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

# ORDER MO-2539

## Appeal MA09-26

## The Greater Sudbury Police Services Board

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## NATURE OF THE APPEAL:

The appellant submitted a request to the Greater Sudbury Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the "protocol" that exists between the Children's Aid Society (CAS) of the Districts of Sudbury and Manitoulin and the Police.

The Police issued a decision in which they identified the responsive record entitled "Protocol of Sudbury Children's Aid Society and Sudbury Regional Police, 2000" (the protocol), and denied access to it in full pursuant to section 8(1) (law enforcement), with reference to section 8(1)(c) (endanger life or physical safety) of the *Act*.

The appellant appealed the Police's decision. Shortly after that, the Police issued a revised decision denying the document, in full, pursuant to a number of other sections within the law enforcement exemption, namely sections 8(1)(a),(c),(g),(l) and 8(2)(a), as well as section 13 (danger to safety or health) of the *Act*.

During mediation, the Police provided the appellant with a second revised decision, granting partial access to the protocol. The Police confirmed that they continued to rely on sections 8(1)(a), (c), (g) and (l), 8(2)(a) and 13 of the *Act* to deny access to the remainder of the protocol. The Police also claimed an additional exemption, section 9(1) (relations with other governments) of the *Act*, to deny access.

The appellant subsequently copied this office with a response he sent to the Police regarding their second revised decision wherein he outlined a number of reasons why the remainder of the protocol should be disclosed to him by the Police. At the same time, the appellant submitted a new access request to the Police for additional information relating to the protocol. The mediator confirmed with both the Police and the appellant that this new request would not form part of the current appeal and would be dealt with separately by the Police. Appeal MA09-196 was opened to address the issues that arose regarding the appellant's second request. I have disposed of the issues in that appeal in Order MO-2540, issued concurrently with this order.

During mediation, the appellant expressed his belief that the public interest override in section 16 of the *Act* applied in the circumstances of this appeal. Accordingly, section 16 was added as an issue in the appeal.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process.

The adjudicator previously assigned to this appeal began her inquiry by sending a Notice of Inquiry to the Police, setting out the facts and issues on appeal. The Police responded with representations in which they indicated that they agreed to disclose the last paragraph on page 19 of the protocol. Accordingly, this portion of the record is no longer at issue. It is not clear whether the Police have disclosed it to the appellant, so I will include an order requiring disclosure of this paragraph below.

The Police also advised that, given that the record at issue was co-authored by the Police and the CAS, it would be helpful to solicit representations from the CAS. Accordingly, the previous adjudicator issued a Notice of Inquiry to the CAS, seeking representations. The CAS did not make any submissions.

The previous adjudicator then sent a copy of the Notice of Inquiry to the appellant, inviting representations, and attached a copy of the Police's representations, which had been severed for confidentiality reasons. The appellant did not submit representations, but when contacted by this office, indicated that the information he provided throughout the appeal should be considered by the adjudicator in deciding this matter.

## RECORD:

The record at issue in this appeal is a 23-page document entitled "Protocol of Sudbury Children's Aid Society and Sudbury Regional Police." The Police have withheld pages 13, 14, 15 and 16 in full and portions of pages 2, 3, 11, 12, 17, 18 and 19.

It should be noted that the Police initially identified a 24-page document as the responsive record and provided a copy of that record to this office. After issuing their second revised decision disclosing portions of the record, the Police sent this office a copy of the severed record. The severed record only had 23 pages. I note that the first page of the 24-page record duplicates the information contained on the second page, that is, the title of the report, which has become the first page of the severed copy of the record. As the pages on each copy were numbered sequentially starting with the first page, they are off by one number on each copy. In addition, although the content of both copies of the document is identical, the printing format has changed resulting in the shifting of paragraphs from one page to another. In order to avoid confusion, I will be referring to the page numbering and paragraph references used on the severed copy, which is the copy that was provided to the appellant.

