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

ORDER MO-2128

Appeal MA-050148-1

Kingston Police Service

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NATURE OF THE APPEAL:

The Kingston Police Service (the Police) received the following request for information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> …all information in regards to the incident(s) surrounding my complaint(s) of bodily harm and trespassing against my stepson … made to the Kingston Police Force on or about the 16th, 17th and 18th of August, 2004; …

The requester states in his request letter that there is a compelling public interest in the disclosure of the information requested, which outweighs the application of any exemptions under the *Act* to any responsive information, thereby raising the possible application of section 16 (public interest override) of the *Act*.

The Police responded with a decision letter in which they identified three responsive records, a Police "general occurrence hardcopy" and two Police "call hardcopies". The Police granted partial access to these records. In their decision letter, the Police stated that personal information belonging to affected persons had been severed from the responsive records, on the grounds that disclosure of this information would constitute an unjustified invasion of their personal privacy [section 14(1) of the *Act*]. In support of their decision under section 14(1), the Police cited the application of the presumption in section 14(3)(b) (investigation into violation of law) of the *Act*. The Police also addressed the requester's reference to section 16, stating that they did not see any grounds upon which a compelling public interest would override the application of section 14(1).

The requester (now the appellant) appealed the decision.

During the mediation stage, the appellant expressed concerns that additional records should exist, namely audio recordings of his conversations with Police, as well as a charge sheet, which he states he viewed from a Police cruiser computer screen. The mediator approached the Police with respect to these records. The Police stated that audio recordings may have existed previously but would have been destroyed in accordance with the Police Records Retention By-Law. The mediator also contacted the appellant's wife and obtained her written consent to the disclosure of those portions of the records that contain her personal information and that of her minor children. The Police reviewed the records and issued a supplementary decision in which they agreed to disclose additional portions of the records at issue, namely those portions relating to the appellant's wife and her minor children. The Police also provided the appellant with a copy of their Records Retention By-Law and a print-out of the computer screen shot, which the appellant had viewed from a Police cruiser.

The mediator was not able to confirm with the appellant whether or not he was satisfied with the disclosure made by the Police and so the file was transferred to the adjudication stage for an inquiry.

After the close of mediation but prior to the commencement of this inquiry, this office clarified the following with the parties:

1. The Police were denying access to certain portions of the records, specifically police officers' notes, on the basis that they are non-

responsive to the appellant's request. The appellant confirmed that he is not interested in the information marked non-responsive. Accordingly, this information is no longer at issue.

2. As the records appear to contain the appellant's personal information, the application of section 38(b), read in conjunction with section 14(1), should be raised as an issue.

3. The appellant maintains that additional records should exist, in light of a reference in a police officer's note to "a copy of reports forwarded" to a named Children's Aid Society (CAS) worker as well as handwritten police reports relating to a particular incident number. Accordingly, reasonable search remains at issue.

I commenced my inquiry by first seeking representations from the Police on the following issues:

1. whether the records at issue contain personal information and, if so, to whom it relates

2. assuming the records do contain personal information, whether section 38(b) and/or section 14(1) apply to it

3. if section 38(b) applies to some of the information, whether the Police properly exercised their discretion under section 38(b) in denying access to it

4. whether there is a public interest in the disclosure of information at issue that overrides the application of the section 38(b) or 14(1) exemptions

5. whether the Police conducted a reasonable search for responsive records

I received representations from the Police that address the aforementioned issues. I then shared the Police's representations, in their entirety, with the appellant and sought submissions from the appellant on the same five issues set out above. The appellant declined to make submissions.

RECORDS:

The undisclosed portions of the following seven records remain at issue:

- Call Hardcopy, dated August 15, 2004 (2 pages)
- General Occurrence Hardcopy and Call Hardcopy, dated August 17, 2004 (5 pages)
- Call Hardcopy, dated August 17, 2004 (2 pages)
- Police officer's notes, prepared by police constable #1 (2 pages)
- Police officer's notes, prepared by police constable #2 (3 pages)

- Police officer's notes, prepared by police constable #3 (2 pages)
- Police officer notes, prepared by police constable #4 (1 page)
- Police officer's notes, prepared by police constable #5 (1 page)

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> …
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> …
>
> (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under one of the paragraphs in section 2(1) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Police state that the records contain the personal information of three identifiable individuals other than the appellant including, in the case of one individual, that person's name, sex, date of

birth and age, address, place of birth, driver's licence number, physical description and family status and, in the case of two other individuals, their names, dates of birth, addresses and telephone numbers.

On my review of the records and the Police's representations, I am satisfied that the severed portions of the records contain the personal information of three identifiable individuals, as described by the Police, pursuant to paragraphs (a), (c), (d) and (h) of the definition of personal information in section 2(1) of the *Act*.

I also find that the severed portions of one of the records contains the personal information of a fourth identifiable individual other than the appellant, including that person's name, date of birth and other personal information relating to that individual, pursuant to paragraphs (a), (d) and (h) of the definition of personal information of section 2(1).

