution "has a greater interest in the records due to the fact that criminal charges were laid and a conviction registered." The police also transferred responsive records.¹

The appellant filed an appeal of the police's decision to transfer the request and records.

[3] The ministry accepted the request and transferred records from the police. The ministry issued a decision letter to the appellant denying him access to the records in full. The ministry withheld the records on the basis of the discretionary exemptions in section 49(a), read in conjunction with sections 19(a) and (b) (solicitor-client privilege), and (b) (personal privacy). The appellant appealed the ministry's access decision and this office opened another appeal, Appeal PA15-277-2.

[4] During the mediation of this appeal, the mediator conducted discussions with the appellant's representative (who I will also identify as the appellant) and the police. The appellant confirmed he takes issue with the police's transfer of the request and records to the ministry. The appellant also claimed that further responsive records ought to exist, thereby raising the reasonableness of the police's search as an issue. The appellant provided the mediator with two lists of records he believed to be missing. The mediator shared these lists with the police, with the appellant's consent.

[5] The police conducted another search for responsive records and located additional records. The police issued a supplementary decision to the appellant explaining the search. The police also maintained their decision to transfer the appellant's request and all responsive records to the ministry. The police advised the appellant the ministry "has a greater interest in the records due to the fact criminal charges were laid and a conviction registered"², thereby raising section 18(3) of the *Act*

¹ Page 2 of the Mediator's Report dated February 24, 2016. The Mediator's Report was shared with the police, the ministry and the appellant. All three parties were invited to comment and note any errors or omissions in the report. None of the parties raised issues with this point.

² The police's supplementary decision letter dated February 5, 2016.

as the basis for this transfer. As a result, the police transferred the additional records to the ministry. The ministry issued an access decision to the appellant denying him access to these records. The appellant appealed the ministry's access decision and this office opened another appeal, Appeal PA15-277-4.

[6] The appellant advised the mediator he no longer takes issue with the reasonableness of the police's search. Accordingly, the police's search for records is no longer at issue in this appeal. However, the appellant confirmed he continues to take issue with the police's transfer of the request and records to the ministry.

[7] I note the Mediator's Report identified the police's transfer to the ministry under section 18(3) to be the sole issue remaining in dispute. The mediator sent a copy of the Mediator's Report to the appellant, the police and the ministry for their review and comment. The police and the appellant did not request any amendments or note any errors or omissions in the report. The ministry did not raise any concerns regarding the mediator's identification of the issue remaining in dispute. In addition, the ministry did not raise any other issues to be resolved at adjudication.

[8] The appeal could not be resolved at mediation and it moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry into the issues under appeal. I began my inquiry by inviting the police and the ministry to make submissions in response to a Notice of Inquiry, which outlines the facts and issues in the appeal. The police and the ministry submitted representations. I then invited the appellant to make submissions in response to the police and the ministry's, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations.

[9] In the discussion that follows, I find the police were not entitled to transfer the request to the ministry and order them to issue an access decision regarding the responsive records to the appellant.

DISCUSSION:

Were the police entitled to transfer the request to the ministry under section 18 of the *Act*?

[10] The sole issue in this appeal is whether the police's decision to transfer the appellant's access request to the ministry pursuant to section 18(3) of the *Act* should be upheld.

[11] Section 18 of the *Act* provides,

(1) In this section,

“institution” includes an institution as defined in section 2 of the *Freedom of Information and Protection of Privacy Act*.

(2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries to determine whether another institution has custody or control of the record, and, if the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

(a) forward the request to the other institution; and

(b) give written notice to the person who made the request that it has been forwarded to the other institution.

(3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

(4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,

(a) the record was originally produced in or for the other institution; or

(b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.

(5) Where a request is forwarded or transferred under subsection (2) or (3), the request shall be deemed to have been made to the institution which it is forwarded or transferred on the day the institution to which the request was originally made received it.

