Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1281

Appeal MA-990130-1

Peel Regional Police Services Board

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NATURE OF THE APPEAL:

The Peel Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) from a lawyer representing her client, for access to the following information relating to an investigation by the Fraud Bureau regarding "an alleged inappropriate payment" made to the client. Specifically, the requester sought:

(a) All notes taken by the [named investigating officers];

(b) a copy of the written statement and video made of [the named individual who made the allegation against the requester's client] (the complainant);

(c) a copy of the video taken of [the requester's client] during his time at the police department on February 5, 1998 which video should include [the client]'s full interrogation and his polygraph test;

(d) copies of the results of the polygraph test;

(e) any other documents obtained by the Police in relation to this investigation, for example we understand that [the requester's client] was shown a letter dated January 26, 1998 addressed to [one of the named police officers] from [a second named individual].

The Police identified 87 pages of responsive records, consisting of police officers' notebook entries, a computer generated "Occurrence Report", the videotape of the client's interview and the results of his polygraph test. The Police granted access in full to the videotape, the polygraph test results and eight pages of records; partial access to 12 other pages; and denied access in full to the remaining 61 pages. For those records to which access was denied either in whole or in part, the Police claimed exemption pursuant to section 38(b) of the Act (invasion of privacy). In so deciding, the Police relied on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the Act.

The client (now the appellant) appealed the decision of the Police. The appellant also claimed that the decision letter issued by the Police was inadequate, in that it did not include the dates when the records were produced, the nature of the records and some detail as to their content, excluding any references to names of third parties.

The Police correctly interpreted this request as falling under Part II of the Act. It is clear that the lawyer was acting on behalf of her client. If a request is received from a lawyer for information on behalf of a client which would otherwise be considered a Part II request if made by the client directly, and the lawyer has satisfied the institution that he/she has been given the requisite authority by the client, then the request should be processed as a Part II request for personal information (Order MO-1227-I).

During mediation, the Police took the position that some of the information contained in the records did not involve the appellant and was not responsive to the request. In addition, the Police identified an additional

record, a videotape of the individual who made the allegations against the appellant, and denied access to this record also pursuant to section 38(b) of the Act.

The appellant agreed not to pursue access to the information the Police described as non-responsive, and confirmed that he did not want to receive the names, addresses and telephone numbers of individuals referred to in the records, with the exception of those individuals who were identified to the appellant by the Police during the investigation. Finally, the appellant raised the possibility that further records may exist, specifically documents that were shown to her client by the Police during the investigation but had not been identified by the Police as responsive records. Therefore, the issue of whether the search by the Police for all responsive records was reasonable has been added to the scope of this inquiry.

A Notice of Inquiry was sent to the appellant and the Police. Representations were received from both parties. Coincidental with the submission of representations, the Police issued a revised decision letter to the appellant describing the withheld records in more detail and elaborating on the reasons for denying access.

PRELIMINARY MATTER:

Adequacy of the decision letter by the Police

The appellant submits that the decision letter issued by the Police was inadequate in that it failed to provide an adequate description of the records and, therefore, does not comply with the requirements of section 22(1)(b) of the Act. As a result, the appellant argues that he was unable to make a reasonably informed decision as to whether the information was properly withheld.

The original decision letter issued by the Police includes an index which identifies the records by page number and indicates which of them are withheld in whole and in part. No descriptive details are included, although a general description can be gleaned by the appellant from the records disclosed in whole or inpart at the time of the original decision.

The subsequent decision letter, issued at the end of this inquiry, is significantly different. The letter itself describes the records being withheld, and the revised index includes a description and the rationale used by the Police in applying the exemption claims.

In one of the early orders of this Office, Order 158, former Commissioner Sidney B. Linden discussed section 29(1)(b) of the provincial Freedom of Information and Protection of Privacy Act (the provincial equivalent to section 22(1)(b) of the Act), and the rationale behind the requirement for reasons in section 29(1)(b)(ii). The former Commissioner's comments are useful to repeat in the present appeal.

> To a large extent, subsection 29(1)(b) of the Act reflects recommendations made by the Williams Commission in a Report entitled Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy,/1980. The Commission's recommendations regarding the content of a notice of refusal when access to a record has been denied are set out in Volume 2, of the Report at p. 268:

1. the statutory provision under which access is refused;

2. an explanation of the basis for the conclusion that the information sought is covered by an exempting provision; (emphasis added in original)

3. the availability of further review and how it can be pursued;

4. the name and office of the person.

The Williams Commission went on to state at p. 268 that:

> Although the obligation to provide reasons for denials may appear to be burdensome, we believe it will be instrumental in encouraging careful determinations of decisions to deny access.

