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

ORDER MO-2402

Appeal MA08-64

The Greater Sudbury Police Services Board

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 Greater Sudbury Police Services Board (the Police) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

1. A copy of a report prepared by a police investigator (as well as the name of his partner) pertaining to a complaint made by an identified individual;

2. A copy of the report and the name of the investigator, pertaining to any investigation of certain circumstances relating to an identified individual;

3. A complete copy of the contents of two specified Police Professional Standards Bureau (PSB) complaint files.

The Police issued a decision letter in which they:

1. Granted partial access to a one-page Occurrence Summary that the Police identified as responsive to item one of the request and disclosed the names of the officers that attended in relation to the matter. They relied on the discretionary exemptions at section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(2)(a) (law enforcement report); and 38(b) (personal privacy) with particular reference to the presumption at section 14(3)(b) (investigation into possible violation of law) to deny access to the portion they withheld;

2. Refused to confirm or deny the existence of records responsive to item two of the request;

3. Claimed that the exclusionary provision in section 52(3) of the *Act* applied to exclude the requested complaint files from the scope of the *Act*.

The requester (now the appellant) appealed the decision.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process. I sent a Notice of Inquiry and a Supplementary Notice of Inquiry setting out the facts and issues in the appeal to the Police, initially. The Police provided representations in response. I then sent a Notice of Inquiry, along with the complete representations of the Police, to the appellant. The appellant provided representations in response.

RECORDS:

Remaining at issue in this appeal are the withheld portions of a one-page Occurrence Summary and the contents of two PSB files, including three compact disks. Also at issue is the Police's refusal to conform or deny the existence of records responsive to item two of the request.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Police take the position that sections 52(3)1 and 3 of the *Act* operate to remove the contents of the two PSB files (item three of the request), from the scope of the *Act*.

I will first address the application of section 52(3)3 of the *Act*, which states:

> Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

Section 52(4) provides exceptions to the section 52(3) exclusions, none of which apply to the records at issue here.

Section 52(3) is record-specific and fact-specific. If this section applies to the records at issue in this appeal, these records are excluded from the scope of the *Act*.

Section 52(3)3: matters in which the institution has an interest

Introduction

For section 52(3)3 to apply, the Police must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part 1: collected, prepared, maintained or used

The Police submit that the contents of the two PSB files were collected, prepared, maintained or used by the Police.

I find that the contents of the two files were collected, maintained or used by the PSB in order to conduct an investigation into the appellant's complaint made under the *Police Services Act* (*PSA*) about the conduct of a named police officer. The two files also include copies of correspondence

from the Ontario Civilian Commission on Police Services (OCCPS) sent by OCCPS to the Police in connection to its review of the decision of the PSB Bureau Commander's decision to not deal with the appellant's complaint.

In short, I am satisfied that the contents of the two PSB files were collected, prepared, maintained or used by an institution. Consequently, the Police have met Part 1 of the section 52(3)3 test.

Part 2: meetings, consultations, discussions or communications

It is evident from my review of the contents of the two files and the nature of the records that meetings, consultations, discussions or communications of various sorts took place involving both the Police and OCCPS with respect to the records. Consequently, I find that the collection, preparation, maintenance and use of the contents of the two files by the Police were in relation to meetings, consultations, discussions or communications.

As a result, I find that the second part of the test under section 52(3)3 has been met with respect to the contents of those files.

Part 3: labour relations or employment-related matters in which the institution has an interest

The meeting, discussions, consultations and communications that took place involved potential disciplinary matters involving an identified police officer. This office has found that disciplinary matters involving police officers are "employment-related matters". [See in this regard Orders M-835, PO-2499 and PO-2426]

In Order PO-2658 Adjudicator Colin Bhattacharjee had the opportunity to discuss the impact of *Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289 (*Goodis*) on sections 65(6) 1 and 3 of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent of sections 52(3)1 and 3 of the *Act*. He wrote:

> … the Divisional Court found that section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Goodis*]. In particular, the Court stated the following with respect to the meaning of sections 65(6)1 and 3:
>
> > Subclause 1 of s. 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution". The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations *per se* - that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an

> employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the Ministry is sued by a third party in relation to actions taken by government employees.
>
> Moreover, the words of subclause 3 of s. 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.