Under section 18(3), an institution that receives an access request may transfer the request to another institution with a *greater interest* in the record. This is true regardless of whether the institution that received the request has custody or control of the record.³

[12] Which of the two institutions has the *greater interest* in a particular record depends on the circumstances of its creation and dissemination, having regard to the criteria in sections 18(4)(a) and (b).⁴

[13] The purpose of section 18(3) is to give the head of an institution some latitude

³ Orders P-279, P-902 and P-1428.

⁴ Order MO-1494.

to decline to respond to a request for a record that the institution does, in fact, have in its custody or control, if another institution is better able to respond to the request.

Representations

The police's representations

[14] The police submit they properly transferred the appellant's request to the ministry. The police submit the ministry has the *greater interest* in the release of the information. The police state they completed the transfer within the 15 days required by the *Act* and the ministry agreed it had a greater interest and accepted the transfer.

[15] The police state the appellant made his request in support of his application under section 696.1 of the *Criminal Code* for ministerial review of his 1986 conviction. The police state the appellant contacted them in November 2014 to obtain records relating to this application. The police further state the release of information relating to this application was already underway since 2012 using the established informal process with the ministry's Crown Law Office-Criminal. The police state they worked cooperatively with the ministry's Crown Law Office-Criminal to facilitate a re-interview of the appellant and the appropriate release of the records for his section 696.1 application.

[16] The police submit they advised the appellant in January 2015 that "the preference is that a single point of contact be used in all communication/requests with respect to this matter. The requester/appellant was to continue to use Crown Counsel-Criminal for this purpose." The police also confirmed they communicated regularly with Crown Law Office-Criminal for this purpose.

[17] The re-interview of the appellant was commenced in March 2015 to establish whether the matter would be formally reopened. Subsequently, the police state they made the independent decision to release all original documentation to the ministry to facilitate its completing disclosure through the informal process.

[18] During this period, the police state the appellant submitted his formal access request under the *Act*.⁵ The police state their Freedom of Information Coordinator was aware that the Crown Law Office-Criminal and the police were in contact with the appellant through the informal process. The police state they decided to transfer the appellant's request to the ministry because the Crown Law Office-Criminal was the primary contact point for the police for issues relating to the appellant's request.

[19] The police state they received a formal request from the Crown Law Office-Criminal on April 23, 2015 for all records in the possession of the police relating to the investigation, excepting any physical evidence returned by the Centre of Forensic Sciences. The police state the ministry's staff attended at the police's offices to retrieve the investigative file and the ministry created an inventory of the contents and

⁵ The appellant's request is dated April 7, 2015.

compared it to their disclosure log.

[20] The police state they no longer have care, control or possession of the investigative file. The police submit their participation in this matter is concluded and the ministry's Crown Law Office-Criminal is now the exclusive point of contact for the appellant in these matters.

[21] The police submit they created the investigative file for the purposes of investigating a *Criminal Code* offence. Once the investigation was complete, the police state the entire file was forwarded to the ministry for the purpose of using these records during the prosecution process. The police submit the ministry bears the primary responsibility of disclosing this information and they have power, possession and control over the Crown Brief and its contents.

[22] The police submit the disclosure of the investigative materials continues between the appellant and the ministry. The police submit the ministry has carriage over the appellant's section 696.1 application and the recent motion in the Superior Court of Justice relating to the disclosure of post-conviction records. Accordingly, the police submit the ministry has the greater interest in the appellant's request and the responsive records.

The ministry's representations

[23] The ministry supports the police's decision to transfer the appellant's request to the ministry pursuant to section 18(3) of the *Act*.

[24] The ministry also submits that section 18(2) of the *Act* applies in this case because the police no longer have custody or control of the records. Rather, the ministry asserts it has custody and control of the Crown Brief record in this matter, which includes all of the original records held by the police. The ministry states it has custody and control over the records to address proceedings in relation to the appellant's application under section 696.1 of the *Criminal Code* and his motion for declaratory relief in the Superior Court of Justice.

