Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2873

Appeal MA12-318

The Greater Sudbury Police Services Board

April 23, 2013

Summary: The appellant sought access to records relating to an identified police incident number. The police granted access to portions of the responsive records, and denied access to other portions of the records on the basis of the exemptions in section 38(a) (discretion to deny access to requester's own information), 8(2)(a) (law enforcement), and 14(1) and 38(b) (personal privacy). This order determines that, with one exception, the withheld information includes the personal information of the affected parties, and the police decision to deny access to the withheld portions of the records is upheld. In addition, the police's search for records is found to be reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of "personal information"), 14(1)(a), 14(2)(f), 14(2)(h), 17, and 38(b).

OVERVIEW:

[1] The Greater Sudbury Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain information relating to an identified incident number. In particular, the request was for "all emails, letters and documents created after February 1st, 2012" referring to or containing the name of either the requester or three other named individuals. The request also stipulated that it was for the following:

> All written and electronic communications between [an identified constable] and any other Greater Sudbury Regional Police employee pertaining to any of the above names and/or [the identified incident number]. All emails, letters or other written and electronic communications created after February 1st, 2012 between the Greater Sudbury Regional Police Service and [two named constables] of the RCMP.

[2] In response to the request, the police issued a decision denying access to the responsive records on the basis of the exemptions in sections 38(a) (discretion to deny access to requester's own information), 8(2)(a) (law enforcement), and 14(1) and 38(b) (personal privacy) of the *Act*.

[3] The appellant appealed the police's decision to deny access to the records.

[4] During mediation, the appellant indicated that the incident involved members of his family, and that he had contacted the police regarding this matter.

[5] Also during mediation, the police issued a revised access decision granting partial access to some of the records, and providing the appellant with an index of records which identified 10 pages of responsive records.

[6] After receiving the revised decision and the index, the appellant took the position that he believed that more records responsive to the request should exist. As a result, the police conducted a subsequent search and located additional responsive records, which consisted of an officer's notebook entries. The police then issued a subsequent decision granting partial access to the additional records found, and denying access to portions of the notebook entries on the basis of the same exemptions cited earlier.

[7] The appellant also appealed the denial of access to the additional records, and maintained that additional responsive records exist.

[8] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the police and the appellant which were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7.*

[9] In this order, with the exception of one small portion of the records, I uphold the decision of the police that the withheld records qualify for exemption under section 38(b) of the *Act*. I also find that the searches conducted by the police for responsive records were reasonable.

RECORDS:

[10] The records remaining at issue consist of an occurrence report (including an occurrence summary), two supplementary occurrence reports (one of which was disclosed in part), and the corresponding withheld portions of the investigating police officer's notebook entries.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?

B. Does the discretionary exemption at section 38(b) apply to the information?

C. Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A. Do the records contain "personal information" as defined in section 2(1)?

[11] 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 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;

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[1]

[13] The police take the position that the records contain information about identifiable individuals other than the requestor, specifically family members of the requestor.

[14] The appellant states that the police improperly referred to certain factors in determining whether the information constitutes "personal information." He also suggests that the police ought to have contacted him to clarify what constitutes "personal information."

[15] I have carefully reviewed the records at issue. I note that the records remaining at issue relate almost exclusively to incidents which involve individuals other than the appellant; however, the appellant is referred to either directly or indirectly in some small parts of these records. In the circumstances, because the appellant is mentioned, I find that the records contain the appellant's personal information, as his name appears with other personal information relating to him (paragraph (h) of the definition).

[16] I also find that, with one exception, the withheld records or portions of records also contain the personal information of a number of identifiable individuals other than the appellant. This information includes their age, sex, marital or family status [paragraph (a)], their address or telephone number [paragraph (d)], their personal opinions or views [paragraph (e)], the views or opinions of another individual about them [paragraph (g)] and their names, along with other personal information relating to them [paragraph (h)].

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[1] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[17] However, there is a small, discreet portion of information contained on page one of the records that contains only the personal information of the appellant including his name, address, telephone number, age, and other information. In addition, this portion of page one of the records does not contain the personal information of identifiable individuals other than the appellant for the purpose of section 2(1). As a result, and because no other exemptions would relate to this information, I will order that it be disclosed to the appellant.

[18] I find that the remaining portions of the records at issue contain the personal information of the appellant as well as that of other identifiable individuals.

Issue B. Does the discretionary exemption at section 38(b) apply to the information at issue?

[19] 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 affected persons' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information.

[20] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person'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. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

Section 14(1)(a)

[21] Section 14(1)(a) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

> upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[22] In this appeal the police confirm that, in the circumstances of this appeal and due to the nature of the information contained in the records, they did not contact the affected parties to the inquire about whether they consented to the release of their personal information.