In my view, a head is required to provide a requester with information about the circumstances which form the basis for the head's decision to deny access. The degree of particularity used in describing the record at issue will impact on the amount of detail required in giving reasons, and vice versa. For example, if a record is described not in general terms, but rather as a memo to and from particular individuals on a particular date about a particular topic, then the reason the provision applies to the record could be given in less detail than would be required if the record were described only as a memo. The end result of either approach is that the requester is in a position to make a reasonably informed decision as to whether to seek a review of the head's decision.

It has been the experience of this office that the more information a requester possesses about the basis for a head's decision, the more likely a mediated settlement of the appeal can be attained. This experience reflects a comment that appears on p. 268 of the Report of the Williams Commission that "... conscientious explanations of the basis for refusal may reduce the number of situations in which the exercise of appeal rights will be thought to be necessary".

In my view, the notice of refusal of the institution in this appeal does not meet the requirements of subsection 29(1)(b)(ii) of the Act. However, as I have dealt with the application of the exemptions to the records in issue in this appeal, I do not see any purpose that would be served by ordering the head to send a new notice of refusal to the appellant. The appellant has raised an issue of general importance to the operation of the Act and I have accepted his position with respect to the obligations of the institution under subsection 29(1)(b)(ii) of the Act.

This Office has had to address the issue of the inadequacy of decision letters in a number of past orders, making its views of the proper interpretation of the requirements of sections 22(1)(b)(i) and (ii) of the Act clear. These sections require institutions to outline "the specific provision of this Act under which access is

refused" and "the reasons the provision applies to the record". To simply quote the section reference and restate the wording of the exemption claim is not sufficient. Requesters are entitled to know the reasons why a request has been denied so, among other things, they are in a position to decide whether or not to appeal.

In the present appeal, I find myself in a situation similar to that faced by former Commissioner Linden in Order P-158. Additional details about the records and the rationale for denying access clearly could have been given to the appellant without compromising the position of the Police regarding the application of exemption claims, and also without revealing the substance of the responsive records for which access was being denied (see Order M-913, upheld on judicial review in Duncanson v. Toronto (Metropolitan Police Services Board), (1999), 175 D.L.R. (4th) 340 (Div. Ct.)). The best evidence of this is the fact that additional details were in fact communicated in the revised decision issued by the Police.

I find that the initial decision letter issued by the Police was inadequate and did not satisfy the requirements of section 22(1) of the Act. While I find that the revised decision adequately satisfies the requirements of section 22(1), it had little or no value to the appellant since it was not provided to him until the late stages of this inquiry, after all representations had been submitted. That being said, through the actions of this Office during both mediation and in the course of this inquiry, I find that the appellant has been provided with sufficient information to enable him to address the issues in this appeal and, in my view, no useful purpose would be served in taking any further action at this point.

Institutions and the Commissioner's Office both have clearly articulated roles to play in administering Ontario's freedom of information scheme, and it is vital that both discharge their statutory responsibilities properly. When institutions do not comply with the requirements of section 22 of the Act, the Commissioner's Office must step in and make up for these deficiencies during mediation. This invariably adds time to the process, at the expense of the appellant, who is entitled to a prompt and comprehensive decision. The actions of the Police in providing a revised decision letter to the appellant, albeit at too late a stage to have any value in the present appeal, demonstrate an awareness of the ability to provide the appropriate level of detail in responding to a request such as this. I encourage the Police to follow the pattern of the revised decision letter in future, which adheres to their statutory responsibilities under section 22(1) of the Act.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, as recorded information about an identifiable individual.

The records relate to the investigation by the Police into allegations made against the appellant of receiving inappropriate payments. The records contain the personal identifiers (e.g. names, addresses, telephone numbers and dates of birth) of the appellant, the complainant and other identifiable individuals, as well as the information and statements provided by these individuals to the Police during their investigation. As such, I find that the records contain the personal information of the appellant, the complainant and other identifiable individuals.

INVASION OF PRIVACY

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals, and the Police determine that the disclosure of the information would constitute an unjustified invasion of the other individuals' personal privacy, the Police have the discretion to deny the appellant access to that information.

In this situation, sections 14(2) and (3) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of the personal privacy of the individuals to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

If none of the presumptions in section 14(3) apply, the Police must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The Police have cited the presumption of an unjustified invasion of privacy contained in section 14(3)(b). This section reads:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Police state that the records relate to the investigation of an allegation of fraud and, therefore, the personal information contained in the records was compiled as part of an investigation into a possible violation of law.

