Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3718

Appeal MA16-284

Peel Regional Police Services Board

January 4, 2019

Summary: The Peel Regional Police Service Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information pertaining to contact that the appellant had with the police or relating to a specified address. The police identified responsive records and issued an access decision granting partial access to them. In addition, the police advised in their access decision that with respect to a specified occurrence, the responsive information falls under the *Youth Criminal Justice Act* and is outside the scope of the *Act*. In the course of mediation, the appellant confirmed that he is not seeking access to the personal information of other individuals that may appear in the records that the police had determined were exempt under section 14(1) (personal privacy) of the *Act*. The appellant took issue with the police's application of section 8(1)(l) (law enforcement) to the police codes in the records, their determination of the scope of the request and their search for responsive records. In addition, the appellant asked that his request be amended to be for continuing access. In this order, the adjudicator finds that certain information is subject to the *Youth Criminal Justice Act* and cannot be addressed in this proceeding, the police properly defined the scope of the request and that they conducted a reasonable search for responsive records. Also, the adjudicator finds that the police codes properly qualify for exemption under section 8(1)(l) alone, or in conjunction with section 38(a), and that although the appellant is not permitted to amend his request to be for continuing access, he may file a new request for the same relief.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, as amended, sections 2(1) ("definition of personal information"), 8(1)(l), 17, 17(3), 17(4)(a) and 38(a); *Youth Criminal Justice Act*, S.C. 2002, c. 1, sections 2, 118(1), 123 and 129.

Case considered: *S.L. v. N. B.*, [2005] O.J. No. 1411 (Ont. C.A.)

OVERVIEW:

[1] The Peel Regional Police Service Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for access to information pertaining to "any and all contact with [the police] and [a specified address], including:

- Any audio recordings to command and 911
- Officer notes
- Motor Vehicle Accidents or Incidents."

[2] The requester asked that for each record the police provide "a date (YYYY, MM, DD) and a reference (for example incident number) and other details (name and badge #)".

[3] The police identified responsive records and issued an access decision granting partial access to them, relying on section 8(1)(l) (facilitate commission of an unlawful act) and section 14(1) with reference to section 14(3)(b) of the *Act* (personal privacy) to deny access to a portion of the information it withheld. In addition, the police advised in their access decision that with respect to information relating to a specified occurrence:

> Following a careful review of your request for [specified occurrence] it has been determined that the type of information you are requesting falls under the *Youth Criminal Justice Act*[1]. The Information and Privacy Commission has determined that these types of records are outside the scope of the *Municipal Freedom of Information and Protection of Privacy Act.*

[4] The requester (now the appellant) appealed the police's access decision.

[5] In the course of mediation the appellant confirmed that he is not seeking access to the personal information of other individuals that may appear in the records that the police had determined would fall within the scope of section 14(1), with reference to section 14(3)(b) of the *Act*. As a result, that information is no longer at issue in the appeal. The appellant continued to seek access to the information that the police stated would fall outside the scope of the *Act* because it is subject to the *Youth Criminal Justice Act*.

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[1] S.C. 2002, c. 1.

[6] In addition, the appellant took the position that additional responsive records ought to exist. After the mediator relayed the appellant's position to the police, they conducted a further search locating additional responsive records. The police then issued a supplementary decision letter granting the appellant partial access to these additional records, relying on the same exemptions to deny access to the portions they withheld. The appellant advised that he is also not seeking access to the personal information of other individuals that may appear in these additional records that the police had determined would fall within the scope of section 14(1), with reference to section 14(3)(b) of the *Act*. As a result, that information is also no longer at issue in the appeal. As the mediator determined that records might contain the appellant's personal information, and the appellant continued to seek information that the police claimed was subject to section 8(1)(l) he added the possible application of section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(l), as an issue in the appeal.