## DISCUSSION:

### BACKGROUND:

The Police provide the following background regarding the creation and purpose of the protocol, and describe the portions of the record that remain at issue in this appeal:

> The Protocol entered into between the CAS and the [Police] was created to allow the two organizations to better coordinate their response to and investigations of matters under the ambit of the *Child and Family Services Act* and the *Criminal Code*. The severed portions of the document can be summarized as dealing with issues surrounding investigation and reporting protocols and methods. The Protocol deals with issues that are highly sensitive in that it details how the organizations investigate the circumstances of abuse or assault of children.

**LAW ENFORCEMENT**

The Police claim that sections 8(1)(a) (c), (g), (l) and 8(2)(a) apply to the record at issue. I will begin with section 8(1)(a), which reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > interfere with a law enforcement matter;

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (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 clause (b)

I am satisfied that the information in the record relates to the law enforcement role of the Police. The Police submit and I agree that "the activities of the CAS in carrying out the provisions of the *Child and Family Services Act"* also meet the definition of "law enforcement" in the circumstances of this appeal (see: Orders M-328, MO-1416 and MO-1574-F).

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.)].

In section 8(1)(a) where the words "could reasonably be expected to" are used, 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.)].

Moreover, 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* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

**Section 8(1)(a)**

A law enforcement "matter" may extend beyond a specific investigation or proceeding. [*Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* [2007] O.J. No. 4233 (Div. Ct.)]. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085 and MO-1578]. In addition, the institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply [Order PO-2085].

***Representations***

The Police submit that the protocol is "intended to apply to all ongoing investigations that meet its criteria of abuse, neglect or assault of a child." Recognizing that this record does not apply to a specific matter, the Police explain that it is intended to be an internal working document to be used by both the Police and the CAS as guidelines and methods for conducting investigations. The Police express concern that disclosure of the withheld portions of the record could result in:

- the manipulation of ongoing and new investigations by alleged abusers;
- an abuser having information that would effectively facilitate and allow him or her to commit or continue the commission of unlawful acts towards a child; and
- [abusers devising] methods to thwart the process and prevent children from obtaining the assistance they require.

The Police submit that disclosure "poses serious concerns to the [Police] and the CAS in their ability to fulfill their direct responsibilities and accountability to protect children in our society."

Although the appellant did not submit representations, he has provided his position on the disclosure of the record to this office in his letter of appeal and during mediation. I have taken his comments into account in arriving at my decision. Some of the appellant's comments relate to his position that the public interest override in section 16 applies, and I will address those comments in my discussion of that section, below. In his letter of appeal, the appellant notes that the protocol is intended to ensure adequate protection for children. Initially, the appellant questioned the existence of such a protocol, as he was denied access to it in full. However, since then, the appellant has received copies of portions of this document, and I will not address this allegation further.

With respect to the application of section 8(1)(a), the appellant indicates that the Police do not enforce the *Child and Family Services Act*. Rather, this legislation is enforced by the CAS. Therefore, the appellant submits that the protocol does not relate to law enforcement, and section 8(1)(a) cannot, therefore, apply to withhold it from disclosure.

The appellant also takes the position that the protocol should be publicly available, as it forms part of the responsibility and accountability of the Police to the community. He points out that some other police forces and children's aid societies in the province have listed their protocols on their websites, and he provides the links for them. I assume that the appellant has provided

this information as evidence that the harms envisioned by the Police could not reasonably be expected to occur as a result of disclosure.

***Analysis and Findings***

I will begin by addressing some of the points made by the appellant. First, as I noted above, the protocol relates to the functions of the Police and the CAS in their law enforcement role. Therefore, the threshold for entertaining the application of the exemptions in section 8(1) has been met.

With respect to the publication of information about protocols in other jurisdictions, I note that the examples provided by the appellant contain information that is similar in nature to that which has been disclosed by the Police in their second revised decision. I do not find that the appellant's evidence supports a conclusion that the harms outlined above could not reasonably be expected to occur should the withheld information be disclosed.

The issue of child abuse investigations is a very serious and sensitive matter. As the Police note, the withheld portions of the protocol deal with the specific methods of investigating abuse allegations that fall within the criteria established in the protocol. I note that much of the rest of the protocol has been disclosed to the appellant. The Police have provided information to the appellant to show that a protocol is in place, as well as some information about its purpose, reporting issues and other procedural matters. The Police have withheld information that would describe the specific investigative steps to be taken and issues arising in investigating allegations of abuse.

