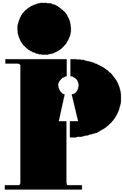

ORDER M-1109

Appeal M-9700316

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) for an occurrence report prepared as a result of a complaint made by the requester of an alleged assault which had taken place against him.

The Police disclosed the entire three-page record, with the exception of any references to the individual identified by the requester as having assaulted him (the affected person). The exemptions relied on by the Police in denying access were:

- section 38(a) - discretion to refuse requester's own information
- sections 38(b) - invasion of privacy
- sections 8(2)(a) and 8(2)(c) - law enforcement

The requester (now the appellant) appealed the decision of the Police.

The Police subsequently contacted the affected person who denied consent to disclose the severed portions of the record.

A Notice of Inquiry was sent to the appellant, the Police and the affected person. Representations were received from the Police and the affected person. The appellant indicated that correspondence received from him during the course of the appeal should constitute his representations.

DISCUSSION:

PERSONAL INFORMATION/DENIAL OF REQUESTER'S OWN INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the three-page occurrence report and find that it contains the personal information of both the appellant and the affected person.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

The Police have relied on section 38(a) to deny access to the record. Under section 38(a), an institution has the discretion to deny access to an individual's own personal information in instances where the exemptions in sections 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

The Police state that sections 8(2)(a) and (c) apply in the circumstances of this appeal. These sections state:

> A head may refuse to disclose a record,

> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
>
> (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

As far as section 8(2)(a) is concerned, only a report is eligible for exemption under this section. The word "report" is not defined in the Act. Based on previous orders, however, for a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order M-1048). Having reviewed the record, I find that it does not qualify as a "report". An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report". Therefore, I find that section 8(2)(a) does not apply, regardless of the fact that the record was prepared during the course of a criminal law enforcement investigation by an agency which has the function of enforcing and regulating compliance with the law.

The essence of the Police's representations regarding section 8(2)(c) is that disclosure of identifying information about the affected person could reasonably be expected to place that individual at risk of a civil lawsuit. I reject this argument. The affected person is neither the author nor quoted or paraphrased in the record. Also, the identity of the affected person is obviously already known to the appellant, since he provided it to the Police in the first place. In my view, it is absurd to conclude that disclosure by the Police could reasonably be expected to expose the affected person to civil liability in the circumstances of this appeal. Therefore, I find that section 8(2)(c) does not apply.

Because neither of sections 8(2)(a) or (c) apply, I find that section 38(a) is not applicable in the circumstances of this appeal.

INVASION OF PERSONAL PRIVACY

The Police have also relied on section 38(b) of the Act. Under section 38(b) where a record contains the personal information of both the appellant and other individuals and the Police determine that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Police have the discretion to deny the requester access to that information.

The Police are aware of a number of previous orders which held that the disclosure of personal information relating to an individual other than the requester, in circumstances where the person requesting the information originally supplied the information, would not result in an unjustified invasion of personal privacy (Orders M-384 and M-444). The rationale for this finding is clearly also applicable in the circumstances of this appeal.

The affected person strongly objects to the disclosure of his/her identity.

It is clear from the affected person's representations that there are a number of ongoing issues involving the affected person and the appellant. However, it is important to restate that the only record at issue in this appeal is the occurrence report prepared at the time the appellant made his statement to the Police. In my view, to deny the appellant information about the identity of an individual which he himself provided would lead to the type of "manifestly absurd result" described by former Inquiry Officer John Higgins in Order M-444. Therefore, I find that disclosure of the remaining portions of the record would not constitute an unjustified invasion of the personal privacy of the affected person, and section 38(b) does not apply.

None of the exemption claims made by the Police are applicable, and the remaining portions of the record should be disclosed to the appellant.

I want to comment on two other aspects of this appeal.

ALTERNATIVE DISCLOSURE PROCESS

In their representations, the Police state:

> During mediation, it was also discovered that a private information has since been laid by the appellant and presently there is charge of assault before the courts. The process known as disclosure is now in effect. What ought to be disclosed at this point in time should be done through the disclosure procedure, not through the Act. People entitled to the information pertaining to this incident is now left up to the discretion of the Crown Attorney. All requests for disclosure must now be done through that institution.

The Police also state that if the request for the occurrence report were to come at this point in time, "no portion of the records would be released as it is currently before the courts."

The position taken by the Police is incorrect.

Section 51(1) of the Act provides:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

Accordingly, the rights of the parties to information available under the rules for litigation are not affected by any exemptions from disclosure to be found under the Act. Section 51(1) does not confer a right of access to information under the Act (Order M-852), nor does it operate as an exemption from disclosure under the Act (Order P-609).