This raises the question as to whether records concerning disciplinary matters involving police officers are "employment-related matters" for the purposes of section 65(6)3 of the *Act*, because such records have been created as a result of complaints filed by a third party with respect to the actions of those officers. In its decision, the Divisional Court provided some guidance on this issue. In particular, it commented on the Court of Appeal's decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, in which one of the records at issue was a copy of a public complaint file of the Police Complaints Commission:

> … *there was no dispute in that case that the file documenting the investigation of the complaint was employment-related - not surprisingly because of the potential for disciplinary action against a police officer.* However, the case does not stand for the proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document. (Emphasis added.)

I have carefully examined the records at issue in the appeal before me, which document the PSB's investigation of the complaints filed against the two OPP officers and OCCPS's review of the two decisions issued by the PSB Bureau Commander. In my view, these records are "employment-related," because of the potential for disciplinary action against the two officers. I find, therefore, that the meetings, discussions, consultations and communications that took place were about "employment-related matters."

I agree with Adjudicator Bhattacharjee's analysis and adopt it for the purposes of this appeal. I find that it is equally applicable to the analysis in the third part of the section 52(3)3 test. Having examined the copies of the records in the two PSB files, I conclude that those copies relate to employment, because of the potential for disciplinary action arising out of the appellant's complaint against the named police officer. I find, therefore, that the meetings, discussions, consultations or communications were about "employment related matters".

The remaining question is whether these meetings, discussions, consultations and communications were about employment-related matters "in which the institution has an interest." The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General),* cited above].

In my view, the Police have an interest in the employment-related matters in the contents of the two files that extends beyond a "mere curiosity or concern." As the employer of the named police officer, the Police clearly have more than a trifling interest in the PSB Bureau Commander's decisions with respect to the complaint filed against the named police officer and the outcome of the subsequent review conducted by OCCPS.

I am satisfied that the Police have met Part 3 of the section 52(3)3 test.

Given that the Police have met each aspect of the three-part section 52(3)3 test, I find that the copies of the records contained in the two PSB files are excluded from the scope of the *Act* under that section. As a result, it is not necessary for me to also consider whether these records are also excluded under section 52(3)1.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" in accordance with section 2(1) of the *Act* 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,
>
> (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.)].

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].

I find that the one-page Occurrence Summary contains the personal information of the appellant. This information qualifies as his personal information because it represents recorded information about him that includes his name, along with other personal information about him (paragraph (h)).

The one-page Occurrence Summary also contains the personal information of another identifiable individual. This information qualifies as their personal information because it contains their address (paragraph (d)) and their name, along with other personal information about them (paragraph (h)).

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

The Police rely on section 38(a), in conjunction with section 8(2)(a) of the *Act*, to deny access to the withheld information in the one-page Occurrence Summary. In their decision letter the Police also relied on section 8(3) of the *Act* to refuse to confirm or deny the existence of records that are responsive to item two of the request.

Section 8(2)(a)

Section 8(2)(a) states:

> A head may refuse to disclose a record,
>
> > 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 word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I]. The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

Generally, and despite the appearance of the word "report" in document names, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1120 and M-1141. In Order M-1109, former Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

> An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".

I agree with this approach and adopt it here. On my review of the Occurrence Summary, I am satisfied that it also does not meet the definition of a "report" under the *Act*, in that it consists of observations and recordings of fact rather than formal, evaluative accounts. The content of this record is descriptive and not evaluative in nature. As a result, I find that the Occurrence Report does not fall within the ambit of section 8(2)(a) of the *Act*. Accordingly, the discretionary

exemption at section 38(a) of the *Act* does not apply to this record.
Section 8(3)

In their decision letter, the Police relied on sections 8(3) and 14(5) to refuse to confirm or deny the existence of records that are responsive to item two of the request. In light of my findings with respect to section 14(5) below, it is not necessary to address the application of section 8(3) of the *Act*.