In addition, I am satisfied that the disclosed portions of the records contain the personal information of the appellant, his wife and minor children, pursuant to paragraphs (a), (d) and (h) of the definition of personal information in section 2(1), including their names, sex, dates of birth, addresses, telephone numbers, physical descriptions and other personal information relating to them.

Having found that the records contain the personal information of both the appellant and other identifiable individuals, I will now consider the application of section 38(b), read with section 14(1), to the non-disclosed information in the records.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

General principles

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 exemptions from this right. The Police take the position that the undisclosed portions of the record are exempt under the discretionary exemption in section 38(b). Under section 38(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met. If the presumptions contained in

paragraphs (a) to (h) of section 14(3) apply, the disclosure of the information is presumed to constitute an unjustified invasion of privacy, unless the information falls within the ambit of the exceptions in section 14(4), or if the "public interest override" in section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In this case the Police have raised the application of section 14(3)(b). This section states:

> 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;

Section 14(3)(b) may still apply even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

Representations

The Police state that the records relate to investigations undertaken by the Police into possible violations of law. The Police submit that the records relate to incidents that they investigated pertaining to "disturbances/disputes" between the appellant and another individual. The Police state that in addition to responding for the purpose of "keeping the peace" between the parties, it was their responsibility to determine if any offences had occurred. The Police submit that the focus of their investigations was domestic violence offences including assault, assault with a weapon, threats and trespass to property.

Analysis and findings

Application of section 14(3)(b)

On my review of the records at issue and the Police's representations, it is clear that the personal information contained in the records was compiled as part of an investigation into possible violations of law under the *Criminal Code* and the *Trespass to Property Act*. Therefore, I find that the section 14(3)(b) presumption applies to the undisclosed information.

I have considered the application of the exceptions contained in section 14(4) of the *Act* and find that the personal information at issue does not fall within the ambit of this provision. I note that the appellant has raised the application of the "public interest override" at section 16 of the *Act*, and I address its application in this case below.

In conclusion, as a result of the application of the presumption in section 14(3)(b), I find that the disclosure of the personal information at issue would result in an unjustified invasion of the

personal privacy of individuals other than the appellant. Accordingly, subject to the application of the public interest override set out below, the information in the records is exempt under section 38(b) of the *Act*.

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 the Police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so [Orders PO-2129-F and MO-1629].

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information

- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Police state that they have attempted, in a manner consistent with the purposes of the *Act*, to release as much information to the appellant as possible without "adversely affecting the privacy interests of involved parties." The Police state that in doing so they considered several factors, including weighing the access rights of the appellant with the privacy interests of other individuals whose personal information is contained in the records, balancing the appellant's past relationship with one of the affected person's and evaluating whether the appellant may be seeking the information for a sympathetic or compelling reason.

On my review of all of the circumstances surrounding this appeal and the representations submitted by the Police on the manner in which they exercised their discretion, I am satisfied that the Police have taken into account relevant considerations in deciding to not disclose the exempt information under section 38(b). Accordingly, I find that the Police have properly exercised their discretion in the circumstances of this case.

Severance

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be released without disclosing material which is exempt. The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires the head of an institution to disclose as much of the record as can reasonably be severed without disclosing the exempt information.

On my review of the records at issue, the Police have released all of the appellant's personal information to him. The only information the Police have not disclosed is information that I have found exempt under section 38(b). Accordingly, I am satisfied that the Police properly completed the severing exercise.

PUBLIC INTEREST OVERRIDE

The appellant has raised public interest in relation to this appeal.

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the 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 [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

As indicated above, the appellant states in his request letter that there is a compelling public interest in the disclosure of the information at issue, which outweighs the application of any exemptions under the *Act* to that information. The appellant does not expand upon this assertion in his request letter. As well, he does not offer any basis for this assertion by way of providing representations, despite being given an opportunity to do so.

The position of the Police is that the records at issue describe a matter that is "essentially a dispute between two persons on a very personal level." While the Police acknowledge that the appellant may have a "strong personal interest" in the information at issue, they do not see how releasing the limited and specific personal information at issue would assist in shedding light on the activities of government. Therefore, the Police state that they are not convinced that this information would rouse strong public interest or attention.

The appellant has the onus of satisfying the criteria for the application of the section 16 public interest override. In this case, the appellant has made a bald assertion without providing

evidence to support his position. I concur with the Police's view that the information at issue is purely the personal information of other individuals. The evidence before me, including the nature of the particular information at issue, does not support a finding that there is a compelling public interest in its disclosure. Accordingly, I find that section 16 does not apply in the circumstances of this appeal.

SEARCH FOR RESPONSIVE RECORDS

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 [Order 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.

As alluded to above, in this case, the appellant raised a concern at the mediation stage that additional records should exist, namely audio recordings of his conversations with Police as well as a charge sheet, which he states he viewed from a Police cruiser computer screen, and information that he believes would have been forwarded to a CAS worker.

The appellant has not provided any further information in support of his contentions, despite being given an opportunity to make representations on the search issue.

Representations

With regard to their search efforts, the Police have provided a detailed affidavit from an individual employed as their Records and Systems Manager (the Manager). The Manager states that as part of his employment duties he is responsible for processing all requests for access to information under the *Act*. In his affidavit, the Manager provides a detailed review of the various steps that he took personally to respond to the appellant's initial request for information and, as he states, to subsequent requests for additional information made by the appellant immediately prior to and during the course of the appeal process.