Former Commissioner Sidney B. Linden held in Order 48 that the Act operates independently of the rules for court disclosure:

> This section [section 64(1) of the provincial Freedom of Information and Protection of Privacy Act, which is identical in wording to section 51(1) of the Act] makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the Freedom of Information and Protection of Privacy Act, 1987 is unfair. The exemption provided by subsection 14(1)(f) [section 8(1)(f) of the municipal Act] should be considered in the context of the governing principles of the Act as outlined in section 1, and, in my view, in order to demonstrate unfairness under subsection 14(1)(f), an institution must produce more evidence than the mere commencement of a legal action. Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. No such exemption exists, and, in my view, subsection 14(1)(f) or section 64 cannot be interpreted so as to exempt records of this type without offending the purposes and principles of the Act.

I adopt this reasoning, and feel it is equally applicable to a situation where criminal charges are before the courts.

The obligations of an institution in responding to a request under the Act operate independently of any disclosure obligations in the context of litigation. When an institution receives a request under the Act for access to records which are in its custody or control, it must respond in accordance with its statutory obligations. The fact that an institution or a requester may be involved in litigation does not remove or reduce these obligations.

The Police are an institution under the Act, and have both custody and control of records such as occurrence reports. Therefore, they are required to process requests and determine whether access should be granted, bearing in mind the stated principle that exemptions from the general right of access should be limited and specific. The fact that there may exist other means for the production of the same documents has no bearing on these statutory obligations.

EXERCISE OF DISCRETION

In the summary part of their representations, the Police state:

> The historical practice of this institution with respect to the release of similar types of documents in the same circumstances was looked into. Once a case has charges before the courts, whether a criminal or provincial offence, release of any documentation would not occur through the Halton Regional Police Service. The process known as disclosure would then be in effect through the Crown Attorneys office.

A decision under the Act to grant or refuse access to a record which may be exempt from disclosure under sections 8, 38(a) or 38(b) is one which requires the head of an institution to exercise discretion, in accordance with established legal practices.

The general principles for the proper exercise of discretion as stated in "de Smith's Judicial Review of Administrative Action" (4th ed., Toronto: Carswell, 1980) at page 285 are as follows:

> In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case.

Discretion must be exercised in consideration of the policies and objects of the Act. (Rubin v. CMHC, [1989] 1 FC 265, FCA). Further, while an institution may adopt general policies for decision-making when responding to a request, those policies must not be applied inflexibly, without reference to the facts of the specific case. In fact, the head must respond to the particular case on its merits. (Lewis and Superintendent of Motor Vehicles for British Columbia, (1980) 108 D.L.R. (3d) 525 (B.C.S.C.), Re Brown and the Queen in Right of Alberta et al. (1991) 82 D.L.R. (4th) 96). The Supreme Court of Canada has stated that an administrative decision maker "... must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function. (Oakwood Developments Ltd. v. R.M. of St. Francis Xavier [1985] 2 S.C.R. 153).

In my view, it is not a proper exercise of discretion where an institution inflexibly applies a policy without considering the individual circumstances of a particular request. To do so amounts to an improper fettering of discretion.

In Orders P-262 and P-344, I made the following comments with respect to this issue:

> In this appeal, the head's representations regarding the exercise of discretion do not refer to the particular circumstances of the appellant's situation. At most, they set out general concerns about the type of record at issue. The head has not explained why, in this case, the appellant's rights and interests are outweighed by these general concerns.
>
> [Order P-262]
>
> In my view, taking a "blanket" approach to the application of section 14(3) in all cases involving a particular type of record would represent an improper exercise of discretion. Although it may be proper for a decision maker to adopt a policy under which decisions are made, it is not proper to apply this policy inflexibly to all cases. In order to preserve the discretionary aspect of a decision under sections 14(3) and 49(a) [the provincial

> equivalents to sections 8 and 38 of the municipal Act], the head must take into consideration factors personal to the individual requester, and must ensure that the decision conforms to the policies, objects and provisions of the Act.
>
> [Order P-344]

In this case, the Police responded under the Act, and applied the section 8 discretionary exemption claim. However, the Police state that they only did so because they were unaware that charges were before the courts. Had they been aware of this, the Police state quite clearly that they would not grant access under the Act, but would instead assume that access would be dealt with under the court disclosure rules. In my view, to proceed in this manner would represent an improper exercise of discretion under the Act. In responding to a request, the Police must make a decision under section 8 (or sections 38(a) or 38(b) if the records contain the personal information of the requester), considering all relevant factors present in the circumstances. These considerations would include whether disclosure of the particular record could reasonably be expected to interfere with a particular investigation, or could reasonably be expected to harm any of the other interests articulated in the various provisions of section 8.

ORDER:

1. I order the Police to disclose the entire record to the appellant by **July 8, 1998** and not before **July 3, 1998**.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the Police to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: June 3, 1998
Tom Mitchinson
Assistant Commissioner