

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3048

Appeal MA13-251

Toronto Police Services Board

May 15, 2014

Summary: A request was submitted under the *Act* to the Toronto Police Services Board for access to a 911 call made by the requester and any related police records in which he is identified. The police granted access to a recording of a 911 call, in its entirety, and access to a number of other hardcopy records, in part. Access was denied to portions of the hardcopy records pursuant to the discretionary exemptions at section 38(a) (discretion to refuse a requester's own information), read in conjunction with the exemption at section 8(1)(l) (facilitate commission of an unlawful act), and section 38(b) (personal privacy), read in conjunction with the presumption at section 14(3)(b) (investigation into a possible violation of law), of the *Act*. The police also denied access to portions of the records on the basis that it was not responsive to the request. The requester appealed the ministry's decision to deny access to portions of the responsive records and also took the position that information relating to a second 911 call should exist. During the inquiry process, it was determined that the records did not contain the personal information of individuals other than the requester and sections 38(a) and (b) were removed from the scope of the appeal. This order finds that the police conducted a reasonable search for responsive records, including a second 911 call, and that they appropriately severed portions of the records as being either not responsive to the request or subject to the exemption at section 8(1)(l). The appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 8(1)(l) and 17.

Orders and Investigation Reports Considered: Order MO-1293.

OVERVIEW:

[1] A request was submitted to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a 911 call made by the requester within a specified time range, as well as to other police records in which he is identified.

[2] The police located records responsive to the request and issued a decision letter granting partial access to them. The police granted access to a recording of a 911 call, in its entirety. Access was denied to portions of the other responsive records pursuant to the discretionary exemptions at section 38(a) (discretion to refuse a requester's own information), read in conjunction with the exemption at section 8(1)(l) (facilitate commission of an unlawful act), and section 38(b) (personal privacy), read in conjunction with the presumption at section 14(3)(b) (investigation into a possible violation of law), of the *Act*. The police also denied access to portions of the records on the basis that it was not responsive to the request.

[3] Following his review of the 911 call, the requester contacted the police and advised that he was of the view that a second 911 call should exist. The police agreed to conduct an additional search and, subsequently, issued a supplementary decision letter advising that no additional records exist.

[4] The requester, now the appellant, appealed both the police's decision to apply the exemptions to the portions of the records as well as their supplementary decision that additional records of 911 calls made by the requester do not exist.

[5] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sought and received representations from the police and shared them with the appellant in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[6] At the same time that they submitted representations, the police issued a revised decision letter to the appellant granting access to additional information as, on further review, it was determined that the information that was previously identified as personal information and subject to exemption under section 38(b), was in fact professional information and not subject to exemption under the *Act*. As a result, section 38(b) is no longer at issue in this appeal. Additionally, given that the police are no longer claiming that the records contain the personal information of individuals other than the appellant, section 38(a) is no longer at issue. Therefore, the law enforcement exemption at section 8(1)(l) remains as the sole exemption claimed to apply to portions of the records.

[7] Following receipt of the revised decision letter and the revised records with the additional disclosure, the appellant submitted brief representations. I deemed that it was not necessary to share them with the police or seek reply representations from them.

[8] In this order, I uphold the police's search for responsive records, uphold their decision to deny access to the portions of records and dismiss the appeal. In the discussion below, I reach the following conclusions:

- the police conducted a reasonable search for 911 calls made by the appellant;
- some of the information in the responsive records is not responsive to the request;
- the discretionary exemption at section 8(1)(l) applies to the information for which it was claimed; and
- the police's exercise of discretion not to disclose the information subject to section 8(1)(l) was reasonable.

RECORDS:

[9] Eleven pages of responsive records and 1 CD with the recording of a 911 call were identified as responsive to the request. Remaining at issue in this appeal are portions of pages 2, 3, 4, 6, 7, 9 and 10.

[10] The appellant also believes that an additional 911 call should exist.

ISSUES:

- A. Did the police conduct a reasonable search for 911 calls responsive to the request?
- B. Is some of the information at issue not responsive to the request?
- C. Does the discretionary law enforcement exemption at section 8(1)(l) apply to some of the information at issue?
- D. Did the police exercise its discretion under section 8(1)(l)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Did the police conduct a reasonable search for 911 calls responsive to the request?

