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

ORDER MO-1767

Appeal MA-030216-1

Toronto Police Services Board

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (the Act)* for the following:

- any report with respect to a six-month pilot project authorized by the Solicitor General authorizing the Police to use the Taser;
- statistics with respect to the use of the Taser on emotionally disturbed persons;
- information gathered or produced regarding the use of the Emotionally Disturbed Person Form; and
- information relating to how apprehensions pursuant to the *Mental Health Act* are documented, in particular, how *Mental Health Act* apprehensions are included on CPIC [Canadian Police Information Centre] entries.

The Police granted partial access to the records identified as responsive to the request, and denied access to records and portions of records based on the exemptions found in section 7(1) (advice and recommendations) and section 8(1)(c) (law enforcement) of the *Act*.

The requester (now the appellant) appealed the Police's decision.

Mediation did not resolve this appeal and it proceeded to the adjudication stage of the process. I sent a Notice of Inquiry to the Police, initially, and received representations in response. I then sent the Notice of Inquiry, together with the non-confidential portions of the Police's representations, to the appellant, who also provided representations.

RECORDS:

The records remaining at issue in this appeal consist of:

- A note at the top of page 5 of the records relating to CPIC entries. This information was denied pursuant to section 8(1)(c) of the *Act*;

- Two reports identified as:
  - an Emotionally Disturbed Person (EDP) Report Form Draft Report, including an Appendix (the EDP Draft Report), and
  - a Police Taser Report with Appendices, including statistical information.

  Access to these two reports was denied pursuant to section 7(1) of the *Act*.

DISCUSSION:

LAW ENFORCEMENT

Section 8(1)(c)

The Police have claimed that section 8(1)(c) of the *Act* applies to the note at the top of page 5 of the records relating to CPIC entries. Section 8(1)(c) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*, which states:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b);

Further, an institution relying on the section 8 exemption must establish that it is reasonable to expect that the harms set out in this section will ensue if the information in the records is disclosed. For the purpose of section 8(1)(c), the Police must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" (see PO-2034). Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)]. However, it is not sufficient for the Police to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

With respect to the section 8(1)(c) exemption, in order to meet the "investigative technique or procedure" test, the Police must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487]. Furthermore, the techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

Representations

The Police take the position that the information at issue qualifies for exemption under section 8(1)(c). The Police state:

> In general, the CPIC system provides a general repository into which the various police jurisdictions within Canada enter electronic representations of information they collect and maintain. Therefore, a reasonable expectation of confidentiality exists between authorized users of CPIC that information therein will be collected, maintained and distributed in compliance with the spirit of fair information handling practices and there is an expectation that this information will be treated confidentially. There may be specific instances where the agency, which made the entry on the CPIC system, may seek to protect information found on CPIC such as protecting law enforcement activities from being jeopardized.

The Police also provide confidential representations in which they identify the specific information contained in the severed portion of the record which they believe fits the exemption, and the reasons for that claim. In these confidential representations the Police identify that certain information contained in the severed portion of page 5 of the records, which they consider an investigative technique or procedure, is generally not known by the public, and that the disclosure of this information could hinder or compromise its effective utilization.

Findings

In order for a record to qualify for exemption under section 8(1)(c), the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. In this case, I am satisfied that the information at issue satisfies the definition of "law enforcement" within the meaning of the legislation.

As set out above, the Police must also establish that it is reasonable to expect that the harms set out in section 8(1)(c) will ensue if the information is disclosed. In this case, the Police must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. It is not sufficient for the Police to take the position that these harms are self-evident from the record.

In my view, the Police have not identified how or why the alleged harm could take place if the information at issue on page 5 were to be disclosed. The Police's representations simply identify the nature of the information at issue and assert that its release would hinder or compromise its effective utilization. The Police have not identified how or why this would take place, nor have they provided sufficient evidence to persuade me that the referenced harm could reasonably be expected to result from the disclosure of the portion of the record at issue. Based on my review of that record and the Police's representations, I am not persuaded that the disclosure of the portion of the record at issue, which the Police identify as an investigative technique or procedure, could reasonably be expected to hinder or compromise its effective utilization.

Having found that the Police have not provided sufficient information to satisfy me that the disclosure of the information could reasonably be expected to hinder or compromise its effective utilization, it is not necessary for me to determine whether the technique or procedure is generally known to the public.

