



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-674

Appeal M_9500568

Town of Amherstburg Police Services Board



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BACKGROUND:

The Policing Services Division of the Ministry of the Solicitor General and Correctional Services (the Ministry) has been delegated responsibility for the police services inspection program established in Part 1, section 3(2) of the Police Services Act. This inspection program is designed to measure the adequacy and the effectiveness of police services in Ontario. The results of all such inspections and any recommendations are contained in a report which is distributed to the Police Services Board and the Chief of Police of the police service under review.

The Acting Chair of the Ontario Civilian Commission on Police Services requested the Police Support Programs Branch to conduct an inspection of the Town of Amherstburg Police Services Board (the Police). The inspection took a total of twelve days to conduct. It was carried on intermittently between November 28, 1994 and January 19, 1995.

On May 25, 1995, the appellant met with the Acting Deputy Chief of Police (the ADC) to discuss several police matters of concern to her. At that time, the ADC advised the appellant that he would provide her with a copy of the inspection report when it was released to the Police by the Ministry.

A copy of the report was sent to the Police on July 11, 1994. On July 24, 1995 the appellant sent a letter to the ADC requesting a copy of the inspection report pursuant to the Municipal Freedom of Information and Protection of Privacy Act (the Act).

The next day, the ADC advised the appellant that he could not provide her with a copy of the full report "at this time". He indicated that he was precluded from doing so because of the policy of the Ministry Policing Services Division on disclosure of inspection reports in response to requests under the Act or the provincial Freedom of Information and Protection of Privacy Act. The ADC cited the following passages from the policy as dictating his response of non_disclosure:

When Policing Services Division releases an inspection report to a particular Municipal Police Services Board, the Board has custody and control of the inspection report. When the institution, the Police Service and the Board, receives a request for disclosure of the inspection report, it will follow the usual procedures for such Freedom of Information (FOI) requests.

...

In certain instances there may be a concern by the Police Services advisors, due to the nature of the specific inspection, that the report should not be released by the Police Services Board.

The ADC further advised the appellant that "... There has not been a debriefing session held by the advisors with the Board, the Chief and the association representatives and therefore the report has not yet been officially released." The debriefing session was held on August 29, 1995.

On July 31, 1995 the appellant submitted a request to the Ministry for a copy of the same record.

On August 31, 1995, the Police responded to the appellant's request for a copy of the inspection report by advising her that the request had been transferred to the Ministry. The Police stated that the request was being transferred because:

The request concerns records in the actual custody or control of the Ministry of the Solicitor General, Policing Services Division in which Policing Services has a greater interest.

The appellant filed an appeal of this decision, objecting to the transfer of the request.

On October 6, 1995, the Ministry responded to the request by providing the appellant with partial access to the inspection report. That issue is currently under appeal in another file.

THE APPEAL:

The sole issue in this appeal is whether the Police were entitled under section 18 of the Act to transfer the request to the Ministry. A Notice of Inquiry was sent to the appellant, the Police and the Ministry. Representations were received from all three parties.

DISCUSSION:

The forwarding or transferring of a request to another institution is governed by section 18 of the Act. This section states in part:

- (1) In this section, "institution" includes an institution as defined in section 2 of the Freedom of Information and Protection of Privacy Act.

...

- (3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.
- (4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,
 - (a) the record was originally produced in or for the other institution; or
 - (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.

- (5) Where a request is forwarded or transferred under subsection (2) or (3), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it.

The Police acknowledge that, as of the date of the request, they did have custody and control of the inspection report. However, it is their position that the Ministry had a greater interest in the record according to the definition set out above in section 18(4). The Police state that the Ministry had a greater interest in the record as the inspection report was produced by the Ministry's Policing Services Division.

While I accept that the Ministry does have a greater interest in accordance with section 18(4), I note that the transfer provisions set out in section 18(3) are discretionary. That is, even if the Ministry did have a greater interest in the record, the Police were under no obligation to transfer the request. In fact, the circumstances surrounding the transfer lead me to the conclusion that the Police did not properly exercise its discretion in making the transfer.

First of all, I note that the Police did not advise the appellant that they were transferring the request until August 31, 1995, some 36 days after they received the request. Section 18(3) requires that such transfer be made within fifteen days of the receipt of the request. It was clear from the beginning of the process that the Ministry had produced the report and thus had the greater interest as defined by section 18(4). Thus, if the Police were exercising their discretion to transfer on this basis, it appears that this decision could have been made within the fifteen days mandated by the statute.