[11] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[12] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.²

[13] The *Act* does not require the institution to prove with absolute certainty that further records *do not* exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.³

[14] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁴

[15] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

Representations

[16] The appellant takes the position that a recording of a second 911 call that he made should exist. As noted above, prior to filing this appeal, the appellant advised the police of his belief and the police conducted an additional search for another 911 call made by the appellant. By way of supplementary decision letter, the police confirmed that no information relating to a second 911 call was located. Despite the additional search conducted by the police, the appellant continues to believe that a recording of a second 911 call should exist.

¹ Orders P-85, P-221 and PO-1954-I.

² Order MO-2246.

³ Orders P-624 and PO-2559.

⁴ Orders M-909, PO-2469, PO-2592.

⁵ Order MO-2185.

[17] The police submit that they made every effort to locate the responsive records, both within and external to the institution, and disclosed all responsive records in their custody in accordance with the provisions of the *Act*. The police state that they:

...conducted a reasonable, even exhaustive search for responsive records, cross-referencing other addresses attached to the hospital, even expanded the parameters to one additional week on either side of the date the appellant believes the call was made.

[18] The police submit that, in the absence of evidence to substantiate the appellant's belief that a second 911 call was indeed made, "it should be taken as a given that this institution and its experienced employees have acted professionally, competently and in good faith." They conclude their representations by stating that they are satisfied that they have completed their obligations in regards to a search for information relating to a 911 call and no additional responsive records exist.

[19] In his representations, the appellant reiterates his position that a second 911 call should exist. He submits that the police should be able to locate another phone call from the exact same phone outlet at the time he was in hospital within a specified range of dates.

Analysis and finding

[20] On my review of the information before me in this appeal, I accept that the police have provided me with sufficient evidence to demonstrate that they made a reasonable effort to identify and locate records responsive to the appellant's request, including an additional 911 call that he submits he made. I accept that the searches were conducted by an experienced employee who is knowledgeable about records held by the police and that they expended a reasonable effort to locate any responsive records sought by the appellant through his request.

[21] As noted above, although a requester will rarely be in a position to indicate precisely which records that the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁶ In the circumstances of this appeal, I find that I have not been provided with a reasonable basis for concluding that a recording of an additional 911 call exists. Although the appellant states that he made such a call, he does not provide any additional information such as the nature of the call or why two separate calls were made. The police have conducted two searches in an attempt to locate the recording and, in my view, the appellant has not provided me with sufficient evidence to suggest or demonstrate that an additional recording of a 911 call might exist.

⁶ Order MO-2246.

[22] Additionally, as previously stated, the *Act* does not require the institution to prove with absolute certainty that further records *do not* exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In the circumstances of the current appeal, I accept that I have been provided with sufficient evidence to show that the police have made a reasonable effort to identify and located records responsive to the appellant's request, including any 911 calls made by the requester from a specific location within a specified time range.

[23] Accordingly, I find that the police have performed a reasonable search for responsive records.

B. Is some of the information at issue not responsive to the request?

[24] Previous orders have established that an institution should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁷ To be considered responsive to the request, records must "reasonably relate" to the request.⁸

[25] The police maintain that they have severed portions of pages 2, 3, 4, 6, 7, and 10 as not responsive because the information does not relate to the appellant's request. Specifically, they submit that that the only portions of the police officer notes on pages 4, 6, 7 and 10 that were severed are those portions that are non-responsive, while the remainder of the information has been disclosed. They explain that police officers record significant events that occur during their tour of duty and submit that their notes and reports can include other information that is neither relevant nor responsive to the request. The appellant states simply that his position is clear: he seeks access to all information pertaining to him.

[26] Having reviewed the portions of the records that have been severed as non-responsive I am satisfied that these portions are, in fact, not responsive to the request. The portions found in the police report at pages 2 and 3 consist of minor administrative information that is unrelated to the appellant. The portions found in the police officer notes at pages 4, 6, 7, and 10 relate to incidents other than the incident related to the appellant, and contain no information pertaining to him.

