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

ORDER MO-1490

Appeal MA-010171-1

Waterloo Regional Police Services Board

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NATURE OF THE APPEAL:

This is an appeal under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a decision of the Waterloo Regional Police (the Police). The requester (now the appellant) requested access to all information held by the Police relating to a specific incident that was investigated by the Police. The Police located nine pages of responsive records, and then notified an individual named in the records (the affected person) of the request, seeking her views on disclosure. In response to this notice, the affected person advised the Police that she did not consent to disclosure of her personal information.

Later, the Police granted the appellant partial access to each of the nine responsive records, but denied access to the remaining portions of the records based on the exemption at section 38(a) in conjunction with sections 8 (law enforcement) and 13 (danger to safety or health), and the exemption at section 38(b) in conjunction with section 14 (personal privacy). The Police also withheld some information from the records on the basis that it was not responsive to the request. Also, the Police advised the appellant that one of the investigating officers was unable to locate his notebook containing information responsive to the request, and that the officer had "provided a sworn affidavit indicating this."

The appellant appealed the decision of the Police to this office. In particular, the appellant took issue with the decision to withhold information in the records, and the position of the Police that it could not provide access to the relevant information in one of the officer's notebooks.

During mediation of the appeal, the appellant advised that he was no longer seeking access to the withheld portions of page 7 of the records.

This office sent a Notice of Inquiry seeking representations on the applicability of the claimed exemptions initially to the Police and the affected person, both of whom provided representations in response. This office then sent a supplementary Notice of Inquiry to the Police seeking representations on the issue of whether or not the Police had conducted a reasonable search for responsive records. The Police provided representations in response to the supplementary notice. This office then sent the non-confidential portions of the representations of the Police to the appellant, together with a modified Notice of Inquiry. The appellant returned representations.

RECORDS:

At issue are the withheld portions of a six-page occurrence report (pages 1, 2, 3, 4, 5 and 6), and the withheld portions of a one-page excerpt from a police officer's notebook (page 9). The appellant removed page 7 from the scope of the appeal, and page 8 is no longer at issue since the only responsive information in this record has been disclosed.

DISCUSSION:

PERSONAL INFORMATION

Introduction

The section 14 personal privacy exemption applies only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*. "Personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The Police submit that the withheld information reveals the affected person's name, race, age, home address and telephone number, as well as other information about the affected person's involvement in the incident in question, all of which is personal information under the definition in section 2(1) of the *Act*.

The affected person submits simply that the information she gave to the Police is "personal" to her, and does not relate in any way to the appellant.

The appellant submits that any personal information in the record relates solely to him or, alternatively, that he is entitled to have access to any personal information relating to him.

Based on my review of the records and the representations, I find that the records contain personal information about the affected person, including her name, race, age, home address and telephone number, as well as other information about the affected person's involvement in the incident in question. This information is clearly "about" the affected person and therefore qualifies as her personal information. In addition, I find that the records contain the personal information of the appellant, similar in nature to the information relating to the affected person.

ACCESS TO ONE'S OWN PERSONAL INFORMATION/INVASION OF ANOTHER INDIVIDUAL'S PRIVACY

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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 requester 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.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information

against the other individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) 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 institution 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].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [See Order PO-1764]

If none of the presumptions in section 14(3) applies, the institution 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.

Here, the Police have relied on the presumption of an unjustified invasion of privacy at 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 Police submit that the withheld information "was compiled and is identifiable as part of an investigation into a possible violation of law", in particular a possible violation of the *Criminal Code*.

Neither the affected person nor the appellant makes specific submissions on the application of the section 14(3)(b) presumption.

In the circumstances, it is clear that the Police compiled the information in question as part of an investigation into a possible violation of law, specifically the *Criminal Code*. Therefore, the withheld information falls within the scope of the section 14(3)(b) presumption of an unjustified invasion of the affected person's privacy, and thus the section 38(b) exemption applies.

In addition, I am satisfied that the Police disclosed as much information to the appellant as reasonably possible, without disclosing information that qualifies for exemption under section 38(b) of the *Act*.
In the circumstances, it is not necessary for me to consider the application of section 38(a) in conjunction with sections 8 and/or 13.

