



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-2256**

**Appeal MA06-343-2**

**Barrie Police Services Board**



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## **NATURE OF THE APPEAL:**

The Barrie Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to an occurrence involving the requester. The request referred to the specific occurrence number, and identified that it was for records relating to the occurrence. Attached to it was a list of the various types of records which would be responsive to the request.

In its initial response, the Police denied access to responsive records on the basis that, pursuant to section 52(3) of the *Act*, the information requested fell outside the scope of the *Act*. The requester (now the appellant) appealed that decision, and Appeal MA06-343 was opened. That appeal was eventually closed when the Police decided not to apply section 52(3) of the *Act*.

The Police then issued a new decision letter, in which they granted full access to certain documents, and denied access, in whole or in part, to other records on the basis of the exemptions in section 38(a) (discretion to refuse requester's own information), section 8(2)(a) (law enforcement report), and section 38(b) (invasion of privacy), with reference to the presumption in section 14(3)(b) and the factors in sections 14(2)(f) and (h). The Police also informed the appellant that certain requested records did not exist.

Following that decision, the Police disclosed some additional information.

The appellant appealed the Police's decision to deny access to some of the responsive information, and also claimed that additional records should exist. This office then opened Appeal MA06-343-2, the present appeal.

During mediation, the Police decided to no longer apply the exemption found in section 38(a) of the *Act*, in conjunction with section 8(2)(a). Accordingly, those sections are no longer at issue in this appeal.

Also during mediation, the appellant narrowed the records at issue, and certain responsive records are no longer at issue in this appeal. In addition, the appellant provided the Police with a letter containing a list of additional records that he believed should exist, and specifically listed 12 records or types of records which he believed ought to exist.

The Police conducted another search for records and located two additional records, to which they denied access in their entirety, based on the exemption found at section 38(b) of the *Act*. In their response to the appellant, the Police also addressed the other items listed in the appellant's letter. The appellant was not satisfied with the response of the Police, and the issue of whether the search for responsive records was reasonable remains an issue in this appeal.

Following mediation, a Mediator's Report was sent to the parties, identifying the facts and issues in this appeal. In response to the Mediator's report, the appellant provided correspondence to this office which reiterated his interest in obtaining all of the records responsive to his request, and referred to his appeal letter (which was shared with the Police) which stated the appellant's view that the Police had failed to conduct a reasonable search for seven specific types of records.

Mediation did not resolve the issues, and the appeal 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, along with the non-confidential portions of the representations of the Police, to the appellant. The appellant did not provide representations to me.

## **RECORDS:**

The following records remain at issue in this appeal:

Record 17: police officer's notes – denied in part;  
Record 18: recording of an affected person's interview and typed synopsis – denied in full;  
Record 19: copy of photographs, Police Forensic Identification Unit – denied in full;  
Record 20: recording of an affected person's voice mail message – denied in full;  
Record 24: police officer's notes – denied in full;  
Record 26: recording of an affected person's voice mail message – denied in full;  
Record 27: Supplementary Report – denied in part.

## **DISCUSSION:**

### **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. 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 if 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 Police state that the records contain the personal information of individuals other than the appellant, including their names, addresses, telephone numbers, dates of birth, as well as other information about them. The Police also identify that the undisclosed portions of the records contain the views and opinions of other individuals about the appellant, and therefore also contain the personal information of the appellant.

Following my review of the records, I find that all of the records contain the personal information of identifiable individuals other than the appellant. The records primarily contain the personal information of one affected party (the main affected party), and contain that individual's name, addresses and telephone number (paragraph (d)), that individual's personal views and opinions (paragraph (e)), and that individual's name along with other personal information relating to that individual (paragraph (h)), including statements made to the Police. Some of the records also contain the names of other identifiable individuals, along with other personal information relating to them (paragraph (h)).

I also find that the records contain the personal information of the appellant, including his name, the views or opinions of other individuals about him (paragraph (g)), as well as his name along with other personal information relating to him (paragraph (h)).

### **DISCRETION TO REFUSE ACCESS TO APPELLANT'S OWN PERSONAL INFORMATION/INVASION OF PRIVACY**

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, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the Police must look at the information and weigh the appellant's right of access to his own personal information against the other individuals' right to the protection of their privacy. If the Police determine that release of the information would

constitute an unjustified invasion of the personal privacy of others, then section 38(b) gives the Police the discretion to deny access to the appellant's personal information.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. Section 14(2) provides some criteria for the Police 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, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

### **Representations**

The Police take the position that disclosure of the personal information of other identifiable individuals, contained in the records remaining at issue, is presumed to constitute an unjustified invasion of the privacy of other individuals under the presumption in section 14(3)(b) of the *Act*. That section 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 state that the personal information contained in the undisclosed records or portions of records was compiled and is identifiable as part of an investigation into a possible violation of law. The Police state:

The [Police] responded to the incident as a result of receiving a call for service. As a result of the investigation, a criminal charge was laid. The personal information in the records was therefore compiled and is identifiable as part of an investigation into a possible violation of the Criminal Code. Therefore, section 14(3)(b) of [the *Act*] applies to the personal information at issue ...

