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

ORDER MO-1793

Appeal MA-030405-1

Peel Regional 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 Peel Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for certain identified records relating to an incident involving the appellant. Specifically, the request was for:

- a copy of a warrant,
- an unsigned statement of the appellant's that was given to the Police,
- the "disclosures" of a named social worker and a named constable, and
- a copy of the "tape taken by the Justice of the Peace".

The Police provided partial access to certain responsive records, and denied access to the other portions of records on the basis of sections 38(b) and 14(1) (invasion of privacy) with reference to section 14(3)(b) of the *Act*. The Police also stated as follows with respect to each part of the request:

> Item #1 requested is a copy of the warrant. No warrant was issued and cannot be provided as it does not exist.
>
> Item #2 requested is your statement. Partial access is granted to your statement.
>
> Item #3 requested is a copy of [a named police officer's] notes and notes from the social worker. Partial access is granted to [the named police officer's notes]. … We are not able to provide access to the social worker's notes as they are not a record that is within our custody or control.
>
> Item #4 requested is a copy of a tape recording made by the Justice of the Peace at your bail hearing. This tape was not made available to police and is not within our custody or control. As a result access cannot be granted.

The appellant appealed the decision to deny access on the basis of the exemptions cited by the Police. He also appealed the decisions that no warrant exists and that the Police do not have custody and control of certain records.

During mediation, the Police disclosed an additional portion of the records to the appellant. Further mediation did not resolve the remaining issues, and this file was transferred to the inquiry 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 a copy of the non-confidential portions of the Police's representations, to the appellant. The appellant provided representations in response.

RECORDS:

The records remaining at issue are the undisclosed portions of the Police officer's notes. They consist of all of pages 2, 3, 4 and 6, and the severed portions of pages 1, 5 and 7.

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 statements given to the Police.

Based on my review of the information contained in the records, I find that it contains the personal information of the affected persons as the records refer to their age (section 2(1)(a)), their address 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 about him (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. They state:

> The personal information was collected by the Police during their investigation of this occurrence. The information provided by [the affected parties] was used by the Police to investigate a possible violation of the law.

The Police then proceed to identify the specific sections of the *Criminal Code* of Canada which were being investigated as a result of the information provided. The Police also identify that, in these circumstance, they did investigate and concluded that there was sufficient information to proceed with criminal charges and a conviction.

Accordingly, the Police take the view that the information falls within the presumption in section 14(3)(b), as it was compiled as part of a law enforcement investigation.

The appellant's submissions do not directly address the issues raised in the Notice of Inquiry; rather, they identify his interest in obtaining access to the requested records, and his reasons for doing so.

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). The appellant has not raised the application of the public interest override provision in section 16 and I find that none of the exceptions in section 14(4) apply.

Accordingly, I am satisfied that the records remaining at issue are 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.

CUSTODY OR CONTROL

As identified above, the request included a request for the "disclosures" of a named social worker and a copy of the "tape taken by the Justice of the Peace". The Police responded to both these requests by identifying that these records are not in the custody or control of the Police.

In their representations the Police state:

> The first record refers to notes made by a Children's Aid Society (CAS) worker as required in the performance of her duties with the CAS. The CAS is not considered an institution under the *Act*. The record was produced by a CAS employee for the CAS and for a purpose related entirely to the aid and welfare of a child ….. The record requested is not in the custody or under the control of the Police.
>
> The second record refers to an audio tape made by a Justice of the Peace for the purpose of the appellant's bail hearing. This proceeding occurred in what is classified as an Intake Court. The Justice of the Peace (at the time of the bail hearing) was responsible to the Ministry of the Attorney General. The Justice of the Peace in making an audio tape did so as part of his duties as an officer of the court in conducting a bail hearing. At no time was the audio tape made for the [Police]. Once the tape was produced, it would be turned over to the Clerk assigned to the Justice of the Peace and retained as part of the court record. The record requested is not in the custody and is not under the control of the Peel Regional Police.