[27] I accept that the scope of the appellant's request was clear; he sought access to any 911 calls that he made within a specified time range, as well as related records that identify him. I am satisfied that the police have severed the portions of the records that do not pertain to the appellant and are, therefore, not responsive to the request. Accordingly, I uphold the police's decision not to disclose these portions to the appellant.

⁷ Orders P-134 and P-880.

⁸ Orders P-880 and PO-2661.

C. Does the discretionary law enforcement exemption at section 8(1)(l) apply to some of the information at issue?

[28] Section 8(1)(l) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

Facilitate the commission of an unlawful act or hamper the control of crime.

[29] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁹

[30] The police state that it applied the exemption at section 8(1)(l) to sever information contained in the 911 call transcript and police office's memorandum books. They submit:

Some criminal elements go to great lengths to try to monitor police communications. This causes police forces, including this institution, to invest several million dollars in technologies to scramble or otherwise thwart the interception of police communications messages for the primary purpose of preventing those who engage in illegal activities from being able to monitor the status of police personnel and equipment.

It is apparent that if a system used by all police agencies for the purposes of law enforcement control, including the CPIC system were to become common knowledge, such knowledge "could reasonably be expected to facilitate the commission of an unlawful act of hamper crime control."

[31] The police refer to Order MO-1293, in which Adjudicator Laurel Cropley relied on other orders of this office which have upheld the application of section 8(1)(l) for the transmission access codes for the CPIC system. In Order MO-1293, Adjudicator Cropley found that the disclosure of information found in the CPIC database could reasonably be expected to facilitate the commission of an unlawful act, that being the unauthorized use of the information contained in the CPIC system and found that section 8(1)(l) applied to exempt that information from disclosure.

[32] The police also indicate that police codes are used to denote addresses of concern or police responses and are not disclosed to ensure that the security of a

⁹ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

location is not jeopardized or used to assist in the formulation of a plan to commit a criminal act.

[33] Having reviewed the information for which section 8(1)(l) has been applied by the police I accept that it has been applied in police officer notes to sever information that consists of police codes and in the police reports to sever CPIC database information that identifies internal codes used to designate police officer activity. This office has issued many orders regarding the release of police codes and has consistently found that section 8(1)(l) applies to this type of information.¹⁰ The appellant has not provided sufficient evidence to persuade me that a different result is warranted in the circumstances of this appeal. Accordingly, I find that, subject to my discussion below on the exercise of discretion, section 8(1)(l) applies to the portions of the records for which it has been claimed.

D. Did the police exercise its discretion under section 8(1)(l)? If so, should this office uphold the exercise of discretion?

[34] The exemption at section 8(1)(l) 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, this office may determine whether the institution failed to do so.

[35] In this order, I have found that portions of the records qualify for exemption under the discretionary exemption at section 8(1)(l). Consequently, I will assess whether the police exercised its discretion properly in applying that exemption to the portions of the record that have been withheld.

[36] This office 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, or
- it fails to take into account relevant considerations.

[37] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution.¹²

¹⁰ For example, see Orders M-93, M-757, MO-1715, PO-1665 and MO-2898.

¹¹ Order MO-1573.

¹² Section 43(2) of the *Act*.

[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations, analysis and finding

[39] The police submit that they have exercised its discretion not to disclose the information for which the exemption at section 8(1)(l) applies and they have done so in good faith. They submit that it has taken into account all relevant facts and have not taken information account any irrelevant factors.

[40] The appellant does not make any specific representations with respect to the police's exercise of discretion not to disclose the information at issue.

[41] As stated above, this office cannot substitute its exercise of discretion for that of the institution. Based on my review of the representations and the information at issue in this appeal I am satisfied that the police have properly exercised their discretion to withhold portions of information under section 8(1)(l) and that it was made in good faith. Having reviewed the records closely, I note that the police have disclosed the majority of the information that is responsive to the request with the exception of information that I have found to be properly exempt pursuant to section 8(1)(l). Accordingly, I uphold their exercise of discretion as reasonable.

ORDER:

1. I find that the police conducted a reasonable search for responsive records.
2. I uphold the police's decision to grant partial access to the responsive records.
3. I dismiss the appeal.

Original signed by: _____
Catherine Corban
Adjudicator

_____ May 15, 2014