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

ORDER MO-2268

Appeal MA06-443

Waterloo Regional Police Services Board

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NATURE OF THE APPEAL:

The Waterloo Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for any active file pertaining to the requester. After contacting the requester to clarify the request, the Police ultimately interpreted this request to be for any file in their record-holdings since 1986 that related to the requester.

The Police identified records responsive to the request and granted partial access to them. The Police relied on the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(c) (law enforcement), 8(1)(l) (facilitate commission of an unlawful act) and 8(2)(a) (law enforcement report); and section 38(b) (personal privacy) with particular reference to the factors at sections 14(2)(f) (highly sensitive information), 14(2)(h) (information supplied in confidence) and the presumption at section 14(3)(b) (investigation into a possible violation of law) to deny access to the portions they withheld.

The requester (now the appellant) appealed the decision to deny him complete access to the records.

At mediation, the appellant alleged that additional responsive records should exist, especially in relation to events that the appellant asserts took place on October 2, 2006. In response, the Police conducted a further search and provided a supplementary decision letter explaining why no other responsive records were found. The appellant was not satisfied with the explanation. Accordingly, the reasonableness of the Police's search for responsive records was added as an issue in the appeal.

Mediation did not resolve the appeal and the matter moved to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Police, initially. The Police provided representations in response to the Notice. A Notice of Inquiry, along with the complete submissions of the Police, was then sent to the appellant. The appellant provided representations in response.

RECORDS:

The records at issue consist of two General Occurrence Reports (consisting of 28 pages in all), an Occurrence Details printout (consisting of two pages) and a series of Event and/or Occurrence Details Reports (consisting of 7 pages). At issue is the information that was severed from these records.

SCOPE OF THE REQUEST:

Appearing on pages 26, 27, 28, 29, 30, 31, 32, 33 and 34 of the records, but severed by the Police, are a series of numbers and abbreviations relating to database queries and printing information made by the Police in the course of responding to the request. Past orders of this office have established that administrative information relating to the date, time and by whom

the report was printed is not reasonably responsive to a request (Orders PO-2315 and PO-2409). I agree with that reasoning and will follow it in this appeal. In my view, this severed information is purely administrative information and I find, therefore, that it is not reasonably related, or responsive, to the request. Accordingly, I will not address this specific information further in this order.

DISCUSSION:

ADEQUACY OF THE SEARCH FOR RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

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 of the *Act* [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].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

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.

The Representations of the Police

The Police submit that after clarifying the request with the appellant they searched their Records Management database for any responsive records relating to the appellant dating back to 1986 and located the records at issue in this appeal. In addition, after sending severed versions of the responsive records to the appellant, the Freedom of Information Co-ordinator for the Police met with the appellant to address any questions that he had regarding them.

In support of their position that they conducted a reasonable search, the Police submit:

> On November 25, 2006 an experienced and trained records clerk in the Records Branch of [the Police] completed the first search for all police occurrence reports and incident reports of all contacts with [the appellant]. This was conducted in the usual and ordinary course of business. The initial search took 40 minutes. The requester was given access to these reports save and except for police codes and third party information.
>
> During mediation on February 21, 2007 another experienced and trained FOI Analyst in the Records Branch of [the Police] completed a search specifically for any October 2, 2006 occurrences involving the requester. No additional records were found.
>
> On March 9, 2007 yet another experienced and trained FOI Clerk in the Records Branch of [the Police] completed a search for all records where the requester is named. No additional records were found.
>
> A search for records requires querying four "records management systems":
>
> 1. Microfilm was used from 1968 - 1984
> 2. Paper records from 1984 - current
> 3. Legacy Records Management System from 1994 - 2005
> 4. New Records Management System from 2005 - current
>
> The Records Branch staff routinely search these four "systems" on an ongoing basis.
>
> ...
>
> It would be highly unusual for any paper occurrence report to be destroyed from 1994 to current [date] because the [Police] ha[ve] not destroyed any occurrence or incident reports dated after 1994. Due to technical issues the [Police] ha[ve] not destroyed any occurrence reports on our computer systems since 1994.