REASONABLE SEARCH

Section 4(1) provides a right of access to a record or a part of a record "in the custody or under the control of an institution." The issue to be decided is whether or not the Police have conducted a reasonable search to determine whether or not records exist "in the custody or under the control of" the Police in response to the appellant's request. The Police are not required to prove with absolute certainty that responsive records are not in its custody or under its control, but simply that they have conducted a reasonable search for them.

The Police submit:

> . . . When this request was received for the complete file on an incident, the investigating officers were contacted by memo for their notes on this incident and the Records Branch Supervisor was contacted, also by memo, for the police occurrence report.
>
> The police occurrence report was received from the Record Branch. One of the officer's [sic] who attended this call submitted her notebook. The second officer on this call searched for his notebook and was unable to locate it. He was asked to provide an affidavit (copy attached), sworn before a Commissioner, authorized to administer oaths or affirmations. The affidavit was submitted by the officer as required. The appellant was also advised of this in the decision letter.
>
> . . . Was the appellant contacted for additional clarification of his request?
>
> The answer to this is "No" because clarification was not required. The appellant was clear in his request for the complete investigative file, which in this incident, was the officers' notes from their notebooks and the police occurrence report.
>
> . . . If the institution did not contact the appellant to clarify the request, did it:
>
> (a) choose to respond literally to the request?

(b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the appellant? If yes, for what reasons was the scope of the request defined in this way? On what date and how was the appellant informed of this decision? Was the appellant provided with reasons for narrowing the scope of the request?

The request was very clear and, therefore, did not require further clarification. The appellant was advised by letter that the institution was dealing with his request as a search for the police occurrence report and the officers' notes. The appellant did not dispute this. There was [sic] no other documents that would be generated for an incident of this nature. Therefore, there were no attempts by the institution to limit the scope of the request.

Details of the search:

The policies and procedures of the [Police] dictate the use of notebooks by Service personnel, who keep notebooks and make notes pertaining to incidents and occurrences. Officers are required to store their notebooks securely. The current and completed notebooks are retained by the officer and they are the only persons who have access to their notebooks, in order to respond to requests.

In order to deal with this request by the appellant, the two investigating officers were contacted by memo, for their notes, including notebooks, relating to the incident in question. One of the officers responded with her notebook. The second officer contacted the Access to Information office to indicate that he was unable to locate his notebook. He was asked to provide a sworn affidavit, stating that he had searched for his notebook unsuccessfully. He was able to provide this affidavit. Therefore, the requester/appellant was advised in the decision letter that this was done.

. . . . .

The notebook in question did exist and was retained by the assisting officer. However, he was unable to locate the notebook to respond to the request from the Access to Information office, in order to comply with the request from the appellant. Therefore, the retention policy of the institution is not relevant to this question.

The officer in question was able to advise this office that he was merely an assisting officer on this call. The notes of the primary officer who attended this call were dealt with as part of this request.

The institution believes that we have complied with the provisions of the *Act* in conducting a search for the notes and by providing a sworn affidavit for the missing records.

The Police provided me with a copy of the affidavit of the secondary officer which states:

> I have misplaced/lost my notebook regarding this incident. I have searched all places I would retain the notebook without results.

The appellant provides extensive representations on this issue, most of which are confusing, and only marginally relevant to the reasonable search issue, if relevant at all. In essence, the appellant does not believe that the officer in question lost his notebook, and also believes that additional responsive records should exist.

In the circumstances, I am satisfied with the explanation of the Police regarding the lost notebook, and I am also persuaded that the Police have conducted a reasonable search for all responsive records. The nature and extent of the records already identified are typical of investigations of this nature. In addition, I am not satisfied that the appellant has provided a reasonable basis for believing that additional responsive records exist.

In his representations, the appellant states that he seeks an adjudication of issues in this appeal in addition to those set out above, and in addition to those described in the Report of Mediator. These additional issues include correction of information in the records, and orders "for investigation and sanctions against" the police officer who lost his notebook, and other Police officials. While the *Act* does provide for a right of correction in certain circumstances, I am not in a position to make any finding on this issue since the appellant has not made a correction request to the Police under section 36(2). In addition, while it is unfortunate that the officer in question lost his notebook, the *Act* does not provide for sanctions against individuals or institutions in circumstances where records have been misplaced. Accordingly, I make no order in this regard.

ORDER:

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

Original Signed By: December 12, 2001
David Goodis
Senior Adjudicator