In summary, the Manager submits that he has tried throughout the course of processing the appellant's request to satisfy the appellant's objectives, even where the scope of the request has expanded beyond what he believed was originally requested.

The Manager states that with the exception of requests for officers' notes, which he forwarded to the specific officers for response to him, he was responsible for undertaking the search for records.

In describing the steps he took to satisfy the appellant's request, the Manager states that all Police general occurrence reports are entered into their Records Management System (RMS) and identified persons are "indexed" to these reports. With regard to the creation of "call reports", the Manager states that anytime the Police receive a request for assistance and a Police response is deemed necessary, a call report is generated. The Manager states that these call reports are then entered into the Computer Aided Dispatch (CAD) system.

In performing his search for records responsive to the appellant's request, the Manager states that he "conducted queries of [the Police] RMS", searching for "incidents/reports" involving the appellant, another identifiable individual and the appellant's address. In addition, the Manager submits that he "browsed both [the] RMS as well as CAD systems." The Manager explains that "browse search" involves a search of the Police's "computer based systems using partial information – so that if some information is omitted or entered erroneously, a browse would find records like [those] being sought [by the appellant]." The Manager states that these browses were conducted using

- the appellant's surname
- another identifiable individual's surname
- partial address information of the appellant
- time frame provided by the appellant
- either the appellant's or the other identifiable individual's surname in the narrative text

The Manager states that initially he interpreted the appellant's request to mean that he was interested in receiving a copy of the Police investigation report and he issued a decision letter on March 28, 2005 based on this understanding. Prior to receiving the Notice of Appeal in this matter, the Manager states that he spoke with the appellant who advised him that he also wanted copies of the police officers' notes. The Manager indicates that while he believed that this request was outside the scope of the original request, he advised the appellant that he would "secure and release" copies of the officers' notes.

Subsequently, during the mediation stage of the appeal process the Manager states that the mediator advised him that the appellant was now also seeking copies of recorded conversations. The Manager submits that while he viewed this additional request as being outside the scope of the original request, he undertook a search for such recordings as well as requesting copies of notes from the involved police officers. The Manager submits that in his position he is "personally responsible for the management of the [Police's] digital audio recording equipment." In the performance of his duties, the Manager states that he routinely purges information from the Police's recording equipment. The Manager states that currently, and at the time of the request, the Police maintain recordings for a period of at least six months, although under their

Retention By-Law they may be destroyed after two months. The Manager states that "[a]t the time that it was learned that the appellant was now seeking copies of audio recordings, these recordings would have been purged from [the Police's] audio recording system." The Manager states that he "personally undertook a search for those recordings and confirmed that they had been purged."

The Manager states that on May 4, 2005 he issued a supplementary decision letter to the appellant confirming the "destruction of the audio recordings as well as […] releasing copies of officer's notes."

The Manager states that on June 30, 2005, on the basis of consent received from the appellant's wife, he issued a supplementary decision letter confirming the release of the wife's personal information contained in the records as well as the personal information of her two minor children. He also provided copies of a "computer screen shot" and the Police's Records Retention By-Law.

In light of the Manager's response to the appellant's original request and subsequent additional requests, he views the appellant's request for copies of reports faxed to the CAS as the sole remaining issue.

The Manager states that in situations involving domestic disturbances or violence where children are present and there is concern about the health and safety of those children, the Police have a "duty to report" to the CAS under the *Child Family Services Act*. The Manager states that, in this case, a "report" was "forwarded to" a named CAS worker in light of the circumstances investigated by the Police. The Manager states that the report that was forwarded is the general occurrence hardcopy to which the appellant received partial access.

With regard to the appellant's interest in any "handwritten police reports" relating to a particular incident number, the Manager states that in cases involving allegations of domestic disturbance where it is found that no offence has been committed, it is the "practice of the Police to enter the information contained on the handwritten [general occurrence report] into the Records Management System (RMS) and then destroy the original handwritten report." The Manager makes reference to a notation in a "field" labeled "Special Study" on page 1 of the general occurrence hardcopy that states: "Domestic Violence Report, Paper Purged". The Manager states that this note confirms that routine Police practice was followed in this case and that the original handwritten report was destroyed after entry into the database.

Analysis and findings

Having carefully reviewed the Manager's affidavit, I find that the Police have provided strong evidence to demonstrate that they made a reasonable effort to identify and locate records responsive to the appellant's request. In particular, through the Manager's affidavit, I am satisfied that the Police have provided a detailed summary of their record keeping processes and have demonstrated the various steps that were undertaken to address the appellant's request in

this case. I have not received any evidence from the appellant that refutes the Police's search efforts. Accordingly, I am satisfied that the Police have met their obligations to conduct a reasonable search in accordance with their responsibilities under section 17(1) of the *Act*.

ORDER:

1. I uphold the decision of the Police to withhold the undisclosed portions of the records.

2. I uphold the Police's search for records responsive to the appellant's request.

Original signed by: November 29, 2006
Bernard Morrow
Adjudicator