The Police also identify that the appellant was advised of the position of the Police set out above in the course of processing the request. Furthermore, the Police indicate that the appellant was also advised about possible methods of obtaining the records.

The appellant's representations do not directly address the issue of whether the records are in the custody or control of the Police.

Findings

Section 4(1) of the *Act* states as follows:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 6 to 15.

In Order 120, former Commissioner Sidney B. Linden stated that the terms "custody" and "control" should be given a broad interpretation in order to give effect to the purposes and principles of the *Act*. I agree with former Commissioner Linden's approach and adopt it for the purposes of this appeal. In that order, he lists a number of factors pertinent to the creation, maintenance and use of records to be considered when determining the issue of "custody" and "control" of the records. The factors relating to "control" are the following:

1. Was the record created by an officer or employee of the institution?

2. What use did the creator intend to make of the record?

3. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

4. Does the institution have a right to possession of the record?

5. Does the content of the record relate to the institution's mandate and function?

6. Does the institution have the authority to regulate the record's use?

7. To what extent has the record been relied upon by the institution?

8. How closely is the record integrated with other records held by the institution?

9. Does the institution have the authority to dispose of the record?

This approach has been used in many subsequent orders. In each case, the issue of custody and/or control has been decided based on the particular facts of the case. Similarly, this appeal must be decided on the basis of its particular facts.

I accept the submissions made by the Police with respect to custody and control of the two categories of records for which this issue was raised. In my view, the relationship between the Police and either of these records is such that there do not exist the required indicia of control to demonstrate that the Police have "control" over the records for the purposes of the *Act*. The nature of the records requested suggest that these records would logically be in the custody or control of the CAS worker and the Justice of the Peace, respectively, or with the organizations for which they are employed. The appellant has not provided evidence sufficient to support a finding that these records would be in the custody or control of the Police, and in the absence of such supporting evidence, based on the Police's representations, I conclude that the Police do not have custody or control of the requested records.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Police will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

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

Representations

As identified above, the request to the Police included a request for "a copy of the warrant". The Police responded by stating that no warrant was issued, and that it could not be provided as it does not exist. Throughout this appeal the appellant has maintained that this record should be provided by the Police in response to the request.

In response to the Notice of Inquiry sent to the Police asking for representations on this issue, the Police state:

> A proper search was conducted which resulted in the determination that a warrant was not sought or issued and that this record could not be produced because it never existed.
>
> Section 495(1)(a) of the Criminal Code of Canada provides police with an authority to arrest without warrant. The section states:
>
> > 495(1) A peace officer may arrest without warrant
> >
> > (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> The offences for which the appellant was charged and convicted … [are] indictable offences for the purposes of section 495(1)(a). … A warrant was not obtained as it was not required under the circumstances of the arrest of the appellant. This was confirmed with the arresting officer during the time this request was being processed.
>
> The [Police] state that a proper search for the records was made, the records that exist were located and that partial access was granted to the appellant to these records. A copy of the warrant referred to in the appellant's request could not be provided because it never existed.

The Police's representations on this issue were shared with the appellant. The appellant's representations identify his general dissatisfaction with the positions taken by the Police, but do not directly address the issue of the reasonableness of the Police's search. However, the appellant does identify his concern that, in circumstances where the Police acted improperly, section 295(1)(a) of the *Criminal Code* should not apply.

Analysis

As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the Police's search for responsive records was reasonable in the circumstances, the Police's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

In the circumstances, I am satisfied that the Police's search for records responsive to the request was reasonable.

The Police conducted searches for responsive records. In response to the appellant's specific request for a copy of the warrant, the Police have specifically addressed this issue by identifying that no warrant exists or ever existed, and provide representations in support of their position. The appellant does not address the Police's position that a warrant never existed; rather, he takes the position that the Police's actions were improper.

I accept the evidence provided by the Police concerning their search for a warrant. I also accept the explanations provided by the Police concerning why a warrant does not exist. Accordingly, I find that the Police's search for records was reasonable.

ORDER:

I uphold the decision of the Police.

Original signed by: May 21, 2004
Frank DeVries
Adjudicator