



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

ORDER M-979

Appeal M_9700128

Halton Regional Police Services Board



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NATURE OF THE APPEAL:

The Halton Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to all records containing information relating to any police surveillance of the requester following an incident in February 1995, as well as any records pertaining to the cost incurred by the Police in undertaking this exercise.

The Police located a three-page occurrence report and three pages of police officer's notes containing information about the incident identified by the requester and denied access to them, claiming the application of the following exemptions contained in the Act:

- endanger life or safety - section 8(1)(e)
- facilitate commission of an unlawful act - section 8(1)(l)
- law enforcement - sections 8(2)(a) and (c)
- invasion of privacy - sections 14(1) and 38(b)

In addition, pursuant to section 8(3) of the Act, the Police refused to confirm or deny the existence of records relating to any surveillance exercise involving the requester during the time period named.

The requester, now the appellant, appealed the Police's decision. A Notice of Inquiry was provided to the Police, the appellant and to another individual whose rights might be affected by the disclosure of the information contained in the records (the affected person). Because the records appeared to contain the personal information of the appellant, the parties were invited to make submissions on the possible application of section 38(a) to the records. This section grants the Police the discretion to refuse to allow access to the requester's own personal information in certain circumstances.

Representations were received from the Police only. The appellant indicated that he wished to rely on the correspondence which he submitted to this office in the mediation stage of the appeal process.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, as recorded information about an identifiable individual. I have reviewed the records and find that they contain the personal information of the appellant, the affected person and other identifiable individuals.

INVASION OF PRIVACY

Where a record contains the personal information of both the appellant and another individual, section 38(b) allows the Police to withhold information from the record if they determine that

disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head 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.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 14 exemption.

Section 14(3)(b) states that:

A disclosure of personal privacy 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;

Having reviewed the officer's notes and the occurrence report, I find that the presumed unjustified invasion of personal privacy in section 14(3)(b) applies to the personal information in these records, because this information was clearly "compiled" and is "identifiable" as part of an investigation into a possible violation of law (the Criminal Code).

The appellant submits that he was not arrested on the date when the records were created and has never been charged with any offence arising out of the incident on that date. However, it has been well-established in a number of orders of the Commissioner's office that it is not necessary that criminal charges be laid, so long as the information contained in the records was compiled and is identifiable as part of an **investigation** into a **possible** violation of law.

Because the presumption in section 14(3)(b) applies to the remaining information contained in the records, I find that their disclosure would constitute an unjustified invasion of the personal privacy of the affected person. In addition, I find that neither section 14(4) nor section 16 are applicable to this information. The records are, therefore, exempt from disclosure under section 38(b).

Since I have found that the records are exempt under section 38(b), it is not necessary for me to review the possible application of sections 8(1)(e) and (l), 8(2)(a) and (c) and 38(a) to them.

REFUSE TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

The Police submit only that they have refused to confirm or deny the existence or non-existence of any record or records relating to their surveillance of the appellant under section 8(3) of the Act because the disclosure of the very fact of the existence or non-existence of records would communicate to the appellant information which falls within sections 8(1) or 8(2) of the Act. The Police have not described in any detail how this might occur.

A requester in a section 8(3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 8(3), the Police are 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 which should be exercised only in rare cases.

An institution relying on section 8(3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 8(1) or (2). An institution must provide evidence that the disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity.

In the circumstances of the appeal, I find that I have not been provided with sufficient evidence to demonstrate that the disclosure of the fact that responsive records exist or do not exist would convey information to the requester which would compromise the effectiveness of a law enforcement activity. I find, therefore, that section 8(3) does not apply.

I have found that the Police are not entitled to rely on section 8(3) to refuse to confirm or deny the existence of records responsive to that portion of his request respecting Police surveillance of the appellant. Accordingly, I confirm that the search undertaken by the Police indicates that no records of any surveillance exercise exist for the time period named by the appellant.

ORDER:

1. I uphold the Police's decision to deny access to the police officer's notes and the occurrence report which comprise the records in this appeal.
2. I confirm that records responsive to that portion of the appellant's request respecting police surveillance of him do not exist.

Original signed by: _____
Donald Hale
Inquiry Officer

July 29, 1997