### **Findings**

With respect to the application of the presumption in section 14(3)(b), I have carefully reviewed the records at issue in this appeal and I am satisfied that they were compiled by the Police in the course of their investigation of incidents involving the appellant. The information remaining at issue consists of statements made to the Police, or is contained in occurrence reports and police officers' notebooks. In my view, the information in these records was compiled as part of an

investigation conducted by the Police into a possible violation, and fits within the presumption in section 14(3)(b). Accordingly, I find that the disclosure of the personal information contained in the records is presumed to constitute an unjustified invasion of the personal privacy of identifiable individuals under section 14(3)(b) of the *Act*.

As set out above, once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2). Accordingly, I find that the disclosure of information in the records is presumed to constitute an unjustified invasion of privacy, and that it is exempt from disclosure under section 38(b).

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). I will, therefore, review the Police's exercise of discretion.

### ***Exercise of discretion***

As noted, section 38(b) is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

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 such a 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 their representations on the manner in which they exercised their discretion, the Police state that they have followed the principles set out in the *Act*, and that access to records is one of the mandates of the Police, particularly in requests for one's own personal information. The Police state that they consider each access request on a case by case basis. They then state:

The [Police] have taken every effort to provide the requester with as much information as possible without in turn violating the privacy of [others]. When additional responsive records were located, they were forwarded to the requester without further delay. After considering the requester's right to access versus [another individual's] right to personal privacy, we feel we must continue to protect the privacy of the [other individuals]. Due to the highly sensitive nature of the information remaining at issue, disclosure of this remaining information would most certainly cause personal distress to the [other individual].

I have carefully reviewed the records remaining at issue in this appeal. I note that many portions of the police officer's notes comprising Record 17, as well as much of the information contained in Record 27, has been provided to the appellant. The severances made by the Police to those two records relate to contacts with or statements made by individuals other than the appellant. With respect to the other records at issue, which were denied in full (Records 18, 19, 20, 24 and 26), each of these records contains only statements or information provided directly to the Police by individuals other than the appellant.

On my review of the information remaining at issue in this appeal, I find no reason to disturb the manner in which the Police exercised their discretion to deny the appellant access to this information. In my view, the Police have very carefully severed the records, and provided the appellant with as much information as possible without violating the privacy of other individuals.

Based on all of the circumstances, I am not satisfied that the Police erred in exercising their discretion not to disclose to the appellant the information remaining at issue, and I uphold the decision of the Police.

## **REASONABLE SEARCH**

### **Introduction**

As set out above, the appellant took issue with the searches conducted for responsive records, and believed that additional responsive records exist.

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 [institution] to prove with absolute certainty that records do not exist. The [institution] 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. 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, during the early stages of this appeal the appellant provided the Police with a letter which listed 12 records or types of records he believed ought to exist. In response, the Police conducted an additional search for records and located two additional records. The Police then responded to the appellant by providing an access decision on those two records, and addressing the other items listed in the appellant's letter. The appellant was not satisfied with the response of the Police, and maintained his position that additional responsive records exist. In addition, after receiving the Mediator's Report in this appeal, the appellant referred to his appeal letter which set out his view that the Police had failed to conduct a reasonable search for seven specific types of records.

In their representations, the Police list the 12 areas identified by the appellant, and provide information in response to each of them. Their representations, prepared by the Freedom of Information Coordinator, read as follows:

- 1) *Notes of [an identified inspector]* - I personally contacted [the named inspector] on February 13, 2007 and asked him to check for any notes he may have recorded in relation to this incident. [The named inspector] called me back shortly thereafter and advised that he had checked and he had no notes in relation to this incident.

*Notes of [a named detective]* - I originally e-mailed [the named detective] on September 7, 2006 and asked him to check for any notes he may have recorded in relation to this incident. I did not receive any notes from him at that time. I e-mailed [the named detective] again on February 12, 2007 and asked him to re-check for notes. He responded on February 27, 2007 that he did not have any notes - see attached copies of e-mails with [the named detective].

*Notes of [an identified staff sergeant]* - I e-mailed [the named staff sergeant] on September 7, 2006 and asked her to check for any notes she may have recorded in relation to this incident. She replied via e-mail on September 11, 2006 that she did not have any notes - see attached copies of e-mails with [the named staff sergeant].



