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

ORDER MO-2139

Appeal MA-060230-1

Guelph Police Service

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The requester submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Guelph Police Service (the Police) for access to a copy of a police complaint filed against him by a named individual (the affected person).

The Police denied the requester access to the requested information pursuant to section 38(b) (discretion to refuse requester's own information) and section 14(1) (invasion of privacy), with reference to the exception to the general provision prohibiting the disclosure of personal information in section 14(1)(a) and the presumption in section 14(3)(b) of the *Act*.

The requester, now the appellant, appealed the decision of the Police to this office. Prior to doing so, however, the appellant sent an e-mail to the Police in which he provided the exact date of an incident in which he was approached by the police, which he asserted occurred because of the complaint that was made against him by the affected person.

The Police provided all the records that they had located as a result of their search for responsive records to this office. Although there were a number of records in the custody of the Police relating to the appellant and the affected person, the appellant's request was specific to one particular complaint. At the outset of the appeal, the mediator advised the Police that the records which were provided to this office did not appear to be responsive to the request, as none of them identified a complaint made by the affected person against the appellant. All of these records were then removed from the scope of the appeal.

During mediation, however, the Police advised that based on the additional information provided by the appellant subsequent to their decision, they obtained additional records. These records comprise notes from one police officer which correspond to a complaint that was made on the date identified by the appellant. In a conversation between the mediator and the appellant, he indicated that he was approached by two police officers on the date of the incident. The mediator therefore asked the Police to contact the other police officer in order to obtain his notes.

Both sets of notes were eventually identified, and copies were provided to this office. The Police issued a supplementary decision in which they denied the appellant access to a copy of these notes pursuant to sections 38(b) and 14(1), with reference to the factors listed in sections 14(2)(e) and 14(2)(i) of the *Act*. The Police advised that there are no other responsive records. The appellant believed that additional records should exist and alleged that the Police destroyed responsive records.

Following receipt of the Mediator's Report, the Police contacted the mediator requesting that the presumption in section 14(3)(b) be added as an issue in the appeal. The appellant was notified of this request and the report was revised accordingly.

No further mediation was possible and this file was forwarded to adjudication. I decided to seek representations from the Police, initially. The Police submitted representations in response and the non-confidential portions of their submissions were provided to the appellant, who was then asked to provide submissions on the issues on appeal. The appellant also submitted representations.

RECORDS:

The record identified as being at issue following mediation is comprised of the portions of 6 pages of police officers' notes that address the complaint made against the appellant.

As will be discussed below, I have also determined that one other record should have been identified as being at issue (pages 10-12 of the records initially identified by the Police as the records at issue). That record comprises the occurrence report relating to a call that was made to the police, which resulted in the attendance of two police officers at the scene of the incident to address the complaint as called in, but which ultimately turned into the complaint against the appellant, which is the subject of the police officers' notes.

DISCUSSION:

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]. A reasonable search is 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, see, also: Order P-880).

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.

It is very clear from the appellant's representations, letter of appeal and correspondence to the mediator, as well as documentation provided to the Commissioner's office by the Police consisting of numerous e-mails sent to the Police by the appellant, that the appellant has a number of issues with the Police relating to the manner in which they have dealt with him, both in response to his access request and in response to the complaint made against him by the affected person.

This documentation also indicates that the appellant has a dispute with the Board of Directors of a particular Condominium, wherein he has alleged management and financial irregularities. The appellant alleged in his representations that the Chair of the Police Services Board (the Board) is implicitly involved in the overall matter which led to the complaint made by the affected person, and that the Chair has influenced the decision of the Police relating to his access request. As a

result, the appellant is of the view that the Police have intentionally withheld information pertaining to the identified incident.

With respect to his allegations of bias within the Police decision-making process, the appellant has not provided me with any evidence to support his claim that the Chair has intervened in responding to his access request. Moreover, in an e-mail dated June 28, 2006 to the appellant from the Freedom of Information Co-ordinator of the Police, it was clearly stated that the decision regarding access was made by the Co-ordinator, on behalf of the Police Services Board. There is no evidence before me that suggests that the Chair of the Board had any involvement in the decision-making process regarding this access request and I find the appellant's allegation to be without merit.