> If the October 2, 2006 incident took place [the appellant asserted at mediation that records should exist in relation to this date] then the requester should be able to provide what type of call it was about rather than stating "a very serious incident". If it was a serious incident then more than one officer would be involved and we would not only have the occurrence general report, but officer statements, witness statements and interviews.
>
> There are no known issues with our new records management system mysteriously deleting or hiding records.
>
> Other possibilities include the requester was dealing with another police service. The OPP is responsible for all provincial highways in our Region. The WRPS only serves the Region of Waterloo. Another possibility could be the requester gave a different name to police for the October 2, 2006 incident.
>
> One last possibility I can think of is the requester approached an officer in person and the police officer never generated a report (which is normal for very minor incidents such as parking complaints).

The Appellant's Representations

The appellant maintains his position that records should exist relating to an incident that took place on October 2, 2006 that he describes in his representations.

Analysis and Finding

I find that the Police provided a thorough explanation of the efforts made to identify and locate records that are responsive to the appellant's request and why no other responsive records exist. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist. In my view, the appellant has not provided a reasonable basis for concluding that other responsive records exist. Accordingly, I am satisfied that the Police's search for responsive records was reasonable and is in compliance with its obligations under the *Act*.

Therefore, I find that the Police have conducted a reasonable search for records as required by section 17 of the *Act*.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, 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,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by an individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where 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.

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.)].

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as "personal information" if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225, PO-2435].

In my view, all of the records at issue contain the personal information of the appellant. This information qualifies as his personal information because it includes his address and telephone number (paragraph (d)), or contains his name along with other personal information about him (paragraph (h)).

The first General Occurrence Report (pages 1 to 14), the second General Occurrence Report (pages 15 to 25), and pages 30 and 31 of the Event and/or Occurrence Details Reports also contain the personal information of other identifiable individuals. This information qualifies as their personal information because it contains their address and telephone numbers (paragraph (d)), or contains their names along with other personal information about them (paragraph (h)).

In my view, the final sentence of the third paragraph on page 4 of the records does not contain the personal information of the appellant or of another identifiable individual.

PERSONAL PRIVACY

If a record contains the personal information of the appellant along with the personal information of another individual, section 38(b) of the *Act* applies to render the information exempt from disclosure, at the discretion of the Police.

Section 38(b) of the *Act* reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

Accordingly, under section 38(b) where a record contains personal information of both the appellant and another identifiable individual, and disclosure of that information would "constitute an unjustified invasion" of that other individual's personal privacy, the Police may refuse to disclose that information to the appellant.

That does not end the matter, however. Despite this finding, the Police may exercise their discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

Under section 38(b), the factors and presumptions in sections 14(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

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; and 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 under section 14(3), 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] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption [See Order PO-1764].

Section 14(3)(b)

Section 14(3)(b) reads as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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 submit that the withheld information in the first General Occurrence Report (pages 1 to 14), the second General Occurrence Report (pages 15 to 25), and pages 30 and 31 of the Event and/or Occurrence Details Reports is the personal information of an identifiable individual other than the appellant that was compiled and is identifiable as part of an investigation into a possible violation of law.

Analysis and Findings

Except for the final sentence of the third paragraph on page 4 of the records, which I will address below, I find that the presumption in section 14(3)(b) applies to the information severed from pages 1 to 25 and pages 30 and 31 of the responsive records because it is personal information of an identifiable individual other than the appellant that was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code*. The fact that charges are not laid does not affect the application of 14(3)(b) [Order PO-1849].

The presumed unjustified invasion of personal privacy at section 14(3)(b) therefore applies to this information. Section 14(4) does not apply and the appellant did not raise the possible application of the public interest override at section 16 of the *Act*. Accordingly, I conclude that the disclosure of the withheld personal information contained in the information severed from pages from pages 1 to 25 and pages 30 and 31 would constitute an unjustified invasion of another individual's personal privacy and it is exempt under section 38(b).