[7] Notwithstanding the additional disclosure, the appellant maintained his position that additional responsive records ought to exist. Accordingly, the reasonableness of the police's search for responsive records was added as an issue in the appeal. In addition, based on his review of the additional records, the appellant took the position that a number of occurrences referenced in them which postdated his initial request, would also fall within the scope of his request and should be disclosed. Finally, the appellant sought to amend his request to be for continuing access to a record under section 17(3) of the *Act*.

[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 under the *Act*.

[9] 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. I then sent a Notice of Inquiry to the appellant as well as a copy of the police's representations[2]. The appellant did not provide any responding representations although given many opportunities to do so.

[10] In this order, I find that two of the records at issue are subject to the *Youth Criminal Justice Act* and cannot be addressed in this proceeding. I also find that the police properly defined the scope of the appeal and conducted a reasonable search for responsive records. Finally, I find that the police codes properly qualify for exemption under section 8(1)(l) alone, or in conjunction with section 38(a), and that although the appellant is not permitted to amend his request to be for continuing access, he may file a new request for the same relief.

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[2] I severed some information from one of the emails the police provided in support of their position on the appeal, as the information met the criteria for withholding representations under IPC Practice Direction 7.

RECORDS:

[11] The records at issue are police records including Occurrence Details and police officers' notes.

ISSUES:

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

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

C. Does section 8(1)(l), in conjunction with section 38(a), apply to the withheld police codes?

D. Should the appellant be permitted to amend his request to be for continuing access to a record, and if the amendment is permitted, is continuing access available under section 17(3) of the *Act*?

DISCUSSION:

Preliminary matter

[12] As set out in their decision letter, the police took the position that two records sought by the appellant are subject to the *Youth Criminal Justice Act*. I have reviewed the records and I agree that they are subject to the *Youth Criminal Justice Act*. Accordingly, considering the provisions of that statute[3], I cannot address those records in this proceeding. As noted by the police in their representations however, the appellant may have an avenue to obtain the records by application to a youth justice court judge under section 123 of the *Youth Criminal Justice Act*.

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

[13] 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,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;

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[3] Most notably sections 2, 118(1) and 129 of that legislation. In this regard see also the decision of the Ontario Court of Appeal in *S.L. v. N.B.*, [2005] O.J. No. 1411.

> (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).

[14] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[4] To be considered responsive to the request, records must "reasonably relate" to the request.[5]

[15] The police submit that although the appellant's request was "relatively broad in nature", sufficient detail was provided to enable an experienced employee of the police, upon a reasonable effort, to identify responsive records. The police submit:

> It is clear based on the request that the appellant was seeking any record to do with any contact he had with [the police], both personally and as it relates to a specified address. This request extends to all records that reasonably relate to the appellant's interactions with [the police], including occurrence reports, officer notes, *Highway Traffic Act* [6] incidents, Motor Vehicle Accident Reports and 911 calls and communications recordings.
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> The [police] adopted a liberal reading of this to encompass any record that might involve the appellant and [the police]. The scope of the request was not limited in any way. …

Analysis and finding

[16] In my view, the police properly adopted a liberal interpretation of the appellant's request, properly defined the scope of his request and identified responsive information. I agree with the police that the portions of the information in the records disclosed to the appellant that were withheld as non-responsive, relate to other matters not involving the appellant and are not responsive to his request. In addition, I concur that, as explained in more detail below, if the appellant is seeking records that postdate his request he should make a new access request for them. Finally, if the appellant's concerns regarding the scope of the appeal are related to the application of the *Youth Criminal Justice Act* to two records at issue, as set out above, I agree with the position

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[4] Orders P-134 and P-880.
[5] Orders P-880 and PO-2661.
[6] RSO 1990, c. H.8.

of the police that they are subject to the *Youth Criminal Justice Act*, and that, accordingly, they cannot be addressed by me in this appeal.

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

[17] 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.[7] 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.