[23] The appellant states in his representations that the police ought to have sought consent from the affected parties, and that the reasons cited by the police for not contacting them are irrelevant. He also indicates that his request included a request for a particular individual's information, and that this individual is "more than willing" to release all records relating to him.

[24] On my review of this issue, I note that the Mediator's Report, which is sent to the parties in this appeal and summarizes the mediation activity in this file, includes a reference to the possibility of contacting affected parties in order to obtain consent. It reads: "The appellant declined the mediator's offer to notify the affected parties of the request."

[25] As a result, I find that section 14(1)(a) does not apply to the information remaining at issue, as the affected parties whose information is at issue did not consent to the disclosure of the information relating to them.

Section 38(b)

[26] Section 38(b) states:

> 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

[27] As indicated above, the police refer to the factor in section 14(2)(h) and the presumption in section 14(3)(b) in support of their decision. The appellant argues that he ought to have access to additional records, and notes that the police acknowledge that some portions of the withheld records contain his personal information. In the circumstances, the factor in section 14(2)(f) also appears to be relevant.

The factors in sections 14(2)(f) and (h)

[28] Sections 14(2)(f) and (h) read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

[29] With respect to the factor in section 14(2)(f), to be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.[2] On my review of the information contained in the records, I am satisfied that the factor in section 14(2)(f) applies to much of that information. I find that there is a reasonable expectation that the disclosure of much of the information relating to the affected parties would result in significant personal distress to them, based on the nature of the information contained in the records.

[30] Regarding the factor in section 14(2)(h), this factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[3]

[31] In the circumstances, I am satisfied that the factor in section 14(2)(h) applies to the information contained in the records that was supplied to the police by the affected parties. I find that the affected parties supplied this information to the police in the course of dealing with the incident which is described in the records, and that the expectation of confidentiality is reasonable in the circumstances of this appeal.

[32] In summary, having found that the factors in sections 14(2)(f) and (h) apply to the information, and in the absence of any factors favouring disclosure, I find that the disclosure of the information contained in the records would constitute an unjustified invasion of the personal privacy of the affected parties under section 38(b) of the *Act*, subject to my discussion of the exercise of discretion, below.

[33] Regarding the appellant's view that additional portions of the records contain his personal information and ought to be disclosed to him, I note that the appellant received the portions of the records that relate to his contact with the police. The other

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[2] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[3] Order PO-1670.

very brief portions of the records that contain any reference to him are mixed with information that is also the personal information of a number of the affected parties. In the circumstances, I find that disclosure of these portions would also reveal the personal information of other identifiable individuals, and would constitute an unjustified invasion of their privacy under section 38(b).

[34] In light of my finding that the records qualify for exemption under section 38(b), there is no need to review the possible application of the presumption in section 14(3)(b).

Exercise of Discretion

[35] 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.[4]

[36] In their representations, the police acknowledge that the records contain both the personal information of the appellant and the affected parties. The police state that they considered a number of factors in exercising their discretion, and particularly the privacy of the affected parties. They also indicate that they are not aware of any sympathetic or compelling need for the appellant to receive the information.

[37] The appellant does not provide specific representations on this issue. He does refer, however, to the sections of the *Act* which confirm an individual's right to their own personal information held by an institution. He states that although the police indicate that he has been given "for the most part" all information that relates specifically to him, there is other information he ought to have access to. He also argues that the police have not provided redacted records. However, I find no basis for this argument as it is clear that the police have provided severed portions of the records to the appellant. Rather, I take the appellant's position to be that further disclosure of portions of the records ought to be made to him.

[38] I have reviewed the circumstances of this appeal and the records at issue. The police provided certain portions of the records to the appellant. I also note that one additional portion of page one of the records is to be disclosed to the appellant as a result of this order. With respect to the remaining information, I have found that disclosure of this information would constitute an unjustified invasion of the personal information of the affected parties, and that it qualifies for exemption under section 38(b). Based on the nature of the information remaining at issue, and on the police's representations, I am satisfied that the police have not erred in exercising their

[4] Orders PO-2129-F and MO-1629.

discretion not to disclose to the appellant the remaining information contained in the records.

Issue C. Did the institution conduct a reasonable search for records?

Introduction

[39] 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.

[40] A number of previous orders have identified the requirements in reasonable search appeals.[5] In Order PO-1744, Acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry 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).

[41] I agree with Acting-Adjudicator Jiwan's statement.

[42] Where a requester provides sufficient detail about the records that he/she 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. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, 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.