I therefore find that the information at issue on page 5 does not qualify for exemption under section 8(1)(c) of the *Act*.

ADVICE TO GOVERNMENT

The Police claimed the exemption in section 7(1) for two records.

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice" or "recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084 upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)]. Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

Furthermore, section 7(2) creates a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7.

I will review the application of the section 7 exemption to each record individually.

The EDP Draft Report (including an Appendix)

With respect to the EDP Draft Report (including an Appendix), the representations of the Police state:

> [This Record] consists of a report outlining a study completed by the Toronto Police Mental Health Coordinator along with [another identified individual].
>
> The study was conducted in order to develop an "Emotionally Disturbed Person Form" to be presented to the [Police]….
>
> In effect the form's development is advice and recommendation to all police officers by assisting with their response to situations involving emotionally disturbed persons. The form contains categories, which support the course of action to be taken … by the reporting officer.
>
> Specific advice is given on training, including various aspects and levels of instruction in use of the Taser.

The Police also state that "Disclosure of [the record] would permit others to draw an accurate inference as to the advice and recommendations provided by the Mental Health Coordinator".

In the material the appellant provided to this office, she identified that she had attended a conference at which the Police's Mental Health Coordinator gave a presentation regarding the Police's contact with emotionally disturbed people. The appellant also provided an abstract of the presentation taken from the program, and that abstract was shared with Police.

In addition, the appellant's representations refer to the responsibility of the Police to disclose as much information as possible, while severing out information which does qualify for exemption under the *Act*. The appellant also suggests that some of the information contained in the records would likely fit within one or more of the exceptions to section 7(1) found in section 7(2) of the *Act*.

Findings

I have reviewed the (EDP) Draft Report, including the Appendix. As identified by the Police, this record is a study completed by the Toronto Police Mental Health Coordinator and another individual which responds to the appellant's request for "information gathered or produced regarding the use of the Emotionally Disturbed Person Form".

Much of this record consists of statistical and factual information concerning the use of the EDP Form. One page of the EDP Draft Report contains the conclusions of the authors of the report. This section includes a summary of particular aspects of the information contained in the record, and also provides the authors' views on the information which is analyzed. Furthermore, one paragraph of this section (the fourth paragraph on page 15) contains what may be regarded as the opinions of the authors of the record concerning modifications to the process.

As set out above, in order for information to contain "advice or recommendations" for the purpose of section 7 of the *Act*, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised. In my view, the EDP Draft Report does not contain information that qualifies as "advice or recommendations" for the purpose of section 7(1) of the *Act*. Although the record contains statistical information and an analysis of the form, including various observations and the opinions of the authors of the report, there is no identified "suggested course of action" for a person being advised to either accept or reject, nor have I been provided with sufficient evidence to support such a finding. In my view the comments in the "conclusions" section also fall short of "advice or recommendations" for the purpose of section 7 of the *Act*. I find that the information contained in this portion of the report is more in the nature of general comments and suggestions, as opposed to a specific suggested course of action for a decision maker to either follow or not. Furthermore, I do not find that the information, if disclosed, would permit one to accurately infer any possible advice or recommendations given.

Accordingly, the EDP Draft Report does not qualify for exemption under section 7(1) of the *Act*.

Having found that the EDP Draft Report does not contain "advice or recommendations" for the purpose of section 7(1), it is not necessary for me to determine whether any of the mandatory exceptions to section 7(1), found in section 7(2) of the *Act*, apply to this record.

A Police Taser Report with Appendices, including statistical information

With respect to the Taser Report (including Appendices and statistical information), the Police identify that this is a study completed by the Emergency Task Force of the Toronto Police Service. The Police identify that "its purpose was to determine whether the use of the 'Taser' was a practical solution for incidents requiring use of force".

The Police Taser Report consists of 57 pages. In addition to a cover page, it contains a 5-page Report, and 6 Appendices. Three of these appendices contain statistical information and summaries of incidents. A fourth contains supporting information including correspondence and newspaper articles, and another consists of a separate "study" conducted by another body. In addition, one Appendix (Appendix C) consists of a section specifically identified as "Recommendations", and this appendix also includes certain financial information.

The Police take the position that this record contains advice or recommendations. In the confidential portion of their representations, they identify the advice or recommendations they believe the record contains.