[18] 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.[8]

[19] To be responsive, a record must be "reasonably related" to the request.[9] 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.[10]

[20] 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.[11] 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.[12]

[21] The police submit that a Freedom of Information Analyst (analyst) who is an experienced employee knowledgeable in the subject matter of the request conducted the search. In her affidavit that the police provided in support of the reasonableness of their search[13] she confirms the police's submissions. She deposes that upon receipt of the request she "proceeded to conduct thorough and fulsome searches in order to locate any responsive records" and "did not restrict the search to a particular timeframe, but rather searched all databases which may have responsive records".

[22] As confirmed in her affidavit, the police submit that she "took the following reasonable steps to locate responsive records":

- conducted a Niche and UCR query of the appellant's name

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[7] Orders P-85, P-221 and PO-1954-I.
[8] Orders P-624 and PO-2559.
[9] Order PO-2554.
[10] Orders M-909, PO-2469 and PO-2592.
[11] Order MO-2185.
[12] Order MO-2246.
[13] With confirming documentation attached.

- conducted a query of the address set out in the request
- conducted a search of Ministry of Transportation of Ontario databases to determine if there were any responsive motor vehicle accident reports
- reviewed and obtained a Persons Detail Report, which contained a summary of all occurrences involving the appellant
- identified any individual within the service who may have responsive records and made a request for any officer's notes and any communications recordings related to the records
- reviewed all responses and confirmed there were no further materials outstanding

[23] In her affidavit the analyst explains that during the mediation of the appeal, she provided a copy of the Persons Detail Report to the appellant as well as provided the appellant with partial access to additional responsive police officer's notes she had located.

[24] The police submit:

> All avenues to identify responsive records have been exhausted. All potential responsive databases, including audio and communications databases were searched. All members who had involvement in any responsive occurrences were requested to search for responsive records and did so. Those who did not have responsive records provided reasonable information to satisfy the [analyst] that there were no further records.
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> There has been no evidence to indicate that there is a reasonable basis to conclude further records exist.

Analysis and finding

[25] Although the appellant took issue with the reasonableness of the police's search for responsive records, he provided no representations to challenge the evidence or submissions they provided in support of the reasonableness of their search. Moreover, he did not provide evidence to support the existence of additional responsive records that fall within the scope and time frame of the original request. I am satisfied that the police's representations and the affidavit they filed in support of their position demonstrate that their search for responsive records is in compliance with their obligations under the *Act*. Accordingly, I conclude that the police conducted a reasonable search for responsive records.

Issue C: Does section 8(1)(l), in conjunction with section 38(a), apply to the withheld police codes?

[26] Section 36(1) gives individuals a general right of access to their own personal information held by an institution.

[27] Personal information is defined in section 2(1) of the *Act*. 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.[14] 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.[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[16] Considering the nature of the request and the content of the responsive records at issue I am satisfied that they contain the personal information of the appellant. Some also contain the personal information of other identifiable individuals which the police viewed as being subject to section 14(1), with reference to 14(3)(b) of the *Act*. As set out in the background above, however, the appellant is not seeking access to this information.

[28] Section 38(a) provides a number of exemptions from an individual's rights of access to their own personal information and it reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[29] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[17]

[30] In this case, the police rely on section 8(1)(l), either alone, or in conjunction with section 38(a), to withhold access to police codes in the records. If the record contains the personal information of the appellant, the information qualifies for exemption under section 38(a) in conjunction with section 8(1)(l). If it does not, the information qualifies for exemption under section 8(1)(l) alone.

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[14] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[15] Orders P-1409, R-980015, PO-2225 and MO-2344.
[16] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[17] Order M-352.

[31] Section 8(1)(l) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[32] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[18] 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.[19] The institution must provide 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. [20]

[33] The police submit that:

> … ten-codes, patrol zone information […] are used by police agencies to facilitate confidential communications without publicly identifying the underlying meaning of the message. The messages are encoded in an effort to reduce the ability of those in criminal activity from using such knowledge to interfere with a police investigation. Furthermore, messages are encoded so as to avoid those involved in criminal activity from attempting to counter police action, thus reducing the risk of harm to police personnel and the general public.
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> The security of those encoded messages would be compromised if released and would negate the usefulness of the codes in the future.