[43] 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.

[44] The police provide representations in support of their position that a reasonable search for responsive records was conducted. They review the steps taken to respond to the request, including their initial response, their subsequent revised decision letter,

[5] See Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.

and their later decision that certain police officer's notebook entries were also responsive to the request. The police confirm that they located the occurrence reports and, with respect to their later searches for police officer's notes, they state:

> We requested from [a named police officer] the Police Officer notes and any e-mail correspondence she had in relation to this matter. Her notes were provided however, she advises she had no correspondence/e-mails from RCMP in relation to this. We have provided a signed affidavit from [the named police officer] indicating that she has provided the information requested. …

[45] The police also confirm that the police reports are accessible to all members of the service through their current records management system, and that they rely on their police members to provide notebooks and e-mails within their possession upon request.

[46] The police also provide a copy of their request to the named police officer to search for all responsive records. They also provide an affidavit sworn by the named police officer, in which she attests to the fact that she has provided copies of her notebook as it pertains to the specific incident number referenced in the request. In addition, she further states: "I have no e-mails from [two named constables] of the RCMP in relation to this investigation."

[47] The appellant maintains that the police have not conducted a reasonable search for responsive records; however, I note that the appellant's main arguments in support of that position relate to the earlier searches conducted by the police. It is clear from the history of this file, as well as from the representations of both parties, that the initial searches conducted by the police, which did not include a search for police officer's notes, were not reasonable. However, the police have conducted additional searches for those notes, located responsive records, and provided access to portions of those records, denying access to other portions as set out above.

[48] The issue before me in this appeal is whether the police have now conducted a reasonable search for responsive records.

[49] Leaving aside the appellant's representations relating to the earlier searches by the police, the appellant states:

> To further demonstrate no reasonable search for records has ever been conducted, the institution made no attempt to contact myself as requester for additional clarification of the request. Instead, the institution chose to unilaterally define the scope of the request ….

> [In addition] the institution indicates that a reasonable search was made for records of any notes and e-mail correspondence between [the named constable] and the RCMP. In the institution's representation they provide [a] signoff sheet indicating that the search was completed and no records exist. To clarify, [one of the named constables] is in fact an RCMP officer who is seconded to the Sureté du Québec. It is possible that the institution is confusing [the named constable's] home organization, however the constable is indeed an RCMP officer as the original request reflects.

[50] The appellant also argues that the police's use of the exemptions to deny access to records, and their actions in this appeal, demonstrate an "intent by the institution to hide or mislead the requester with respect to records that should have been released."

Findings

[51] As set out above, in appeals involving a claim that responsive records exist, 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*. In this appeal, if I am satisfied that the police's search for responsive records was reasonable in the circumstances, the decision of the police will be upheld. If I am not satisfied, I may order that further searches be conducted.

[52] 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.[6] In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[53] I adopt the approach taken in the above orders for the purposes of the present appeal.

[54] In this appeal, the police initially located the occurrence reports relating to the numbered incident, and subsequently located the police officers' notes relating to that

[6] Order M-909.

incident. The representations of the police and the attached affidavit review the nature of the searches conducted for responsive records and the results of those searches.

[55] I have considered the representations of the appellant. To begin, I do not accept the appellant's position that the police ought to have clarified the request with him. The request is clear on its face, and the police identified the responsive occurrence reports. The initial failure of the police to search for the police officer's notes does not arise from the lack of clarity in the request.

[56] Regarding the appellant's concerns that the named RCMP constable may have been seconded to the Surete du Quebec, I note that the police officer who conducted the search identified the named constable by name, and indicated that she did not have any emails from him relating to this investigation. I am satisfied that the police officer's affidavit evidence regarding any emails received from the named constable is sufficient evidence to satisfy me that the search for records of this nature was reasonable.

[57] In the circumstances, based on the information provided by the police regarding the searches conducted and the explanations provided, and because the appellant has not provided me with sufficient evidence to support a finding that additional searches ought to be conducted, I am satisfied that the police's search for records responsive to the request was reasonable, and I dismiss this aspect of the appeal.

ORDER:

1. I order the police to disclose to the appellant by **May 27, 2013** one portion of page one of the records, as it only contains the personal information of the appellant. For greater certainty, I have highlighted the portion of page one which the police are to disclose on the copy of that page sent to the police along with this order.

2. I uphold the decision by the police to withhold the remaining severed portions of the records on the basis of the exemption in section 38(b) of the *Act*.

3. I find that the police have conducted a reasonable search for records responsive to the request, and dismiss this aspect of the appeal.

Original signed by: April 23, 2013
Frank DeVries
Adjudicator