*Notes of [a named police constable]* - these notes were previously located and listed as Doc. 24 on the Index of Records where access was denied in full.

- 2) *Notes of [a named detective] from March 28, 2005 to present time* - These notes were previously located and listed as Doc. 11 on the Index of Records where partial access was granted. I e-mailed [the named detective] on February 13, 2007 and asked him to re-check for a number of items including further notebook notes. He replied via e-mail on February 14, 2007 that he did not have any further notes - see attached copies of e-mails with [the named detective].
- 3) *[An identified report]* - the requester was advised to contact the Crown Attorney's office for further information.
- 4) *All documents and records relating to [the appellant]* - all applicable information was previously located and noted on the Index of Records. [A named detective], the investigating officer, was re-contacted via e-mail on February 13, 2007 and asked to look for any further information (per attached copies of e-mails). Further, I re-checked the file to determine if I had inadvertently omitted any documents/records. No further information was located.
- 5) *All documents and records relating to subsequent investigations* - I have re-checked [the Police's records management system] and have spoken with [a named detective] to determine if the requester was the subject of any subsequent investigations. These efforts were negative and [the Police] has not had any further involvement with [the appellant] as the result of a criminal investigation.
- 6) *All audio recordings on [a named detective's] business telephone* - as per [the named detective's] enclosed e-mail of February 14, 2007, one additional audio recording was located concerning this investigation. This voice mail recording became Doc. 26 on the Index of Records and access was denied in full. A copy of this voice mail recording was provided to [the IPC]. No further audio recordings exist in relation to this investigation.
- 7) *All records re: Breach of Recognizance* - this issue was addressed as Item 6 as above. As per [the named detective's] enclosed e-mail of February 14, 2007, [the Police] have no further information on file in relation to Breach of Recognizance by [the appellant].
- 8) *All documents and records relating to interactions between [the Police] and [a named assistant crown attorney and other crown attorneys] re: [the appellant] from [a specified date]* - during the initial response to this request, no such records were located. After receiving the request for additional documents, I have re-checked our entire file but I was unable to locate any such documents/records.
- 9) *All recorded telephone messages and conversations* - please see Doc. 20 and Doc. 26 on the Index of Records. After receiving the request for additional documents,

I have re-checked our entire file and our records management system for any notation of further telephone messages and conversations. No further information was located.

- 10) *Witness statement of involved party* - no such record exists per [a named detective's] enclosed e-mail of February 14, 2007.
- 11) *Witness statement of involved party* - no such record exists per [a named detective's] enclosed e-mail of February 14, 2007.
- 12) [*An identified Report*] - report was located and became Doc. 27 on the Index of Records. A copy of this report was provided to [the IPC] Mediator and partial access was provided to [the appellant].

The Police also state as follows:

It was not necessary to contact the requester for additional clarification of the request as the requester's representative was quite specific in the additional information that he was looking for. The entire file of [the Police] was re-examined in an effort to locate this additional information. There is no evidence to indicate that the additional information that the requester was looking for existed but subsequently destroyed. The [named] investigating officer ... has confirmed that no records or documents in relation to this investigation have been destroyed.

The representations of the Police were shared with the appellant. The appellant chose not to provide representation in response to the invitation to do so.

### **Finding**

In the course of this appeal the appellant provided the Police with detailed information relating to additional records that the appellant believed existed. In response to this information, the Police did locate two additional responsive records, and issued access decisions on them.

In their representations in response to the Notice of Inquiry, the Police specifically address the 12 areas identified by the appellant, and provide information regarding either the nature of the searches conducted for those records and the results of those searches, or provide information as to why responsive records were not located. The appellant did not respond to the representations of the Police.

As set out above, the issue that I must decide 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 searches carried out were reasonable in the circumstances, the decision of the Police will be upheld. If I am not satisfied, further searches may be ordered.

Based on the representations provided by the Police, and in particular the representations set out above which review in detail the nature of the searches conducted for responsive records, I am satisfied that the searches conducted by the Police were reasonable.

In this appeal both parties acknowledge that the Police's initial search did not locate two records, which were subsequently located. Although the Police do not provide a reason why these two records were not initially located, the Police conducted further searches in the course of this inquiry, and have provided detailed information regarding the nature, extent and results of those searches. In the absence of any additional information from the appellant regarding this issue, and based on the detailed representations of the Police, I am satisfied that reasonable efforts have been made by the Police to locate records responsive to the request.

**ORDER:**

I uphold the decision of the Police, and dismiss this appeal.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

December 20, 2007 \_\_\_\_\_