As I have found that, with one exception, the withheld portions of pages 1 to 25 and pages 30 and 31 fall within the section 14(3)(b) presumption section, it is not necessary for me to address whether the factors in section 14(2) might also apply.

In conclusion, subject to my discussion on the exercise of discretion below, I find that the information that I have found to be subject to the section 14(3)(b) presumption, qualifies for exemption under section 38(b).

I will now turn to the remainder of the withheld information at issue. This consists of the "900" codes and other references to coding procedures contained in the withheld portions of pages 26 to 32 of the records at issue, as well as the final sentence of the third paragraph on page 4.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38(a) provides a number of exemptions from this right. It reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

LAW ENFORCEMENT

Sections 8(1)(c) and (l) and 8(2)(a) of the *Act* state:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement; or
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.
>
> (2) A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

The Police rely on section 8(1)(l) to withhold the "900" codes and other references to coding procedures contained in pages 26 to 32 of the records at issue. The Police rely on sections 8(1)(c) and 8(2)(a) to withhold the final sentence of the third paragraph on page 4.

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.)].

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution 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.)].

It is not sufficient for an institution 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* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*, cited above].

Under section 2(1) of the *Act*, "law enforcement" is defined to mean:

> (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 (b).

I am satisfied that the matters at issue relates to policing and qualifies as "law enforcement" under paragraph 2(1)(a).

Section 8(1)(l): facilitate the commission of an unlawful act

The Police submit that section 8(1)(l) was applied to the "900" codes and other references to coding procedures in some of the withheld portions of the records at issue. The Police submit that:

> … [the] "900" codes are internal systems of communication between dispatchers and the police. Release of such codes may hamper the investigations and could result in the risk of harm to either the public, namely individuals directly involved

> in these incidents and/or [the] police, as those involved in the criminal activity can anticipate police response if the codes were released.

Analysis and Finding

A number of decisions of this office have consistently found that Police ten codes and "900" codes qualify for exemption under section 8(1)(l) of the *Act* (see for example Orders M-393, M-757 and PO-1665). These codes have been found to be exempt because of the existence of a reasonable expectation of harm to an individual or individuals and a risk of harm to the ability of the police to carry out effective policing in the event that this information is disclosed. I adopt the approach taken by previous orders of this office. I find that the Police have provided me with sufficient evidence to establish a reasonable expectation of harm with respect to the release of this information. As a result, I find that section 8(1)(l) applies to this information.

Accordingly, subject to my discussion on the exercise of discretion below, I find that the section 38(a) exemption applies to this information.

Sections 8(1)(c) and 8(2)(a): reveal investigative techniques/law enforcement report

The Police rely on sections 8(1)(c) and 8(2)(a) to withhold the final sentence of the third paragraph on page 4 of the records.

In order to meet the "investigative technique or procedure" test in section 8(1)(c), the institution 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]. The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders P-1340, PO-2034].

In my opinion there is no information in the first General Occurrence Report (pages 1 to 14) that qualifies as "investigative techniques or procedures" within the meaning of those words in section 8(1)(c). I am not satisfied that disclosure of any of the information in the record to the public could reasonably be expected to hinder or compromise the effective utilization of any technique or procedure that may exist. Accordingly, I am not satisfied that the Police have established a reasonable expectation of harm if the final sentence of the third paragraph on page 4 is disclosed. As a result, I find that this information does not fit within the ambit of section 8(1)(c).

In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the Police must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders MO-1238, P-200 and P-324]

The word "report" is not defined in the *Act*. However, previous orders have found that to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order P-200).