[25] The ministry submits the ministry and the police made the decision to transfer custody and control of the original records to the ministry, together. The ministry submits this decision was made in response to the appellant's initiation of the section 696.1 process in 2012, which necessitated that disclosure be provided to the appellant. The ministry identifies the following factors to support its position:

- The records were compiled as part of an investigation into a possible violation of law and now form part of the Crown Brief;
- The ministry has physical possession of the records currently because they were voluntarily provided by the creator and were required and relied upon to address the appellant's applications;

- The ministry has a right to the possession of the records to address the appellant's applications;
- The contents of the records clearly relate to the ministry's mandate and function;
- The ministry has the authority to regulate the record's use as it pertains to responding to the appellant's applications;
- The records are closely integrated with other records held by the ministry; and
- The ministry now has the responsibility for the care and protection of the records.

In light of these factors, the ministry submits it has custody and control over the police's transferred records.

The appellant's representations

[26] The appellant states the records were formed in the course of a homicide investigation and eventually formed part of the Crown Brief relating to the file. The appellant submits the greater interest attached to the records should have been lost with their disclosure during the appellant's original trial. Since the appellant was convicted and served his sentence, the appellant submits it is unclear how the ministry has a greater interest in the records than the police.

[27] The appellant submits the records were transferred informally, but questions the ministry and police's reliance on the formal processes available to them to deny him access to records relating to his conviction. Further, the appellant submits that the "informal process" identified by the police and ministry highlights the challenges individuals with a valid claim of wrongful conviction face in obtaining materials from public officials regarding their convictions.

[28] Finally, the appellant submits "the question of whether the police do have an entitlement to transfer the request should not obscure the fact that transferring the request to the ministry did not actually assist the appellant in obtaining a complete set of records relating to his conviction." The appellant submits it is not relevant whether the transfer was valid or not. Rather, the appellant submits the relevant question is whether the ministry has any basis to withhold access.

Analysis and Findings

[29] First, I confirm the only issue before me in this appeal is whether the police were entitled to transfer the appellant's request to the ministry. I cannot address the ministry's access decision regarding the records themselves.

[30] Having regard to section 18(4) and the creation and dissemination of the records, I find the ministry does not have a greater interest in the records within the meaning of section 18(3) of the *Act*. Section 18(4) provides two circumstances under

which another institution has a greater interest in a record than the institution that receives the request for access, for the purposes of section 18(3). With respect to section 18(4)(a), both the police and the ministry confirm the police produced the records for the purposes of a homicide investigation. As for section 18(4)(b), the police were the first institution to receive the records or copies of them as these records were produced for the purposes of a homicide investigation. Since the records were not originally produced "in or for" the ministry and the ministry was not the first institution to receive them, I find the ministry does not have a greater interest in the records. As such, the police were not entitled to transfer the appellant's request to the ministry under section 18(3).

[31] I appreciate the ministry and the police's desire to have a single contact for the appellant with his applications under the *Criminal Code* and to the Ontario Superior Court. It is also my understanding that the ministry has carriage over these matters. However, these circumstances do not negate the police's interest in the records or absolve them of their responsibilities under the *Act*.

[32] Based on my review of the circumstances relating to the creation and dissemination of the records, I find the police continue to have an interest in the records themselves. The IPC has considered the roles of the police and prosecutors in relation to police records. Specifically, in Order PO-2494, the adjudicator considered the application of the solicitor-client privilege exemption in the provincial equivalent to section 12 of the *Act*. The adjudicator found the exemption did not apply to police records on the basis that copies might be found in the Crown brief. The adjudicator stated,

With respect to the remaining records, I do not accept the Ministry's position that records held by the police should automatically be seen as meeting the "prepared for Crown counsel in contemplation of or for use in litigation" test on the basis that copies of them found their way into the Crown brief.

