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

ORDER MO-1292

Appeal MA-990293-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

In September 1997, the appellant was seriously injured as a result of an altercation with a security officer at a Toronto hospital. The appellant's complaint against the security officer was investigated by the Police and the security officer was charged with the offence of aggravated assault, but was ultimately acquitted.

The appellant made a request to the Toronto Police Service (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to copies of all of the material in its possession relating to its investigation into the assault and the trial and acquittal of the security officer, including the Crown brief and any videotapes from hospital security cameras which may have captured the assault.

The Police located 224 pages of documents and an audiotape which were responsive to the request. After notifying a number of persons whose rights may be affected by the disclosure of the information contained in the records under section 21(4) of the Act, the Police denied access, in whole or in part, to many of the documents. Others were disclosed to the appellant, with or without severances. The Police relied upon the exemptions contained in section 9(1)(a) (relations with other governments), 14(1) and 38(b) (invasion of privacy), 15(a) (information published or available) and 38(a) (discretion to refuse requester's own information) of the Act to deny access to the remaining records and parts of records.

The appellant appealed the decision to deny access to the undisclosed information contained in the records, and maintained that additional records, particularly the videotapes taken by the hospital security cameras, should exist. I initially sought the representations of the Police in a Notice of Inquiry. The submissions which I received from the Police were shared, in part, with the appellant. I have not received any representations from the appellant though his appeal letter included extensive information.

The records consist of a large number of witness statements, occurrence reports, police officer's notes, correspondence, witness lists, exhibit lists, notes by the Crown attorney, materials relating to disclosure to counsel for the accused security officer, notes taken at the trial by police officers and an audiotape of an interview with a witness.

Included with the material filed by the appellant at the time he initiated the appeal were complete copies of Records 71, 72, 73-76, 95 and 172. As the appellant has been provided with access to these documents, it is not necessary for me to address them further in this order.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

As noted above, the request relates to the investigation, trial and acquittal of the security officer who was charged with assaulting the appellant. Because the responsive records are about the Police investigation and

prosecution of the accused, I find that the majority of them contain the personal information of this individual. Specifically, Records 1 (which also appears as Record 97), 2-3 (which also appears as Record 103), 4 (which also appears as Records 87, 88, 89 and 169), 5 (which is duplicated at Records 100 and 170), 6-7 (copied at Record 105-106), 8, 9-11, 15-22, 23-28, 46, 47, 48, 49-51, 52-68, 69 (copied at Record 150), 77-78, 79, 81-82, 83 (which also appears at Records 116, 163, 164 and 165), 85, 91, 92-94, 96, 98, 99, 101 (duplicated at Record 177), 104, 107 (duplicated at Records 171 and 224), 108-110, 115, 116-117, 118-121, 122-124, 125-126, 127, 128 (copied at Record 136), 129-131, 132, 133-134, 135, 137-139, 140-142, 143, 144, 145, 146, 147, 148, 149, 151, 152, 153-154, 155, 156-158, 159 (which is duplicated at Record 175), 160, 162, 166-168, 173, 174, 176, 178-179, 180-181, 182-183 (which is copied at Record 187-188), 184-185 (copied at Records 186 and 189), 190-196, 197, 198-199, 200, 201, 202-205, 206, 207-209, 210, 211, 212, 213-223 and the audiotape identified as responsive to the request contain the personal information of the security officer charged with assaulting the appellant.

Because the records relate to an assault in which the appellant was the victim, many of the records also contain his own personal information, such as his address, date of birth, age, marital status and medical condition following and prior to the assault. I find that Records 1 (copied at Record 97), 2-3 (also appears as Record 103), 5 (which is duplicated at Record 100 and 170), 6-7 (copied at Record 105-6), 8, 9-11, 15-22, 23-28, 29-38, 39-45, 46, 47, 48, 49-51, 52-68, 77-78, 79, 85, 90, 96, 99, 104, 107 (copied at Records 171 and 224), 108-110, 112, 113, 115, 116-117, 118-121, 122-124, 125-126, 127, 128,129-131, 132, 133-134, 135, 136, 137-139, 140-142, 153-154, 155, 156-158, 173, 174, 176, 178-179, 180-181, 182-183 (which is duplicated at Record 188-189), 184-185, 186, 190-196, 198-199, 200, 201, 202-205, 207-209, 210, 211 and 212, as well as the audiotape identified as part of the records, contain the personal information of the appellant.

