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

ORDER MO-1192

Appeal MA-980180-1

Halton Regional Police Services Board

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NATURE OF THE APPEAL:

The appellant submitted a request to the Halton Regional Police Services Board (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for copies of all police officers' notes and police reports relating to an alleged assault on the appellant at a named school.

The Police notified "the suspect" and another individual (the affected persons) pursuant to section 21(1) of the Act to determine whether they would consent to disclosure of their personal information. The "suspect" did not consent to disclosure and the Police did not receive a response from the other affected person. The Police then provided partial access to the responsive records and withheld the names and addresses of a number of individuals, including the suspect and a witness, and their statements regarding the incident on the basis of sections 14(1)(f) (invasion of privacy), 8(2)(a) and (c) (law enforcement), 38(a) (discretion to refuse requester's own information) and 38(b) (invasion of privacy).

In appealing the decision of the Police to deny access to portions of the records, the appellant raised the application of section 14(2)(d) (fair determination of rights).

This office sent a Notice of Inquiry to the Police and the appellant. In preparing the Notice of Inquiry, I noted that the Police also withheld a portion of the police officer's notebook on the basis that it was not responsive to the request. It was not clear whether the appellant disputes this severance. Therefore, in the Notice of Inquiry, I asked the parties to address this issue.

Representations were received from the Police and the appellant.

RECORDS:

The records at issue consist of the withheld portions of a two-page occurrence report and four pages of a police officer's notes.

PRELIMINARY ISSUE:

NON-RESPONSIVE RECORDS

The appellant believes, on the one hand, that the information in the non-responsive portion of page two of the police officer's notebook may be "highly relevant to the issues at hand". On the other hand, he appears to acknowledge that his request was only for records pertaining to the assault and that the information may not be responsive.

The Police indicate that the withheld portion of page two of the police officer's notes contains information which is completely unrelated to the matter involving the appellant.

I have reviewed this record and I agree with the Police. The non-responsive portion of the record documents other events involving the police officer which occurred during this person's tour of duty and does not pertain, in any way, to the officer's investigation into the alleged assault on the appellant. Therefore, I find that this portion of page two was properly withheld as being non-responsive to the request.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The records pertain to an investigation by the police into an alleged assault against the appellant. They contain a physical description of the suspect given by a witness and the appellant, the names, telephone numbers and addresses of the individuals involved, including the witness, the suspect and other possible suspects as well as statements given by some of these individuals. This information is clearly "about" identifiable individuals.

The appellant submits that "the name of an individual and a summary of his alleged criminal acts is not information that could be defined as personal". In my view, information pertaining to alleged criminal activity on the part of an identifiable individual is very "personal". Further, even the inclusion of an individual's name alone, without any other specific references to this individual, but recorded in the context of a criminal investigation, would, in my view, be sufficient to bring this information within the parameters of "personal information" as defined in section 2(1) of the Act. This would be the case because the name, given in this context, would reveal other personal information about the individual (section 2(1)(h)), that is, that the individual was involved in some way in a criminal investigation.

Taken together, I find that the records contain the personal information of the appellant, the witness and the suspects.

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 it determines 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.

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 [Order M-1154; John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (div. Ct.)].

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.

The Police indicate that the personal information pertaining to the suspect which is contained in the records was compiled as part of a law enforcement investigation into an alleged assault at a high school. The Police state further that the occurrence report consists of the facts in the case and the manner in which the officer concluded his investigation. Therefore, the Police submit that, since the personal information pertaining to individuals other than the appellant relates to records compiled as part of an investigation into an assault, the disclosure of the personal information is presumed to be an unjustified invasion of their personal privacy.

The appellant submits that since the Police made a judgment call not to lay charges against the suspect, they have not established the application of the presumption in section 14(3)(b).