The police prepared all of the records at issue for the purpose of investigating the matter involving the appellant, and deciding whether to lay criminal charges against her. **This purpose is distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges and, if so, using the records to conduct the litigation.**

In effect, police investigation records such as officers' notes and witness statements found in a Crown brief are "prepared" twice: first, when the record is first brought into existence, and second when the police, applying their expertise, exercise their discretion and select individual records for exclusion in the Crown brief, and then make copies of those records to deliver to Crown counsel.

The fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared and are now held by the Ministry. [Emphasis added]

[33] The analysis in Order PO-2494 was adopted in a number of subsequent decisions of the IPC.⁶ In the case before me, this analysis is instructive in my determination of the issue of whether the ministry has a greater interest in the records than the police. Upon consideration of this analysis, which distinguishes the interests the police and the ministry have in investigatory records, I find the ministry does not have a greater interest in the records at issue. The fact that the ministry now has custody or control of the records does not change the purposes and circumstances of the creation and dissemination of the records. Further, the fact that the ministry is now responsible for responding to the appellant's applications under the *Criminal Code* and to the Ontario Superior Court does not alter the police's interest in the records themselves. Therefore, upon review of the parties' submissions, I find the ministry does not have a greater interest in the records. Accordingly, the police were not entitled to transfer the appellant's request to the ministry under section 18(3) of the *Act*.

[34] I note the ministry also raises the application of section 18(2). I find the ministry cannot rely on this section. First, the parties agreed, through acceptance of the Mediator's Report, that only section 18(3) is at issue. Second, in responding to the request, the police did not advise the appellant they were forwarding the request to the ministry under section 18(2) of the *Act* in their decision letters. As described in the Mediator's Report, in response to this request, the police decided to transfer the request and the records to the ministry, on the basis that the ministry had a greater interest in the records, not on the basis that they did not have custody or control of the records.

[35] The ministry submits the "decision to transfer custody and control of the original records to the Ministry was made between the Ministry and [the police] prior to the Appellant's decision to launch his FOI request." It may be that the police and the ministry had already agreed that the ministry should take possession of the responsive records, in connection with the appellant's parallel efforts to obtain the records through his application under the *Criminal Code*. While that may be, it also appears the transfer of the records was effected once the request was received. The police's representations themselves do not offer any clarification regarding the responsive records and when they were forwarded to the ministry. The best evidence I have on this point is from the police's decision letters and the Mediator's Report.

[36] Based on my review of the Mediator's Report and the police's decision letters, it appears the police transferred the records after they received the request.⁷ I note the ministry and the police were provided with an opportunity to note any errors or omissions contained in the Mediator's Report. Neither did.

[37] Furthermore, during the mediation stage of the appeal, the police conducted

⁶ See, for example, PO-2733, PO-2769 and PO-3321, among others.

⁷ See paragraph 2, above, for the language in the Mediator's Report.

another search and located additional responsive records. The police forwarded these additional records to the ministry. Therefore, it appears the police had custody and control of at least some of the records at issue at the time of the request.

[38] In any event, section 18(2) applies where an institution receives a request for access to records that are not in its custody *or* control. Even if the police had reached an arrangement with the ministry under which they would release their original investigative file to the ministry to facilitate informal disclosure through the *Criminal Code* process, the police did not assert that this resulted in relinquishing all control over their original investigative records.

[39] Based on all of the above, I find the ministry cannot raise section 18(2) of the *Act* as the police's decision was based on a transfer of the request under section 18(3), and not a forwarding of the request.

[40] Furthermore, for the reasons set out above, I find the ministry does not have a greater interest in the records within the meaning of section 18(3).

[41] In conclusion, I find the police were not entitled to transfer the appellant's request to the ministry under section 18(3). I will order the police to issue an access decision to the appellant regarding his request for the responsive police records.

ORDER:

I order the police to issue an access decision to the appellant regarding the appellant's request for responsive police records, in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

Original Signed by: _____
Justine Wai
Adjudicator

September 6, 2018 _____