Many of the records also contain the personal information of the witnesses to the alleged assault and the physicians and nurses who treated the appellant both before and after the altercation took place. This personal information includes their names, addresses, telephone numbers, medical history and their personal opinions or views. The records also contain the personal information of another security officer who was involved in the altercation with the appellant but was not charged.

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(a) of the Act, the Police have the discretion to deny access to an individual's own personal information in instances where the exemptions in sections 6, 7, 8, **9**, 10, 11, 12, 13 or **15** would apply to the disclosure of that personal information. [Emphasis added]

RELATIONS WITH GOVERNMENTS

The Police submit that some of the records, which comprise the Confidential Crown Brief, are exempt from disclosure under the mandatory exemption in section 9(1) of the Act which reads, in part:

A head shall refuse to disclose a record if the disclosure could reasonably be expected

to reveal information the institution has received in confidence from,

...

(b) the Government of Ontario or the government of a province or territory in Canada;

...

(d) an agency of a government referred to in clause (a), (b) or (c);

...

In order to deny access to a record under section 9(1), the Police must demonstrate that the disclosure of the record could reasonably be expected to reveal information which the Police received from one of the governments, agencies or organizations listed in the section **and** that this information was received by the Police in confidence.

The words "could reasonably be expected to" appear in the preamble of section 9(1), as well as in several other exemptions under the Act dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)]. I find that this requirement also applies in the context of section 9(1)(b) and (d).

The Police argue that notes taken by the Crown Attorney during the preliminary hearing and trial of the accused security officer, as well as records relating to the disclosure of the Crown's case to the accused's counsel, relate to the criminal proceeding and there was no expectation on the part of the Crown Attorney that they would be disclosed to anyone. The Police rely on the findings of Adjudicator Holly Big Canoe in Order MO-1202 to support its position.

In that decision, Adjudicator Big Canoe reviewed each of the component parts of the section 9(1) exemption and the rationale behind the exemption itself when applied to certain severed information contained in a document entitled "Confidential Crown Envelope". She stated:

> In Volume II of their report entitled Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy/1980 (at page 306-7), the members of the Williams Commission discussed the need for an exemption for information received in confidence from other governments in the provincial access to information scheme:
>
> > ... It is our view that an Ontario freedom of information law should expressly exempt from access material or information obtained on this

> basis from another government. Failure to do so might result in the unwillingness of other governments to supply information that would be of assistance to the government of Ontario in the conduct of public affairs. An illustration may be useful. It is possible to conceive of a situation in which environmental studies (conducted by a neighbouring province) would be of significant interest to the government of Ontario. If the government of the neighbouring province had, for reasons of its own, determined that it would not release the information to the public, it might be unwilling to share this information with the Ontario government unless it could be assured that access to the document could not be secured under the provisions of Ontario's freedom of information law. A study of this kind would not be protected under any of the other exemptions ... and accordingly, could only be protected on the basis of an exemption permitting the government of Ontario to honour such understandings of confidentiality ...

I have reviewed the information to determine whether, in the hands of the Ministry of the Attorney General, any of the exemptions in the provincial Freedom of Information and Protection of Privacy Act would apply.

I am satisfied that the information was prepared or obtained for the dominant purpose of existing or reasonably contemplated litigation. I am also satisfied that it was prepared or obtained with an intention that it be confidential in the course of the litigation. In my view, the information would fall within section 19 of the provincial Freedom of Information and Protection of Privacy Act.

Accordingly, I find that the requirements for section 9(1) have been met and the severed information on Record 60 is exempt under section 38(a).

I will now evaluate whether the records which comprise the Confidential Crown Brief would qualify for exemption under section 19 of the provincial Act if they were in the possession of the Ministry of the Attorney General, through the Crown Attorney's office.