Although the appellant has described his grievances against the Police and the affected person, I do not find that they assist me in determining whether the search for responsive records conducted by the Police was reasonable. The Police have provided representations and an affidavit from the person who conducted the search for responsive records. In these documents, the Police explained the steps taken in searching for responsive records as follows:

- The Police did not contact the appellant on receipt of his request, choosing to interpret it literally;
- All searches were conducted by a legal assistant in the Freedom of Information Branch who has had extensive experience searching record management databases;
- The legal assistant conducted a computerized search on "Legacy", the in-house record management system of the Police using the names of the appellant and affected person as reference points. Although the search produced a number of incidents, none of them identified both the appellant and affected person as parties to the dispute;
- The Police then issued a decision to the appellant advising him that no personal information of his was contained in any reports pertaining to the affected person and that all documents relating to her were being withheld from disclosure;
- At about the same time, the Police received an e-mail from the appellant, wherein he indicated that a complaint had been made against him on April 29, 2004;
- Based on this additional information, the Police were able to isolate the report in question, but noted that it did not identify the appellant. Nevertheless, the Police contacted one of the two investigating officers to obtain his notes of the incident. The notes were subsequently sent to the Freedom of Information office and it was determined that references were made in them to both the appellant and the affected person;
- The notes were sent to the Commissioner's office and the second officer's notes were obtained and forwarded to this office. The Police subsequently issued a supplementary decision relating to these notes;
- The legal assistant confirmed that no records had been destroyed.

During mediation, the Police suggested that it is likely that the information relating to the incident identified by the appellant was either listed improperly or that the individual filling out the occurrence report neglected to input all of the information relating to the incident, which resulted in the omission of the appellant's name on the report.

The appellant described the incident in which the two police officers confronted him and asserted that they are being untruthful about the information they have relating to this incident. He believed that there should be an occurrence report describing this incident and the complaint that initiated it. He alleged that either the Police have lied about the contents of the occurrence report or that the report was destroyed.

I have reviewed the records that were initially sent to this office, but which were subsequently determined to be not responsive to the request. I find that there is, indeed, an occurrence report that corresponds to the incident in which the appellant and affected person were involved, even though it does not identify the appellant by name. I am unclear as to why this document was not identified as a record at issue as it became clear, once the officers' notes were retrieved, that it contains the record of the call that brought the Police to the location of the incident at which time the complaint was made against him. Using the approach set out in Order P-880, I find that this record is reasonably related to the appellant's request such that it should have been considered to be responsive.

I note that the Police initially made a decision regarding this record prior to it being designated as non-responsive and I find that its submissions overall are applicable to the content of this record in the same way as the officers' notes. I also find that the appellant's representations are similarly applicable. I therefore do not find it necessary to approach the parties for further submissions regarding this record, as their positions on the issues are abundantly clear from the submissions already made.

With respect to the search conducted by the Police, I am satisfied that, in the end, they have taken the appropriate steps to search for responsive records, and that the search was conducted by a person who would likely know or be in a position to determine whether such records do or would likely exist. I find their explanation for the lack of detail in the report to be reasonable. There is no evidence before me to suggest that further records should exist or that any records have been tampered with as suggested by the appellant. I am therefore satisfied that the search for responsive records conducted by the Police was reasonable in the circumstances.

I would point out, however, that some confusion could have been avoided had the Police contacted the appellant for additional information when their search initially failed to produce a record. Had they attempted to narrow the time frame for their search, as they were ultimately able to do once he provided a date, they would have been in a position much earlier to address the substantive issues on appeal. I would also encourage the Police to take a more expansive approach when determining those records that are responsive to a request. Although the appellant's name was not listed on the record, by implication, the record was clearly related to

his request as it initiated the involvement of the Police in the dispute between the appellant and affected person.

PERSONAL INFORMATION

General principles

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,

(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 the 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 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 paragraphs (a) to (h) 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 take the position that the police officers' notes contain the personal information of both the appellant and the affected person. The appellant submits that these notes contain only his own personal information, but not that of the affected person.