In my view much of this record consists of factual information which, based on section 7(2)(a), is not "advice or recommendations" for the purpose of section 7(1) of the *Act*. However, in light of my finding set out below (that the mandatory exception at section 7(2) applies to the record), it is not necessary for me to determine whether or what parts of this record, if any, qualify for exemption under section 7(1).

Section 7(2)

As set out above, section 7(2) creates a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these exceptions, it cannot be withheld under section 7(1). Section 7(2) reads, in part:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:
>
> (a) factual material;
>
> (b) a statistical survey;
>
> …
>
> (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
>
> (g) a report containing the results of field research undertaken before the formulation of a policy proposal;
>
> …
>
> (i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;
>
> (j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

The word "report" appears in several parts of section 7(2). This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

Section 7(2)(g)

As set out above, section 7(2)(g) states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:

> a report containing the results of field research undertaken before the formulation of a policy proposal;

In Order P-726, former Assistant Commissioner Irwin Glasberg examined the mandatory exceptions to the section 13(1) exemption in the *Freedom of Information and Protection of Privacy Act* (similar to section 7(1) of the *Act*). He stated the following with respect to the exceptions in section 13(2) of that Act, which are similar to those found in section 7(2):

> Sections 13(2)(f) and (g) are unusual in the context of the *Act* in that they constitute mandatory exceptions to the application of an exemption for discrete types of documents, namely reports on institutional performance or feasibility studies. Even if the report or study contains advice or recommendations for the purposes of section 13(1), the Ministry must still disclose the **entire** document if the record falls into one of the section 13(2) categories. [emphasis in original]

Although Order P-726 did not consider the provincial equivalent of section 7(2)(g), in my view former Assistant Commissioner Glasberg's statements are equally applicable to section 7(2)(g), since it also refers to a discrete document described as a "report". Accordingly, if the mandatory exception in section 7(2)(g) applies to a record, the entire record cannot qualify for exemption under section 7(1), regardless of whether or not portions of the record contain "advice" and "recommendations". [See PO-1823]

Findings

As set out above, the word "report" appears in several parts of section 7(2). This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

Upon my review of the Police Taser Report at issue, I am satisfied that this record is a "report" for the purpose of section 7(2)(g). It contains a formal account of the results of the collation and consideration of information (namely, a statistical and narrative review of the incidents of the use of the Taser), and an account of the results of the collation of this information.

I must now determine whether the Report contains the results of field research and, if so, whether this research was undertaken before the formulation of a policy proposal.

In Order P-763, Former Inquiry Officer Mumtaz Jiwan developed the following definition of "field research" for the purposes of the provincial equivalent of section 7(2)(g) of the *Act*:

> … field research can be said to mean a systematic investigation, conducted away from the laboratory and in the natural environment, of the study of materials and sources for the purpose of establishing facts and reaching new conclusions.

I agree with this approach and will apply it to the information contained in the Police Taser Report.

As identified above, the report contains a statistical review of the operational use of the Taser in the field, including a narrative review of the incidents in which the Taser was deployed by personnel in the field. Furthermore, the report summarizes and breaks down this data, and identifies a number of conclusions based on the data from the operational use of the Taser. I am satisfied that this report consists of a systemic investigation of the use of the Taser, by reviewing the incidents of the use of the Taser in the field. Accordingly, I find that the report contains the results of a systematic investigation, conducted away from the laboratory and in the natural environment (being the specific review of the incidents in the field in which the Taser was used).

Furthermore, as identified by the Police, this study was conducted for the purpose of "determining whether the use of the 'Taser' was a practical solution for incidents requiring use of force". Indeed, the Police have identified that the results of the report include information such as the type of system to be used, related forms, deployment strategy, medical assessment, treatment and training. Based on the information provided to me, I am satisfied that this research was undertaken before the formulation of a policy proposal.

Accordingly, I find that the exception to the section 7(1) exemption, found in section 7(2)(g) of the *Act*, applies to this record.

Having found that the Police Taser Report fits within the exception to section 7(1) found in section 7(2)(g), it is not necessary for me to decide whether or not any of the other mandatory exemptions found in section 7(2) may apply to the record.

ORDER:

1. I order the Police to disclose the records at issue to the appellant by providing her with a copy of them by **April 9, 2004**.

2. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the material disclosed to the appellant pursuant to Provision 1, upon request.

Original signed by: March 19, 2004
Frank DeVries
Adjudicator