Solicitor-Client Privilege

Branches 1 and 2

Section 19 consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

In Order P-1342 Adjudicator Big Canoe considered whether Branch 2 of the section 19 exemption would be available in cases where a record would not qualify for solicitor-client privilege at common law under Branch 1. After reviewing the legislative history of section 19, she concluded (at page 8):

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.

The information contained in Records 69, 70, 81, 82, 83 (which also appears as Records 161, 163, 164 and 165), 84, 92, 93, 94, 143, 144, 145, 147, 148, 149, 150, 151, 152, 162, 166-168, 173, 174, 176, 178, 179, 206, 210, 212 and 213-223 was also prepared or obtained by the Crown Attorney responsible for the prosecution of the accused security officer for the dominant purpose of existing litigation. It is clear

from the contents of these records that they were obtained or were prepared with an intention that they would be treated confidentially in the course of the litigation against the accused. As such, I find that the information in each of these records would fall within the second part of Branch 1 of the section 19 of the provincial Freedom of Information and Protection of Privacy Act if the information which they contain was in the hands of the Ministry of the Attorney General.

However, in the present appeal, the litigation which gave rise to the creation of these records was completed with the acquittal of the accused security officer. In Order PO-1664, Adjudicator Big Canoe reviewed the state of the law with respect to the impact which the termination of litigation has on documents which are subject to litigation privilege. She found that:

> Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [Boulianne v. Flynn, [1970] 3 O.R. 84 at 90 (Co. Ct.); Meaney v. Busby (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [Carleton Condominium Corp. v. Shenkman Corp. (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while the purpose for its recognition continues to be served. Unlike solicitor-client communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor-client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter.
>
> As indicated above, "opinion" work product, which consists of counsel's mental impressions, conclusions, opinions or legal theories, enjoys a heightened protection over ordinary work product. Having reviewed the records at issue, I find that most of what I would consider to be opinion work product is no longer at issue because of the manner in which I have dealt with section 21 of the Act. Record 34, however, contains notes made by the Crown which consist of "opinion" work product. In the circumstances, I am satisfied that the rationale for litigation privilege is present with respect to this record. Accordingly, despite the termination of litigation, I find that Record 34 qualifies for exemption under section 19 of the Act. Having reviewed the other records remaining at issue, I find that none consists of "opinion" work product.
>
> All litigation involving the Crown is now at an end regarding these matters and, on the basis of the representations and the contents of the records, I am not satisfied that disclosure of these records will harm the adversarial process by hindering the investigation and preparation of future cases of this nature. Therefore, the rationale for litigation privilege is no longer present and, accordingly, I find that these records do not qualify for exemption under Branch 1 of section 19.

I have reviewed the records contained in the Confidential Crown Brief with a view to determining which, if any, contain information which may properly be described as "opinion work product" as opposed to "ordinary work product". In my view, Records 70, 81, 82, 83 (which also appears as Records 161, 163, 164 and 165), 84, 94, 145, 162, 173, 174, 176, 178-179, 206, 210 and 212 qualify as opinion work product as they represent the Crown Attorneys' mental impressions, strategies and opinions. Accordingly, I find that despite the termination of the litigation for which these records were created, they continue to qualify for exemption under section 19 of the provincial Act.

Other records which found their way into the Confidential Crown Brief do not enjoy similar protection, however. I find that Records 69, 92, 93, 143, 144, 147, 148, 149, 150, 151, 152 and 213-223, which deal exclusively with questions relating to the disclosure of the Crown's case to counsel for the accused security officer did not contain the same degree of attention from the Crown Attorney who prepared them. They reflect more the administrative arrangements required for the disclosure process and may be more accurately described as "ordinary", rather than "opinion" work product. As the litigation which gave rise to these records has been completed, I find that the privilege which may have existed in them under Part 2 of Branch 1 of the section 19 exemption has terminated.

Because these records contain personal information relating to the accused, I will address the application of the invasion of privacy exemption in section 14(1) to them below.