I am satisfied that the Police investigated an alleged assault on the appellant at the named high school and that the investigation was conducted with a view to determining whether criminal charges were warranted. Accordingly, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law and its disclosure would constitute a presumed unjustified invasion of personal privacy. The presumption may still apply, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225). As I indicated above, once a determination has been made that the presumption in section 14(3)(b) applies, it cannot be rebutted by factors in section 14(2). Therefore, even if I were to find that section 14(2)(d) applies in the circumstances, it would not be sufficient to rebut the presumption in section 14(3)(b). I have considered section 14(4) and find that it does not apply in the circumstances of this appeal.

The appellant claims that the so-called "public interest override" in section 16 applies to the information which is exempt under section 14(1). In this regard, he submits that the foundation of the public importance is that of victims' rights. He argues that public policy should require that where the police decide not to charge, or the Crown decides not to prosecute, the victim of the crime should have the opportunity to review the materials prepared by the police to determine whether the police were justified in their actions.

Moreover, the appellant argues that it is absurd that the victim of a criminal act be declined the opportunity to find out who committed that act upon him or her and the people who witnessed it.

Section 16 of the Act states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

It has been established in a number of orders of the Commissioner's office that in order for section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the invasion of privacy exemption [Order P-1398, upheld on judicial review in Ontario (Minister of finance) v. Ontario (Information and Privacy Commissioner) (January 27, 1999), Docs. C29916, C29917 (Ont. C.A.), reversing (1998), 107 O.A.C. 341 (Div. Ct.)].

In Order P-984, Adjudicator Holly Big Canoe described the criteria for the first requirement mentioned in the preceding paragraph, as follows:

> In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established , it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 14. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

I agree with these approaches to the analysis of section 16. In my view, there may be an interest on the part of the public as to the manner in which the police undertake their responsibilities, however, I am not convinced that this interest is "compelling". I am also not convinced that the interest in the disclosure of the records in this appeal is sufficiently "public". Rather, in the circumstances of this appeal, it is very clear that the interest in seeking this information is primarily the "private" interest of the appellant in obtaining information in furtherance of any potential civil remedy he may have. Accordingly, I find that section 16 has no application to the information in the records and, therefore, section 14(3)(b) applies to it.

I will deal with the exercise of discretion under section 38(b) below.

LAW ENFORCEMENT

Although I have found that section 14(3)(b) applies to the information in the records, I will also consider whether the exemptions in sections 38(a) and 8(2)(a) and (c) apply.

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 undisclosed portions of the records. 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:

> (2) 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;

Section 8(2)(a)

Only a report is eligible for exemption under this section. The word "report" is not defined in the Act. 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 (Order P-200). Generally speaking, results would not include mere observations or recordings of fact (Order M-1048).

In Order M-1109, Assistant Commissioner Tom Mitchinson noted:

> 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".

In the circumstances of the current appeal, I have reviewed the Occurrence Report and find that it contains factual information provided by the individuals involved as well as observations by the police officer. It also contains conclusions drawn by the police officer as a result of the consideration of the investigation which is reflected in the information contained in the record. In my view, the Occurrence Report in this case does contain a formal account of the results of the collation and consideration of information and thus qualifies as a report. I am satisfied that the record was prepared during the course of a criminal law enforcement investigation by the Police which is an agency which has the function of enforcing and regulating compliance with the law. Therefore, it qualifies as a "law enforcement report" and section 8(2)(a) applies.

However, the Police officer's notebook cannot be similarly characterised. This record simply contains details of the event as recorded by the police officer during his investigation into the matter. It is not a formal statement or account of the results of the collation and consideration of information. Rather, it is more appropriately described as a collection of "mere observations and recordings of fact". Therefore, this record does not qualify as a "law enforcement report" and sections 8(2)(a) and 38(a) do not apply to it.

Section 8(2)(c)

The Police note that the appellant states that he is contemplating a civil action against the school board and the perpetrators of the assault. The Police take the position that disclosure of any of the records could reasonably be expected to now place the suspect at risk of civil liability. The Police submit that the intent of the legislation is not to expose any individual to liability through the disclosure of material through the Act.