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. The Police take the position that the responsive information withheld from the one-page Occurrence Summary also qualifies for exemption under section 38(b).

Section 38(b) 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.

Despite this, 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.

The factors and presumptions in sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) 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

(*John Doe*)] 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 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 submit that the responsive information severed from the Occurrence Summary is personal information that was compiled and is identifiable as part of an investigation into a possible violation of law, as contemplated by the presumption in section 14(3)(b). As a result, they argue that disclosure would result in a presumed unjustified invasion of personal privacy. The appellant's representations do not directly address the application of section 14(3)(b).

I find that section 14(3)(b) applies in the circumstances of this appeal. I have reviewed the Occurrence Summary and I conclude that the personal information that was severed from the record was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code*. Whether or not charges are laid does not affect the application of 14(3)(b) [Order PO-1849]. Because this presumption applies, in accordance with the ruling in *John Doe* cited above, I am precluded from considering the possible application of any of the factors or circumstances under section 14(2).

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 has not raised the application of section 16. Accordingly, I conclude that the disclosure of the withheld personal information contained in the severances remaining at issue in the Occurrence Summary would constitute an unjustified invasion of personal privacy. As a result, this information is exempt from disclosure under section 38(b) of the *Act*.

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

The Police rely on section 14(5) of the *Act* as the basis for their decision to refuse to confirm or deny whether any records exist that are responsive to item two of the request. Section 14(5) reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

Section 14(5) gives an institution discretion to refuse to confirm or deny the existence of a record in certain circumstances.

A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339].

Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.
>
> [Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802]

The effect of this interpretation is that the institution may *not* invoke section 14(5) where disclosure of the mere existence or non-existence of the record would not itself engage a privacy interest.

Part one: disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy

Definition of personal information

Under part one of the section 14(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. As noted above, under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Records of the nature requested in item two, if they exist, would reveal that there was a Police investigation of an incident involving an identified individual. I find that such information, if it exists, would qualify as the personal information of an identified individual.

Unjustified invasion of personal privacy

The factors and presumptions in sections 14(2), (3) and (4), which are discussed earlier in this decision, provide guidance in determining whether disclosure would or would not be "an unjustified invasion of privacy" under section 14(5).

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 (section 14(3)(b)). If records which satisfy the requirements of this section exist, then access would be denied on the basis of this presumption. I find that disclosure of any such records, if they exist, would constitute a presumed unjustified invasion of personal privacy because they fall within the section 14(3)(b) presumption. Records of this type are not among those listed in section 14(4). The appellant did not raise the possible application of the "public interest override" at section 16.

In the result, I find that the Police have satisfied part one of the section 14(5) test.

Part two: disclosure of the fact that the record exists (or does not exist)

Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The appellant's representations point to his concerns about an identified individual. The Police submit that the disclosure of the fact that the record exists (or does not exist) would adversely impact the filing of complaints.

I find that disclosure of the fact that a record of the nature requested exists or does not exist would reveal personal information about an identified individual; specifically, whether or not

they have been involved with the Police in the context of a law enforcement investigation. In my view, this information could be considered as highly sensitive, thereby raising section 14(2)(f) as a relevant consideration favouring privacy protection. In my view, in the circumstances of this appeal, this factor outweighs any concerns that were raised by the appellant in his representations. Accordingly, I find that disclosing the existence or non-existence of responsive records would in itself convey information to the requester, and the nature of the information conveyed is such that its disclosure would constitute an unjustified invasion of personal privacy.

Accordingly, I conclude that the Police have established both requirements for section 14(5), subject to any findings I may make below under "exercise of discretion".

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 14(5) and 38(b) are discretionary exemptions, I must also review the Police's exercise of discretion in deciding to rely on section 14(5) and to deny access to the information that 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 and based upon the representations of the Police, I am satisfied that the Police considered all of the relevant circumstances and conclude that they exercised their discretion appropriately.

ORDER:

1. I uphold the decision of the Police.

March 24, 2009

Steven Faughnan
Adjudicator