In accordance with the conclusions of Adjudicator Big Canoe in Order MO-1202, I find that Records 70, 81-82, 83 (which also appears as Records 161, 163, 164 and 165), 84, 94, 145, 162, 173, 174, 176, 178-179, 206, 210 and 212 qualify for exemption under section 9(1)(d) because they would be exempt under section 19 in the hands of the Ministry of the Attorney General. Because Records 81-82, 83 (which also appears as Records 161, 163, 164 and 165), 173, 176, 210 and 212 contain the personal information of the appellant, they are, therefore, exempt under section 38(a).

INVASION OF PRIVACY

As noted above in my discussion of "personal information", 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 institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Where, however, the record only contains the personal information of other individuals, section 14(1) of the Act prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. In the circumstances, the only exception which could apply is section 14(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

In both these situations, sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual 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].

The Police submit that the information contained in the records was compiled and is identifiable as part ofan investigation into a possible violation of law. The Police argue that disclosure of this information to anyone other than the individual to whom the information relates is presumed to be an unjustified invasion of personal privacy under section 14(3)(b) which reads:

> 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 appellant is aware of the name of the security officer and the charge which was brought against him. In Records 2-3 (copied at Record 103), 5 (also appears as Records 100 and 170), 6-7 (copied at Record 105-106), 23, 80, 96, 98, 99, 104, 107 (also appears as Records 171 and 224), 146 and 159 (which is the same as Record 175), this is the only personal information which was not disclosed to him.

In Order PO-1759, Adjudicator Laurel Cropley ordered the disclosure of certain references to an affected person contained in various records compiled by the Crown Attorney involved in the prosecution of the appellant in that case. She reasoned that the appellant was aware of the information about the affected person and its disclosure would not constitute an unjustified invasion of this individual's personal privacy. Adopting the reasoning in Order PO-1759, I find that the disclosure to the appellant of information which is within his knowledge would not constitute an unjustified invasion of the personal privacy of the security officer. Accordingly, the undisclosed portions of Records 2-3 (copied at Record 103), 5 (also appears as Records 100 and 170), 6-7 (copied at Record 105-106), 23, 80, 96, 98, 99, 104, 107 (also appears as Records 171 and 224), 146 and 159 (which is the same as Record 175) will be ordered disclosed to the appellant.

In addition, notes were taken by the investigating officers at the preliminary hearing and trial of the accused where testimony from witnesses was given in open court. These notes appear at Records 46, 48, 113, 127 and 133-134. Again, the appellant is aware of the information related by the witnesses called at the preliminary hearing and the trial of the security officer as he was present when the testimony was given. Again, I find that disclosure of evidence of testimony which was made in open court and for which the appellant was present would not constitute an unjustified invasion of personal privacy [Order M-628]. Accordingly, I will order that these records also be disclosed to the appellant.

Finally, the Police have severed information from correspondence which it received from the appellant himself or information from notes taken during interviews with the appellant. These documents are found at Records 29-38, 39-45, 153-154, 155, 156-158 and 180-181. In Order M-444, former Adjudicator John Higgins commented on the application of the presumption in section 14(3)(b) to information which was obtained by an institution from the requester himself. He found that:

> However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.
>
> It is possible that, in some cases, the circumstances would dictate that this presumption should apply to information which was supplied by the requester to a government organization. However, in my view, this is not such a case. Accordingly, for the reasons enumerated above, I find that the presumption in section 14(3)(b) does not apply. In the absence of any factors favouring non-disclosure, I find that the exemption in section 38(b) does not apply to the information at issue in the records.

In the present situation, the requester provided the information in Records 29-38, 39-45, 153-154, 155, 156-158 and 180-181 to the Police. Accordingly, in order to avoid an absurd result, I will order that these documents also be disclosed to the appellant. [Orders M-444, PO-1759]

Record 90 is a CPIC printout of the appellant's criminal record. All of the information contained in that document was disclosed to the appellant with the exception of a seven-digit code. I note that this information was provided to the CPIC system by the Police themselves and not by the agency which maintains the CPIC system, the RCMP. For this reason, the mandatory exemption in section 9(1)(b) and (d) does not apply to this portion of the record [Orders M-794, M-826 and M-1004]. Finally, the code itself does not constitute "personal information" and, as no other discretionary exemptions have been claimed for this information and no mandatory exemptions apply to it, I will order that Record 90 be disclosed to the appellant in its entirety.

