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

ORDER MO-1768

Appeal MA-030339-1

Kingston Police Services Board

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NATURE OF THE APPEAL:

The appellant, a journalist, wrote to the Kingston Police Services Board (the Police) seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to records relating to the criminal investigation of a named individual (the affected party).

The Police identified responsive records and advised the requester that it was denying access to all of them on the basis of the exemptions for law enforcement records (sections 8(1)(a), (b), (f)) and personal privacy (section 14).

The appellant then appealed the decision of the Police to this office. In his appeal, the appellant raised as an issue the possible application of the section 16 public interest override. The Police take the position that section 16 does not apply in these circumstances.

Mediation was not successful in resolving all of the issues in the appeal, and the appeal was streamed to the adjudication stage of the process.

I first sent a Notice of Inquiry setting out the issues in the appeal to the Police, and I received representations in response. I then sent a copy of the Notice, together with the non-confidential representations of the Police to the appellant, who in turn provided representations.

RECORDS

The records at issue include Crown briefs, police reports, police officers' notes, court information forms, witness information and statements and other records relating to the investigation and prosecution of the affected party.

DISCUSSION:

LAW ENFORCEMENT

Section 8(1)(a) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > interfere with a law enforcement matter;

The term "law enforcement" is defined in section 2(1) as follows:

> "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)

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.)].

For section 8(1)(a) to apply, the Police must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Police submit:

> . . . [T]he accused in this matter has been charged with offences under the *Criminal Code* of Canada. The accused has made two appearances ([specified date], 1995 for a bail hearing and [specified dated], 1995 for a court appearance). Subsequently, the accused has fled. The charges are currently held in abeyance until such time as the accused can be located and can be again brought before the court to answer to these charges. Currently, [the Police] maintain in their active Warrant Files, two warrants for the accused. Additionally, entries have been made in the Canadian Police Information Centre (CPIC) investigative databases indicating that this subject is currently wanted by the [Police] as noted above. To maintain an entry on CPIC, a Police Agency must comply with CPIC Policy as enumerated in the CPIC Reference Manual. Section 7.4 of that manual stipulates the conditions a Police Agency must meet to maintain an entry in the CPIC system.
>
> a. Any record placed on the CPIC system must be the subject of a police file maintained by the originator for as long as the record is on CPIC. An agency must be able to confirm its CPIC records promptly, 24 hours a day, 7 days a week. The CPIC file jacket/package file must contain sufficient documentation to establish the accuracy and validity of the CPIC record (i.e., court documents, copies of C-216's, prisoner's reports, driver's licences or Motor Vehicles Branch printouts). Duplicate documentation is not required if the information is already supported on the CPIC file jacket/package or where the agency maintains their files in electronic format.
>
> . . .[C]learly these records are a law enforcement matter (an investigation into allegations of wrongdoing under the *Criminal Code* of Canada) . . . [T]he matter

> is ongoing (two warrants are being maintained by the [Police] for the accused in this matter) and clearly relate to proceedings and anticipated proceedings.
>
> In some of its Orders, the IPC has applied the test of whether any recent activity has occurred on the file to determine if the file could still be considered active and on-going. I would note the timelines already established in this file. The original investigation was launched in 1990 (and related to offences alleged to have occurred in 1972 – an 18 year lapse). The original investigation was stopped in 1991 at the request of the victim. In 1995 (another 4 year lapse), the investigation was renewed. While these timelines do not represent the norm in Police investigations, they are not as unusual as one might expect. Additionally, given the seriousness of the allegations, these timelines might be extended. Recently, for example, the [Police] charged a person in a 30 year old homicide investigation – while the investigation sat dormant but unsolved for a number of years. When applying a test of recentness, consideration should be given to the seriousness of the allegations. While this investigation has seemingly been dormant, based on information supplied by the appellant in this matter, the [Police] have renewed their efforts to bring the accused before the courts.
>
> Finally, the onus is on the [Police] to demonstrate that the release of the noted information could reasonable be expected to interfere with the matter. As indicated, the accused in this matter has fled the jurisdiction of the court and has presumably gone into hiding.

The Police go on to make additional representations that I have agreed should remain confidential.

The appellant submits:

> First, I see no evidence in the police representations that this is an active law enforcement matter. Keeping warrants on file means nothing if the suspect remains abroad and no one is trying to locate him for trial.
>
> Now, perhaps the police have, as they assert, "renewed their efforts" based on my inquiries – but given the misrepresentations I've already encountered, I remain sceptical. Will this case lie dormant again until someone else requests records, then suddenly come back to life, however briefly? . . .
>
> Even if we accept the police representation that the case is active, I see nothing to warrant the blanket refusal to release records – no evidence to establish a "reasonable expectation of harm". Section 4(2), remember, provides that a head "shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions." If the police are finally investigating in earnest and seeking to arrest [the accused], I would certainly understand their not releasing records about, say, pending extradition-related matters and how they are trying to locate him. But that should not be used

> to justify across-the-board denial. Releasing at least some of the records, such as mug shots, might well bring in the leads needed to finish the case.
>
> Other Canadian law enforcement agencies with active cases routinely do this – see the [Royal Canadian Mounted Police (RCMP)] picture-filled "most wanted" web site, for example. They understand, it seems to me, that fugitives differ fundamentally from other criminally accused persons: They deprive themselves of a fair trial. *Contrary to the police representations, [the accused] has had the opportunity to present a defence – and waived it by fleeing*. It is the job of the police to bring such people to justice. And when they fail, it is the job of the press to ask why. The police should not be allowed to thwart that scrutiny by answering no questions and releasing no records.

Based largely on the confidential representations of the Police, and the surrounding circumstances, I am satisfied that release of any of the records at issue could reasonably be expected to interfere with this continuing law enforcement matter, that is the Police investigation of the accused and the efforts of the Police to locate him and bring him to Canada to face the pending charges. I am not in a position to provide further elaboration on my reasons for accepting the position of the Police, due to the sensitive nature of the confidential submissions.

In the circumstances, partial disclosure of the records would not be appropriate, since disclosure of any of the records could reasonably be expected to lead to the harm described in section 8(1)(a).

I am also satisfied that the Police did not err in exercising their discretion to claim the section 8 exemption.

Therefore, I conclude that section 8(1)(a) applies to all of the records. As a result, it is not necessary for me to consider whether the records are exempt under sections 8(1)(b) or (f), or the section 14 personal privacy exemption.

In addition, it is not necessary for me to consider the application of the section 16 "public interest override", since it cannot apply to override records withheld under the section 8 law enforcement exemption.

ORDER:

I uphold the decision of the Police to deny access to the records.

Original Signed By: March 23, 2004
David Goodis
Senior Adjudicator