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

ORDER MO-1636

Appeal MA-020050-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The appellant submitted a request to the Toronto Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records, notes and information relating to a specific police investigation in which he was placed on a suspect list.

The Police located 12 pages of responsive records and granted partial access to them. In particular, the Police disclosed two pages in full and denied access to the remaining pages either in part or in full relying on the following sections of the *Act*:

- Facilitate commission of an unlawful act – section 8(1)(l);
- Invasion of privacy – sections 14(1) and 38(b), with reference to sections 14(1)(f) and 14(3)(b);
- Discretion to refuse requesters' own information - section 38(a).

In appealing the decision of the Police, the appellant also indicated his belief that more records exist.

During mediation, attempts were made to resolve the issues relating to the existence of additional records. However, the appellant continues to believe that more records exist and this remains as an issue.

Also during mediation, the appellant indicated that he was not interested in information relating to other individuals. The appellant was prepared to accept the mediator's recommendation regarding the contents of the severed portions of the records he received as to whether they clearly contained the personal information of others. As such, the severed portions of pages 1, 2, 3 and 4 of the record identified by the Police are no longer at issue in this appeal. Since the Police only claimed the application of sections 8(1)(l) and 38(a) for portions of pages 1, 2 and 3, these exemptions are no longer at issue.

Further mediation was not possible and this appeal was forwarded to adjudication. As a result of mediation, the issues remaining to be adjudicated are the application of section 38(b) in conjunction with section 14(1) (invasion of privacy) and the reasonableness of the search conducted by the Police for records responsive to the request.

I sought representations from the Police first. I then sent the non-confidential portions of the submissions they made to the appellant and provided him with an opportunity to respond. The appellant also submitted representations.

RECORDS:

The records at issue consist of the withheld portions of six pages of occurrence reports pertaining to two occurrences (pages 5, 6, 7, 9, 10 and 11).

CONCLUSION:

The records at issue are exempt from disclosure. Moreover, the search conducted by the Police for responsive records was reasonable.

DISCUSSION:

REASONABLE SEARCH

Introduction

Where a requester provides sufficient detail about the records he is seeking and the institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records responsive to the request. The *Act* does not require the Police to prove with absolute certainty that further records do not exist. To properly discharge its obligations under the *Act*, the Police must provide sufficient evidence to show that it has made a reasonable effort to identify and locate all responsive records (Orders M-282, P-458 and P-535).

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

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

During mediation, the appellant provided background to the mediator to substantiate his belief that further records exist. In this regard, the appellant indicated that he was one of a number of potential suspects in a Police investigation. After three years, the Police did not charge any of the suspects nor did they clear the appellant from the suspect list. The appellant indicated that he subsequently made a complaint to the Police concerning how the investigating officer had conducted herself.

The appellant believes additional records exist primarily because of statements made by the officer investigating his complaint under the *Police Services Act* that the "original investigative files" were reviewed by the internal affairs unit and perhaps archived. The appellant is of the view that either these files continue to exist and access is being denied to them or they have been destroyed.

As an additional basis for his belief that more records exist, or that they have been destroyed, the appellant provided copies of letters from the operations manager at his place of employment and the senior security manager for a named organization, which he suggests demonstrate that the investigating officer's investigation was negligent. It appears that the appellant believes that the Police have failed to locate additional records intentionally in order to protect their interests.

In responding to this issue, the Police indicate that the Freedom of information (FOI) unit contacted the FOI Liaison Officer at the relevant division to request "memorandum books and any other notes/records pertaining to the appellant's request." The Police note that two separate occurrence reports were identified. They continue:

> …The investigating officer had informed the above Liaison Officer that the 'case' was being handled by Internal Affairs.
>
> As a result, [a named detective] of Internal Affairs was contacted and stated that this was in fact not an Internal Affair's case and that he would advise the investigating officer. He recalled that when [the investigating officer] had contacted Internal Affairs she was informed that this case did not fall into the mandate of Internal Affairs. He further stated that had she forwarded any reports they would have been sent back to her. [Police emphasis]

The Police outline the subsequent contacts they had with the appellant and note that they advised him that "it was improbable that Internal Affairs Unit would have any records pertaining to him as their responsibility pertains to the conduct of members of the [Police]."

The Police indicate that following receipt of the Notice of Inquiry, the Internal Affairs unit was again contacted. The Police conclude:

> [the named] Detective Sergeant advised that he has no knowledge of why the Complaint Investigator would have made this statement and reconfirmed that Internal Affairs did not have any records pertaining to the request.
>
> It would appear that [the investigating officer] informed the Public Complaints Bureau that her files were given to Internal Affairs before [the named detective] of Internal Affairs had returned them to her. Further, all possible contacts were made with any person that would or should have knowledge of any existing records and it is therefore the position of this institution that a reasonable search was made to identify any records which are responsive to the request.