This interpretation was affirmed by Senior Adjudicator David Goodis in Order MO-1238. In that case, Senior Adjudicator Goodis rejected arguments to the effect that this interpretation was too narrow. He stated:

> ... an overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous. The Legislature could not have intended that result. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the "Williams Commission") (at p. 294):
>
> > The need to exempt certain kinds of law enforcement information from public access is reflected in all of the existing and proposed freedom of information laws we have examined. This is not surprising; if they are to be effective, certain kinds of law enforcement activity must be conducted under conditions of secrecy and confidentiality. Neither is it surprising that none of these schemes simply exempts all information relating to law enforcement. The broad rationale of public accountability underlying freedom of information schemes also requires some degree of openness with respect to the conduct of law enforcement activity. Indeed, if law enforcement is construed broadly to include the enforcement of many regulatory schemes administered by the provincial government, an exemption of all information pertaining to law enforcement from the general right to access would severely undermine the fundamental objectives of a freedom of information law.
>
> This office's interpretation of the word "report" in section 8(2)(a) is not only plausible, but also promotes the purposes of the legislation. The Commissioner's interpretation takes into account the public interest in protecting the integrity of law enforcement procedures which underlies the purpose of the exemption. To

> the extent that any harm could reasonably be expected to result from disclosure of law enforcement records, the various exemptions in sections 8(1) and 8(2)(b) to (d) may apply (for example, where disclosure could reasonably be expected to interfere with a law enforcement matter under section 8(1)(a), or deprive a person of the right to a fair trial under section 8(1)(f)). In addition, certain law enforcement records which consist of a formal statement or account of the results of the collation and consideration of information qualify for exemption under section 8(2)(a), regardless of the potential for harm from disclosure [see, for example, Order MO-1192]. At the same time, this interpretation takes into account the public interest in openness as articulated by the Williams Commission, since records which do not meet the specific definition of report, and which do not otherwise qualify for exemption under the remaining provisions of section 8, cannot be withheld under this exemption.

In Order MO-1238, Senior Adjudicator Goodis made it clear that the title of a document will not necessarily determine whether or not it is a "report". For example, he found that section 8(2)(a) did not apply to a Field Inspection Report or an Inspection Record of a municipal building department, both of which contained entries made over a period of time, on the basis that documents of this kind did not satisfy the first requirement of the section 8(2)(a) exemption test. Similarly, in Order M-158, former Adjudicator Anita Fineberg found that a number of memoranda met the definition of "report", while a number of others did not. Generally, occurrence reports and supplementary reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, because they have been found to be more in the nature of recordings of fact than formal, evaluative accounts of investigations [see Orders M-1109, MO-2065 and PO-1845].

I have considered the substance and nature of the record containing the excerpt remaining at issue and have assessed whether it consists of a "formal statement or account of the results of a collation and consideration of information", as opposed to a "mere observation or recording of facts". In my opinion the first General Occurrence Report (pages 1 to 14) containing the excerpt at issue does not fall within the definition of a "report" set out above, and therefore the excerpt does not fit within the ambit of section 8(2)(a).

In all the circumstances the Police have failed to provide me with sufficient evidence to substantiate a finding that the excerpt at issue fits within sections 8(1)(c) and/or 8(2)(a). As a result, I find that the exemption at section 38(a) of the *Act* does not apply. Accordingly, I will order that the final sentence of the third paragraph on page 4 of the records be disclosed to the appellant.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because sections 38(a) and (b) are discretionary exemptions, I must also review the Police's exercise of discretion in deciding to deny access to information they withheld. On appeal, this office may review the institution's decision in order

to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Police erred in exercising their discretion where, for example:

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations

In these cases, I may send the matter back to the Police for an exercise of discretion based on proper considerations [Order MO-1573].

In the circumstances of this appeal, I conclude that the exercise of discretion by the Police to withhold the severed information that I have not ordered to be disclosed was appropriate, given the circumstances and nature of the information.

ORDER:

1. I find that the Police's search for responsive records is reasonable.

2. I order the Police to disclose to the appellant the portion of page 4 of the records that I have highlighted on the copy of page 4 that I have provided to the Police with this order by sending it to the appellant by **February 29, 2008** but no earlier than **February 25, 2008**.

3. I uphold the decision of the Police to deny access to the portions of the records it withheld.

4. In order to verify compliance with provision 2 of this order, I reserve the right to require the Police to provide me with a copy of page 4 of the records as disclosed to the appellant.

Original signed by: January 31, 2007
Steven Faughnan
Adjudicator