I agree with the Police that a "law enforcement matter" may extend beyond a specific investigation or proceeding. As noted by the court in *Ontario* (*Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* (cited above), and quoted by the Police in their representations:

> The plain and ordinary meaning of the word "matter" is very broad. We find that "matter" does not necessarily always have to apply to some specific on-going investigation or proceeding.

Looking at the purpose of the record at issue and the manner in which it is to be used, I am satisfied that, in this case, it is not necessary that there exist a "specific" ongoing investigation or proceeding. I find that the protocol is intended to apply to all ongoing investigations, and that the protection of children and investigation of allegations of abuse qualify as a "law enforcement matter."

In the circumstances, I am satisfied that the Police have provided "detailed and convincing" evidence to establish a "reasonable expectation of harm" should the information at issue be disclosed. I find that disclosure of the methods to be applied to such investigations could reasonably be expected to impede the effectiveness of the investigation by providing alleged abusers with sufficient information to evade or thwart the efforts of the Police and CAS workers to protect vulnerable children.

Accordingly, I find that disclosure of the record at issue could reasonably be expected to interfere with a law enforcement matter and thus qualifies for exemption under section 8(1)(a) of the *Act*.

**Exercise of Discretion**

The section 8 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)].

The Police indicate that in exercising their discretion to withhold the remaining portions of the record, they consulted with the CAS, as it co-authored the protocol and was a party to it. The Police submit that the portions of the protocol that could be disclosed, were provided to the appellant, and that the remaining portions were considered to be too sensitive.

In light of the overall submissions made by the Police regarding this record, I am satisfied that, in the circumstances of this appeal, the Police have not erred in exercising their discretion to not disclose the record at issue. Accordingly, I find that the record at issue is exempt under section 8(1)(a) of the *Act*.

**PUBLIC INTEREST OVERRIDE**

After receiving the second revised decision letter referred to above, the appellant wrote to the Police with a copy to this office and explained his reasons for believing that the document should be disclosed in full. In part, he reiterates the comments he made in his letter of appeal. In addition, he states that the *Police Services Act* requires the Police and CAS to develop a protocol, and that it sets out what the protocol should contain. The appellant appears to believe that the public should be able to scrutinize and hold the authorities accountable with respect to the content of the protocol and the manner in which it is used in order to ensure that it adequately protects children. He then changes direction somewhat and argues that an accused has a right to know who is making allegations of child abuse, who feels threatened and abused, and what warranted the police investigation.

**General principles**

Section 16 states:

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

Section 8 of the *Act* is not included as an exemption subject to the public interest override in section 16. In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act*, which are equivalent to sections 8 and 12 of the *Act*, are to be "read in" as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

On June 17, 2010, the Supreme Court of Canada released its decision on this matter, overturning the Court of Appeal's decision [*Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23]. The Court restored the Commissioner's decision confirming the constitutionality of section 23 and holding that two of three records at issue are exempt under section 19. The Court held that, while section 2(b) of the *Charter* does not guarantee access to government information, such access is nonetheless "a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government." The Court went on to find no section 2(b) *Charter* breach in the particular case before it. In arriving at this conclusion, the Court found, among other things, that the impact of the absence of a section 23 public interest override is minimal because the discretionary exemptions at sections 14 and 19 (sections 8 and 12 of the municipal *Act*) already incorporate consideration of the public interest.

There is nothing in the circumstances of this appeal to support the application of section 2(b) of the *Charter*. I find that the application of section 16 is not available to override the exemption in section 8 of the *Act*.

As a result of the findings I have made in this order respecting the application of section 8(1)(a) to the record, it is not necessary for me to consider the application of sections 8(1) (c), (g), (l), 8(2)(a), 9 or 13.

## ORDER:

1. I order the Police to disclose the last paragraph of page 19 of the record to the appellant by August 3, 2010.

2. I uphold the decision of the Police to withhold the remaining portions of the record.

3. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the portion of the record disclosed to the appellant.

Original signed by: July 14, 2010
Laurel Cropley
Adjudicator