In response to the submissions made by the Police, the appellant resubmitted a number of documents that he had provided to the mediator. In addition, he provided a copy of his letter to the Ontario Civilian Commission on Police Services, in which he sets out a chronology of his contacts with various officers and the impact the treatment he has received has had on him.

In his submissions, he notes that, "the amount of information regarding this case is surprisingly limited considering the fact that the crime was very serious and that the investigation was 'more than thorough'." Moreover, the appellant believes that the position of the Police on this issue, as described in their representations, is "inconsistent and not truthful".

While the documents the appellant attached to his submissions reflect his frustration, they do not provide a basis for concluding that the search conducted by the Police for additional records was

not reasonable. Furthermore, in reviewing their submissions, I find nothing inconsistent or untruthful apparent on their face.

I am satisfied that the Police have searched in locations where responsive records could reasonably be expected to be found and that they have made reasonable efforts to locate responsive records based on the comments made in the Investigation Report. I am also satisfied with their explanation for the non-existence of records. I accept that it is unlikely that Internal Affairs would have retained any records, even if they had been forwarded to that unit.

Therefore, based on the explanations provided by the Police, I find that their search for responsive records was reasonable in the circumstances, and this portion of the appeal is denied.

PERSONAL INFORMATION

Personal information is defined in section 2(1), in part as "recorded information about an identifiable individual."

The records at issue comprise two occurrence reports in which the appellant is identified as a suspect. The reports contain information relating to alleged offences and include information about identifiable individuals, such as their names, dates of birth, addresses and involvement in the matters.

I find that both records (pages 5-7 and 9-11) contain recorded information about the appellant and other identifiable individuals.

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447, M-122, P-1124, P-1344 and MO-1285).

Other orders have recognized that in certain situations, although individuals are identified in their professional capacity, the nature of their involvement in the matter at issue has no relation to their professional duties. In these cases, the records must be viewed contextually (see, for example: Orders MO-1524-I and PO-1983).

The Police state:

> [T]he records at issue contain the personal information of several individuals, all of whom were interviewed as a result of a theft of a large sum of money

> …Although it is agreed that their professions are what drew the individuals into the investigation, *all were interviewed in relation to a criminal investigation into their (possible improper)* actions as an individual in relation to the theft. [Police emphasis]

After reading the records at issue, I accept the characterization of the information, as submitted by the Police, as pertaining to the individuals in their personal capacity. Accordingly, I find that the records at issue contain the personal information of the appellant 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 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 Police determine that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Police have the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The Police must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the Police determine that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives them 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 Police 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 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 relied on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act* and the factors listed under section 14(2)(f) and (i) of the *Act*. These provisions state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (b) 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;

Section 14(3)(b)

Following their submissions on the nature of the offence being investigated, as noted above, the Police state:

> Personal information collected about individuals who are under suspicion for a criminal offence is considered by this institution to be extremely sensitive, and the release of such information could very well unfairly damage their reputation or (as in this case) jeopardize their job status.
>
> The [Police] must be able to maintain the confidence of the public that it protects, when it relates to personal information obtained during law enforcement investigations. This includes not only members of the public who provide information to the police concerning investigations, but also those members of the public who come under suspicion and those who are charged with criminal offences.

In their confidential representations, the Police provide additional explanation as to why they have not provided this information to the appellant.

The appellant's representations do not address this issue.

Based on the submissions made by the Police and my review of the records, I am satisfied that the personal information contained in them was compiled and is identifiable as part of an investigation into a possible violation of law ("theft under", which is a *Criminal Code* offence). Therefore, I find that its disclosure would constitute a presumed unjustified invasion of personal privacy pursuant to section 14(3)(b).

I note that the appellant has been provided with portions of these records. In my view, any remaining information about him is intertwined with that of the other identifiable individuals in such a way as to render it unseverable.

I find that neither section 14(4) nor section 16 is applicable to the records at issue.

Exercise of Discretion

The section 38(b) exemption is discretionary, and permits the Police to disclose information, despite the fact that it could be withheld. On appeal, this office may review their decision to determine whether the Police exercised discretion and, if so, to determine whether they erred in doing so (see: Order PO-2129-F).

Upon review of all of the circumstances of this appeal and the submissions made by the Police, I am not satisfied that the Police have erred in the exercise of their discretion under section 38(b). Accordingly, I find that the records at issue are exempt under section 38(b) of the *Act*.

Because of these findings, it is not necessary to address the factors under section 14(2) of the *Act*.

ORDER:

1. The search conducted by the Police for responsive records was reasonable and this portion of the appeal is denied.

2. I uphold the decision of the Police to withhold the records at issue from the appellant.

Original signed by: April 24, 2003
Laurel Cropley
Adjudicator