Each of the remaining records comprise the contents of the investigation file maintained by the Police in the course of their inquiries into the possible laying of charges against the security officer who allegedly assaulted the appellant. These records consist of various documents including an audiotape of an interview with a witness, a Record of Arrest, Civilian Witness Lists, notes of interviews with witnesses, occurrence reports, witness statements, a subpoena, correspondence and various internal hospital investigation records which were provided to the Police by the hospital security staff during the Police investigation.

I find that these records were compiled by the Police and are identifiable as part of their investigation into a possible violation of section 268 of the Criminal Code, the offence of aggravated assault, against the security officer. As such, I find that they fall within the ambit of the presumption in section 14(3)(b) and their disclosure would constitute an unjustified invasion of personal privacy. Records 1 (which also appears as Record 97), 8, 9-11, 15-22, 23-28, 47, 49-51, 52-68, 77-78, 79, 85, 108-110, 112, 115, 116-117, 118-121, 122-124, 125-126, 128 (duplicated at Record 136), 129-131, 132, 135, 137-139, 140-142, 182-189, 190-196, 198-199, 200, 201, 202-205, 207-209 and 211, as well as the audiotape identified by the Police as responsive to the request, are exempt under section 38(b). Records 4 (duplicated at Records 87-89 and 169), 12, 13, 14, 91, 101 (copied at Record 177), 102, 114,160 and 197, which do not contain the personal information of the appellant, are exempt under section 14(1).

I found above that Records 69, 92, 93, 143, 144, 147, 148, 149, 150, 151, 152 and 213-223 did not qualify for exemption under section 9(1)(d) because they would not be exempt under section 19 if they were in the possession of the Ministry of the Attorney General. These documents relate primarily to the issue of disclosure of the Crown Attorney's case to counsel for the accused security officer. As they were created following the Police investigation and the laying of a charge under the Criminal Code, it cannot be said that they were created or are identifiable as part of an investigation into a possible violation of law. Records 69, 92, 93, 143, 144, 147, 148, 149, 150, 151, 152 and 213-223 do not, therefore, fall within the presumption in section 14(3)(b) of the Act.

Records 69, 92, 93, 143, 144, 147, 148, 149, 150, 151, 152 and 213-223 contain only the personal information of the accused security officer and several witnesses. They do not contain any of the personal information of the appellant. I have not been provided with any submissions from the appellant raising the possible application of any of the considerations in section 14(2), or any unlisted factors which might favour the disclosure of this information. Accordingly, I find that these documents are exempt under section 14(1) as their disclosure would constitute an unjustified invasion of the personal privacy of the accused and the witnesses referred to therein.

I find that section 14(4) does not apply to the records in the circumstances of this appeal. The appellant has not raised the public interest override in section 16 and considering the facts of this case, I find that it does not apply.

Because of the manner in which I have addressed the application of section 38(b) to Records 190-201, it is unnecessary for me to consider whether they are properly exempt under section 15(a).

REASONABLENESS OF SEARCH

In the material filed by the appellant with his appeal, reference is made to the existence of certain videotapes taken from security cameras at the hospital on the day the appellant was injured. These documents were provided to the appellant by the Police in response to his request and were identified as Records 12, 15 and 72. They indicate that the Police received several videotapes from the hospital. The appellant is of the view that these videotapes captured the assault against him and are responsive to his request. He argues that these records clearly exist, as evidenced by the references to them in Records 12, 15 and 72, and that he is entitled to them.

In cases where a requester provides sufficient details about the records which he or she is seeking and the institution indicates that records do not exist, it is my responsibility to insure that the institution has made a reasonable search to identify any records that are responsive to the request. The Act does not require the institution to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the institution must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request.

