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

ORDER MO-1794

Appeal MA-030304-1

Ottawa Police Services Board

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NATURE OF THE APPEAL:

The Ottawa Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to an assault investigation involving the requester. The Police located 20 pages of records responsive to the request and granted full access to 13 pages. Access to portions of the remaining seven pages of records was denied on the basis that they were exempt from disclosure under the discretionary exemption in section 38(b) of the *Act* (invasion of privacy).

The requester, now the appellant, appealed the decision of the Police.

During the mediation stage of the appeal, the Police conducted a further search for notebook entries made by six police officers identified by the appellant. The Police indicated that four of the officers did not have any notes relating to the incident involving the appellant and that full access had been granted to the notebook entries of the other two officers. The appellant maintains that the search undertaken by the Police for notebook entries was inadequate.

Further mediation was not possible and the matter was moved to the adjudication stage of the appeal process. I decided to seek the representations of the Police, initially. The Police provided me with submissions that were shared, in their entirety, with the appellant. I also received representations from the appellant. In her submissions, the appellant also raised the possible application of the "public interest override" provision in section 16 of the *Act*.

RECORDS:

The records at issue consist of the undisclosed portions of Record 3, an occurrence report, along with Record 7, a computer printout, and Records 13 to 17, a narrative of the investigative action undertaken by a police officer.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

The personal privacy exemption in section 38(b) applies only to information that qualifies as personal information. Therefore, I must first assess whether the relevant records contain personal information and, if so, to whom that information relates. The term "personal information" is defined in section 2(1) of the *Act*, in part, to mean recorded information about an identifiable individual, including the individual's name if 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 records contain the personal information of both the appellant and other identifiable individuals (the affected persons) including their age, date of birth, address, telephone numbers and the contents of the statements given by them to the Police.

Based on my review of the undisclosed portions of the records, I find that they contain the personal information of the affected persons including references to their ages (section 2(1)(a)), their addresses and telephone numbers (section 2(1)(d)), as well as their names along with other

personal information relating to them (section 2(1)(h)). I further find that the records contain the personal information of the appellant, including the views or opinions of other individuals (the affected persons) about her (section 2(1)(g)).

While 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. In this case, the Police applied section 38(b) in refusing access to the records.

Section 38(b) provides an exception to the general right of access to one's own personal information where a record contains the personal information of both the requester and other individuals. This section 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 another 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 deciding 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].

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.

The Police applied section 38(b) in conjunction with section 14(3)(b) to the remaining records and portions of records which have not been disclosed to the appellant. Section 14(3)(b) 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 indicate that the information in the records was compiled as part of their investigation into the appellant's complaint that she had been assaulted and was used to determine whether an offence under the *Criminal Code* had been committed.

The appellant argues that the records contain the personal opinions or views of the affected parties about the appellant and thereby qualify as the personal information of the appellant only. As a result, the appellant submits that the disclosure of this information would not constitute an unjustified invasion of another individual's privacy.

The appellant also suggests that the Police and the Mediator assigned by this office did not take sufficient steps to contact the affected parties in order to obtain their consent to the disclosure of their personal information under section 14(1)(a). In my view, given the circumstances surrounding the incident that gave rise to the creation of the records and the age of the affected parties, it is not surprising that they either declined to consent to the disclosure of their personal information to the appellant or did not respond to the Mediator's efforts to contact them.

Based on my review of the records and the representations of the Police, I am satisfied that the records were compiled as part of an investigation into whether charges under the *Criminal Code* should be brought. If records contain personal information and that information was compiled during the course of an investigation and is identifiable as such, the presumption at 14(3)(b) applies (Orders P-223, P-237, P-1225, MO-1181, MO-1443 and MO-1741). Further, I find that none of the exceptions in section 14(4) apply. Although some of the undisclosed portions of the records contain the personal information of the appellant, particularly the views or opinions of the affected persons about her, I find that this information is inextricably intertwined with the personal information of the affected persons. In my view, it would not be possible in the circumstances to sever and disclose only those portions of the records that relate solely to the appellant.

Accordingly, I am satisfied that the information in the records remaining at issue is properly exempt under section 38(b). I have also reviewed the manner in which the Police exercised their discretion not to disclose this information and find that it was based on proper considerations.

PUBLIC INTEREST IN DISCLOSURE

The appellant takes the position that there exists a public interest in the disclosure of the undisclosed information in the records and that section 16 of the *Act* authorizes the release of this information regardless of the fact that it would otherwise be exempt under section 38(b).

For section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

The appellant indicates that:

> . . . the exercise of police investigation powers is certainly a matter of compelling public interest. In order to maintain public confidence in the police, particularly those who are victimized, [the appellant] submits that there is a compelling public interest for victims of crime to be fully informed of the progress of the police investigations into their respective matters. Moreover, the need to be informed, it is further submitted, includes knowledge of the information upon which the police base their conclusions, as they relate to the alleged victim, whether a criminal charge is laid or not. As such, public interest for victims of crime clearly outweighs the invasion of privacy exemption raised by the Police.

I disagree with the contention by the appellant that there exists any public interest, compelling or otherwise, in the disclosure of the remaining information contained in the records. The appellant's interest in obtaining access to the undisclosed portions of the records is a purely private one. The incident described in the records relates to a private matter involving the appellant and the affected persons and does not include any aspect in which the public may have an interest. As a result, I find that section 16 has no application in the circumstances of this appeal.

REASONABLENESS OF SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In the present case, the appellant "takes issue" with the search conducted by the Police for investigation notes taken by two specific officers. The appellant argues that the handwritten memorandum notes taken by these two officers and disclosed to her are not as "extensive" as the typed reports prepared by the officers which were also disclosed to her. As a result, the appellant suggests that, "if there is a possibility that further handwritten police notes exist, the Police must disclose same."

The Freedom of Information Co-ordinator for the Police indicates that during the mediation stage of the appeal and at the request of the appellant, she initially contacted four identified police officers and requested that they provide copies of their "duty books and investigative files" containing any information relating to the appellant. Two of the officers located responsive notes and copies were disclosed to the appellant. The remaining two officers and an additional two officers later identified by the appellant did not have any responsive notes in their duty books. The Police also point out that:

> . . . the fact that an individual speaks to an officer does not mean that this officer will make notes. Officers take notes when they deem necessary. The fact that the appellant spoke to these officers does not mean that there would be notes in relation to any conversation she had with them.

Based on the representations of the Police and my review of the contents of all of the records, including those portions that were not disclosed to the appellant, I am satisfied that the Police have conducted a reasonable search for records responsive to the appellant's request. I concur with the statement by the Police that notes are not necessarily taken by Police officers recording each and every contact they have with members of the public. As a result, I conclude that the searches undertaken by the Police were reasonable and I dismiss this part of the appeal.

ORDER:

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

May 26, 2004

Donald Hale
Adjudicator