After reviewing the police officers' notes as well as the contents of the report at pages 10-12 of the records, I find that all of these pages contain the personal information of both the appellant and the affected person. Although the appellant's name is not listed on pages 10-12, when this record is viewed in context, I find that it would be possible to accurately ascertain his identity. Moreover, taking an expansive interpretation of the identification of personal information under Part II of the *Act*, even if his identity could not be ascertained from the record itself, it clearly pertains to the incident in which a complaint was made against him, and for that reason, it contains his personal information.

I find that the personal information of the appellant and affected person in the records is intertwined in such a way that to sever out that which pertains solely to the appellant would result in "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, I do not find severance of the records to be reasonable in this case, as an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

INVASION OF PRIVACY

General Principles

I have found that the records contain the personal information of the appellant and another identifiable individual. As noted above, 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.

Under section 38(b), where a record contains 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, 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 the circumstances, it appears that the presumption at section 14(3)(b) may apply. This section states that:

> 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;

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

The Police stated that although they were initially called regarding a neighbour dispute involving a parking issue, once they arrived at the scene, the complaint became one of harassment. The investigating officers then undertook an investigation into the harassment claim, albeit not an extensive one, and dealt with the matter.

In his representations, the appellant described his dispute with the affected person. He also claimed that, in raising the presumption against disclosure in section 14(3)(b), the Police were attempting to intimidate and dissuade him from proceeding to the adjudication stage of this appeal, as well as from filing a complaint against them with the Ontario Civilian Commission on Police Services.

I do not find any merit in the appellant's latter allegations as the Police are obligated to consider all of the factors and presumptions in section 14(1) before deciding whether or not to disclose personal information.

Moreover, it is clear from the records that the Police were called, in their law enforcement capacity, to deal with what appeared to simply be a parking issue, but which ultimately turned into a complaint of criminal harassment against the appellant, and was dealt with as such. Although no charges were laid, I find that the investigation was conducted by the Police with a view towards determining whether there was a possible violation of law and the records, on their

face, identify that the personal information was compiled in that context. Accordingly, I find that the presumption at section 14(3)(b) applies to the personal information of the affected person.

EXERCISE OF DISCRETION

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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)].

In explaining its exercise of discretion not to disclose the information contained in the records, the Police stated that in light of numerous harassing e-mails sent by the appellant to them relating to the affected person, they exercised their discretion not to release the information in order to prevent the continued harassment of the affected person. As noted above, the Police had submitted 37 e-mails that they had received from the appellant to this office during mediation, and I have taken them into account in determining the issues in this appeal.

In response to the submissions made by the Police, the appellant stated:

> The handling of my FOI request indicates that the Police never intended to disclose any of my personal information. The Police acted in bad faith with the intent to indemnify [the affected person] from the consequences of filing a false police complaint against me.

The appellant continued that he believed that the Police have taken the side of the affected person; that they have participated in her "campaign of harassment" against him and that by ordering him not to communicate with her, they have prevented him from questioning what he considers to be fraudulent acts under the *Condominium Act*.

I find the appellant's obsessive interest in this matter and the extent to which he is willing to malign individuals, as reflected in the many e-mails he has written as well as the inflammatory

comments he has made in his representations, to support the concerns raised by the Police regarding disclosure of the information in the records. I find that, in these circumstances, there is particular sensitivity inherent in the personal information contained in the records. I further find that disclosure would not be consistent with one of the fundamental purposes of the *Act* identified by former Senior Adjudicator Goodis in Order MO-1378, that being, the protection of privacy of individuals, and the particular sensitivity inherent in records compiled in a law enforcement context. In the circumstances, I find that the Police have properly exercised their discretion, taking into account all relevant factors and not taking into account any irrelevant factors.

Accordingly, because the disclosure of the personal information in the records is presumed to constitute an unjustified invasion of personal privacy, I find that the records are exempt from disclosure under section 38(b).

ORDER:

1. The search conducted by the Police was reasonable and I dismiss this portion of the appeal.

2. I uphold the Police's decision to withhold access to the records.

Original signed by: December 22, 2006
Laurel Cropley
Adjudicator