The Police explain this by stating that they did not believe that "the actual request was effective ..." until after the debriefing on August 29, 1995. I am unclear as to what the Police mean by this as there is nothing in the Act that discusses the "effective dates" of requests. Those sections of the Act which outline the time lines an institution must follow in processing access requests refer to the number of days "after the request is received" (sections 18, 19 and 21).

Secondly, given the decision of the Police dated July 25, 1995 referred to above, I believe that the Police were under a misapprehension about the Ministry Policing Services Division policy on dealing with requests for such inspection reports. In their decision letter, the Police quoted those portions of the policy which indicate that once the Ministry forwards the inspection reports to the Police, the latter institution has custody and control of the document and "... It will follow the usual procedures for ... freedom of information (FOI) requests". The policy goes on to say that:

The Ministry of the Solicitor General and Correctional Services will render any assistance to the municipality that may be necessary.

The policy contains the following direction regarding transfers:

In certain instances there may be a concern by the **police service advisors**, due to the nature of the specific inspection, that the report should not be released by the police services board. In such limited cases, the **board will be asked by the advisor** to have the "head" of the institution, apply section 18 of the Municipal

Freedom of Information and Protection of Privacy Act to any request for information. Subsection 18(3) provides that “If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request...”. The issue of greater interest is then clarified in subsection 18(4) which states “For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,

- (a) the record was originally produced in or for the other institution; (emphases added)

Relying on this provision, the Police maintain that they could not make a decision on whether or not to transfer the request until the debriefing held on August 29, 1995 had occurred. The Police also note that because the Police are a small service and the inspection report refers to the Co_ordinator and all members of the Police services, the fact that the appellant is the wife of an officer would raise a conflict situation. Thus the Police maintain that:

A more objective analysing of releasable information from the report could be done much more independently by an outside analyst who knew no one noted or referred to in the report with some input for concerns on release of personal information or information that would jeopardize the security of the Police Service, by the ... Police Service Co-ordinator.

However, it is clear from the policy that the Police had the mandate to make a decision on access to the record upon receiving the request. That portion of the policy which addresses the issue of transfer relates to concerns held by the **Ministry** policy advisors, not concerns which are held by the Police. Furthermore, had the Police wished to consult with the Ministry prior to issuing their decision, they could have claimed a time extension pursuant to section 20(1)(b) and so advised the appellant.

In addition, the appellant has provided some information describing the manner in which the Police responded to other requests for access to the inspection report under the Act. On September 27, 1995 **the Police** responded to a request for access to the report submitted by another individual. The Police granted access to the entire report with the exception of portions of 5 pages. Furthermore, the media had obtained a copy of the report on September 29, 1995, and reported on some of its contents and recommendations in an article published the next day. These events occurred **after** the Police had transferred the **appellant's** request to the Ministry on the basis that it had the greater interest in the record and should respond to the access request.

Documentation provided by the Police goes some way in explaining this situation. The Police indicate that, on September 18, 1995, a meeting was held with the Ministry Policing Service Advisors to discuss any concerns about releasing the report and what, if any, exemptions should be applied. The Police state that, at that time, the Ministry and the Police agreed on what portions of the report could be released. They also agreed that the Police would process any requests they received for the report and that the Ministry would process those requests it received. This is the process which was in place when the Police received the September 27 request and when the media were provided access to the report.

However, the Police did not advise the appellant of this change of position. Thus, while the Police were providing copies of the report to these requesters, the appellant was still waiting to receive her copy from the Ministry. As noted, she did not receive it until October 6, 1995.

The Ministry's submissions state:

... in the circumstances of the appellant's request, it was appropriate for only one institution, i.e. the Ministry to respond to the request.

In my view, these comments do not directly address the issue of whether the Police were entitled to transfer the request.

Given the admittedly unique circumstances of this case, I am of the view that the Police did not properly exercise their discretion when they transferred the appellant's request to the Ministry.

However, now that the appellant has received a decision on access to the report from the Ministry, there is no remedial order for me to make in the circumstances. I would merely remind the Police to be cognizant of the provisions of the Act when responding to such access requests in the future.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ December 19, 1995