The Police submit that they have made extensive efforts to locate the requested videotapes. They indicate that searches were conducted by the Freedom of Information (FOI) Unit analyst assigned to the file, the Co-ordinator of the FOI Unit, the FOI liaison at the Division level, the detective in charge of the investigation and the unit commander. The Police conclude that the FOI Unit analyst also contacted the Video Services Unit and Property Bureau as part of the search undertaken. The Police also submit that the appellant was advised that, according to the references made in the records to the videotapes by the investigating officers, the videotapes did not, in fact, capture the altercation between him and the security officer.

The Police have also provided an explanation as to why they no longer have copies of the hospital security camera videotapes. They indicate that the tapes were provided to counsel for the accused security officer prior to his trial as part of the Crown's disclosure obligations to the accused. It would appear, based on the submissions of the Police, that the tapes were not recovered from counsel for the accused by either the Crown Attorney's office or the Police following the conclusion of the trial. For this reason, the records are no longer in the possession of the Police.

I am satisfied, following my review of the representations of the Police and the records, that the searches undertaken to locate the hospital security camera videotapes were reasonable and I dismiss that part of the appeal.

ORDER:

1. I am satisfied that the Police conducted a reasonable search for the hospital security camera videotapes and I dismiss that part of the appeal.

2. I order the Police to disclose to the appellant Records 2-3 (copied in part at Record 103), 5 (which also appears as Records 100 and 170), 6-7 (also listed as Record 105-106), 29-38, 39-45, 48, 71, 72, 73-76, 80, 86, 90, 95, 96, 98, 99, 104, 107 (also copied as Records 171 and 224), 113, 127, 133-134, 146, 153-154, 155, 156-158, 159 (which is identical to Record 175), 172 and 180-181 by providing him with a copy by May 16, 2000 but not before May 9, 2000.

3. I uphold the Police decision not to disclose the remaining records to the appellant.

4. In order to verify compliance with Provision 2 of this order, I reserve the right to require the Police to provide me with a copy of the records which it provided to the appellant.

Original signed by: April 7, 2000
Donald Hale
Adjudicator

ADDENDUM TO ORDER MO-1292

Appeal MA-990293-1

Toronto Police Services Board

This is an addendum to Order MO-1292, an order which disposed of an appeal involving a substantial number of records maintained by the Toronto Police Services Board (the Police). Following the issuance of Order MO-1292, the Freedom of Information and Privacy Protection Co-ordinator for the Police contacted the Adjudication Review Officer assigned to this appeal by telephone. In that conversation, several issues regarding the order provisions contained in the decision were identified. As a result of my review of these concerns and the appeal file itself, I have decided to address these matters by way of an Addendum to the original order.

In an Index provided to this office by the Police during the mediation stage of the appeal, it was indicated that certain records had been disclosed in their entirety to the appellant. In my decision, I again ordered that some of these records be disclosed to the appellant as they were not subject to any of the exemptions contained in the Act. As Records 33, 34, 37, 38, 41, 42, 44, 45, 71 to 76, 86, 95, 158 and 172 have already been made available to the appellant, I will not require that they again be provided to him by the Police. The Police, therefore, need not comply with Order Provision 2 of Order MO-1292 to the extent that it applies to these records.

The Index also indicated that certain information contained in several of the records was deemed by the Police to be non-responsive to the appellant's request. The Mediator assigned to the appeal by this office confirmed with the appellant that he was not seeking access to any of the information in the records deemed by the Police to be non-responsive, including a severed portion of Record 90. This was also confirmed in the Mediator's Report which was provided to the parties at the conclusion of mediation. Accordingly, the Police need not comply with Order Provision 2 to the extent that is applies to the undisclosed portion of Record 90.

Finally, at Page 9 of Order MO-1292, I found that the disclosure of Record 46 to the appellant would not constitute an unjustified invasion of personal privacy under section 38(b) of the Act. As Record 46 was found not to be exempt, it ought to have been included in the list of records ordered disclosed to the appellant in Order Provision 2 of the decision. Therefore, I order the Police to disclose Record 46 to the appellant in accordance with the time frames set out in Order MO-1292.

This Addendum is to be considered as part of Order MO-1292 and the corrections I have indicated above supplant those portions of Order Provision 2 where necessary.

May 10, 2000

Donald Hale

Adjudicator