The appellant submits that:

> While [the records] may have been compiled as part of an investigation into a possible violation of law, the Appellant submits that [the records] should be disclosed to him based on the doctrine of "absurd result".

The appellant relies on the findings in Orders P-1494 and P-1117 in support of her position.

In Order P-1494, former Adjudicator Marianne Miller stated:

> Several previous orders of this office have considered whether information of which an appellant was previously aware, or which was provided to or received from an appellant by an institution, should be subject to a presumption against non-disclosure (Orders M-384, M-444, M-613, M-847, P-1263 and P-1414). All of these orders deal with fact situations analogous to the present case in that the information at issue was the personal information of both the appellant and other individuals.
>
> These orders found that non-disclosure of personal information **which was originally provided to the institution by an appellant** would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. They determined that applying the presumption to deny access to the information which the appellant provided to the institution would, according to the rules of statutory interpretation, lead to an "absurd" result. [emphasis added]

In Order P-1117, former Adjudicator John Higgins found:

> The records contain a substantial amount of medical information about the appellant's mother, primarily relating to the circumstances leading up to her death. Normally, the presumed unjustified invasion of personal privacy in section 21(3)(a) [the equivalent provision to section 14(3)(b) contained in the provincial legislation] applies to this information. However, in this case, this information has been provided to the appellant and other members of his family on several previous occasions. Under these circumstances, it would not be reasonable to apply this presumption, and I find that it does not apply.

The appellant points out that he is aware of the identity of the complainant and other individuals interviewed during the course of the investigation, and argues that to deny access in these circumstances would constitute an "absurd result".

I do not accept the appellant's position. As the orders referred to by the appellant make clear, the "absurd result" doctrine has been applied by this Office to personal information which was originally provided to the institution by an appellant, or information which was previously and clearly provided to an appellant in other contexts. Order P-1494 is an example of the former, and Order P-1117 of the latter. It has not and should not apply to circumstances such as those in the present appeal where the content of the records is clearly not known by the appellant. Therefore, I find that the "absurd result" doctrine has no application.

I accept the submission of the Police that the records were compiled as part of an investigation into a possible violation of law, in this case the investigation of possible fraud contrary to the Criminal Code.

In Order MO-1192, Adjudicator Laurel Cropley stated, in the context of a request for police records concerning an alleged assault:

> The appellant submits that since the Police made a judgment call not to lay charges against the suspect, they have not established the application of the presumption in section 14(3)(b).
>
> I am satisfied that the Police investigated an alleged assault on the appellant at the named high school and that the investigation was conducted with a view to determining whether criminal charges were warranted. Accordingly, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law and its disclosure would constitute a presumed unjustified invasion of personal privacy. The presumption may still apply, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225). As I indicated above, once a determination has been made that the presumption in section 14(3)(b) applies, it cannot be rebutted by factors in section 14(2). Therefore, even if I were to find that section 14(2)(d) applies in the circumstances, it would not be sufficient to rebut the presumption in section 14(3)(b). I have considered section 14(4) and find that it does not apply in the circumstances of this appeal.

In my view, the principles articulated by Adjudicator Cropley apply in the present appeal. Although no criminal charges were laid, the requirements of a presumed unjustified invasion of privacy under section 14(3)(b) have nonetheless been established.

None of the personal information contained in the records fall under section 14(4).

Accordingly, I find that the records qualify for exemption under section 38(b) of the Act.

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he is seeking and the Police indicate that further records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify all responsive records. The Act does not require the Police to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge their obligations under the Act, the Police must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate responsive records.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

During mediation, the appellant claimed that further records responsive to his request should exist, in particular, a document that was shown to him by the Police during the investigation. According to the appellant, the letter dated January 26, 1998 as described in Part (e) of the request has not been identified by the Police as a responsive record, and therefore the search by the Police is not complete.

In my view, any such letter as described by the appellant, if it exists, would be responsive to the request.

As far as the letter is concerned, the Police submit:

> Upon receipt of the Notice of Appeal the institution reconfirmed with [the lead investigator in this case], that additional records did not exist and was advised that this is correct. It is believed that the document in question, a letter shown to [the appellant's client] at the time of his interrogation, was not the property of the Police and was returned to the holder of the record.

I accept the explanation offered by the Police, and I find that the efforts made to search for and locate responsive records was reasonable, despite the fact that the letter specified by the appellant was not identified. Accordingly, I dismiss this part of the appeal.

ORDER:

I uphold the decision of the Police and dismiss the appeal.

Original signed by: March 3, 2000
Tom Mitchinson
Assistant Commissioner