[34] The appellant provided no representations in the appeal.

Analysis and finding

[35] A long line of orders[21] has found that police operational codes qualify for exemption under section 8(1)(l), because of the reasonable expectation of harm from their release. I make the same finding here. In my view, there is nothing in this matter

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[18] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[19] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[20] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[21] For example, Orders M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, PO-2339 and PO-2409.

that would lead me to conclude otherwise. As a result, I find that section 8(1)(l) applies to the police operational codes (including the "ten" codes). Accordingly, if a record contains the personal information of the appellant, the information qualifies for exemption under section 38(a) in conjunction with section 8(1)(l). If it does not, the information qualifies for exemption under section 8(1)(l) alone. I also find that, in either case, the police appropriately exercised their discretion not to disclose this information to the appellant.

Issue D: Should the appellant be permitted to amend his request to be for continuing access to a record, and if the amendment is permitted, is continuing access available under section 17(3) of the *Act*?

[36] As set out above, section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for continuing access to records. This section states, in part:

> (3) The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.
>
> (4) When a request that is to continue to have effect is granted, the institution shall provide the applicant with,
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> > (a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and
> >
> > (b) a statement that the applicant may ask the Commissioner to review the schedule.
>
> (5) This Act applies as if a new request were being made on each of the dates shown in the schedule.

[37] The right to request continuing access should be interpreted broadly, and not restricted to records produced "in series".[22] The degree of access to be given (i.e. whether exemptions/exclusions should be claimed) on each scheduled access date is to be decided at that time – as mandated by section 17(5).[23]

[38] A possible exception to the application of section 17(3) arises in the case of a request where it is impossible or highly unlikely that further responsive records would come into existence during the continuing access period. In that case, the institution would have the option of refusing the continuing access request, or issuing a schedule

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[22] Order PO-2730.
[23] Order PO-2730.

with very few dates on it.[24]

[39] A second exception arises from the inclusion of the words, "if granted" in section 17(3); if access is fully denied in response to the initial request, these words indicate that section 17(3) does not apply.[25]

[40] The police submit that the appellant did not ask for continuing access in his original request and as a result they did not provide the schedule set out in section 17(4)(a).

[41] The police submit that while allowing the appellant to amend his request to be for continuing access would not prejudice the police:

> … if the request is amended, it must comply with the legislation which states that if granted, the request can only continue for a specified period of up to two years. If the request is considered amended, the request will only continue for two years from the original request which is March 22, 2018.
>
> It is submitted that it is highly unlikely that further responsive records would come into existence during the continuing access period, and as such, a schedule with very few (or one (1)) date(s) of receipt should be issued. […]
>
> Alternatively, the appellant could submit a new request in which he specifies that he is seeking continuing access.

[42] The appellant provided no representations in support of his position that the request should be amended to be for continuing access.

Analysis and finding

[43] The appellant's original request was not for continuing access. Accordingly, the police were not given an opportunity to consider the request at that time, or to provide the appellant with a section 17(4)(a) schedule, if the request was granted. In my view, given the circumstances of the appeal, it would be more in keeping with the spirit of the *Act* and the need for orderly proceedings to deny the amendment request with the proviso that, as suggested by the police, the appellant is permitted to submit a new request in which he specifies that he is seeking continuing access.

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[24] Order PO-2730.
[25] Order PO-2730.

ORDER:

1. I uphold the police's definition of the scope of the request and the reasonableness of their search for responsive records.

2. I uphold the police's application of section 8(1)(l) alone, or in conjunction with section 38(a), to the police codes in the responsive records.

3. I deny the appellant's request to amend his original request to be for continuing access.

Original Signed by: January 4, 2019

Steven Faughnan
Adjudicator