In my view, the inclusion of section 8(2)(c) within the law enforcement exemption is to protect individuals who have provided information to the police during a police investigation, or who have authored a record in this context, the nature of which may expose them to civil liability. In this case, the Police are only concerned about information which has been provided to the police. Examples of this type of information would include information of a speculative nature, innuendo and hearsay. (See also: Reconsideration Order R-970004 for other circumstances in which section 8(2)(c) may be applicable).

I do not accept that the Act contemplates that an individual who is being investigated for criminal activity or those who provide statements regarding what they directly observed would necessarily fall within the protection of this section without some further indication of exposure to liability. The representations of the Police fall short of establishing that anyone quoted or paraphrased in the record could reasonably be expected to be exposed to civil liability as a result of their involvement in the investigation or of anything they said. Rather, in my view, any potential civil liability stems from the actions of the suspect rather than anything that was said to the police during their investigation into this matter. Accordingly, I find that sections 8(2)(c) and 38(a) do not apply to the information in the records.

That being said, I would like to address one other point raised by the Police in their discussion under section 8(2)(c). They argue that these records can be obtained via discovery. The Police made similar arguments in the appeal which resulted in Order M-1109. The Assistant Commissioner addressed these arguments in some detail and concluded:

> The position taken by the Police is incorrect.
>
> Section 51(1) of the Act provides:
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> > This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
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> 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).
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> Former Commissioner Sidney B. Linden held in Order 48 that the Act operates independently of the rules for court disclosure:
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> > 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.

This issue was also considered in Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Do. 21670/87Q (Ont. Gen. Div.). In this case, Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the Act:

> The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the [Act] legislation, nor ban the publication of the contents of police files required to be produced under that Act. My order was directed toward the preservation of the integrity of the discovery process by prohibiting publication of information obtained by one party from the other under the compulsions of that discovery process, including publication by third parties of such information. In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.
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> Although that seems to me to be the effect of the order as it presently reads, it is desirable to clarify by adding at the end of the sentence: "this order does not restrict the jurisdiction of the Information and Privacy commissioner/Ontario under the [Act] to direct the production of documents or information even though such documents or information may have been the subject of discovery in this action."

I agree with the above comments. In my view, the two schemes work independently. The fact that information may be obtainable through discovery is not an answer to whether access should be granted under the Act.

EXERCISE OF DISCRETION

As I indicated above, because the records contain the personal information of the appellant, as well as that of other identifiable individuals, the "invasion of privacy" analysis is conducted under the discretionary exemption in section 38(b). In addition, sections 8 and 38(a) are also discretionary exemptions. I propose to address the Police's exercise of discretion collectively in this discussion.

It is important to state at the outset, however, that once I have found that the presumption in section 14(3)(b) applies, or that the record is a law enforcement report under section 8(2)(a), and thus uphold the decision of the head that he or she may refuse to disclose a record or part of a record, section 43(2) of the Act prohibits me from ordering the head to disclose the record or part of a record (See: Order MO-1180). Previous orders of this office have interpreted this provision as meaning that all I may do is review the exercise of discretion by the Police to ensure that it was properly exercised (Orders P-58 and P-158).

The appellant submits that the head's exercise of discretion was incorrect. The appellant relies on Order M-1109 in support of this position. In this order, Assistant Commissioner Tom Mitchinson examined 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, which provides:

> 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.

The Assistant Commissioner also referred to the comments he made in Order P-262. The essence of his approach is that it is not a proper exercise of discretion where an institution inflexibly applies a policy without considering the individual circumstances of a particular request. He found an improper exercise of discretion in Order P-262 where:

> ... 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.

The appellant argues that any expectation of privacy that the perpetrator of the assault might have would have disappeared after the assault was committed. In addition, the appellant points out that he is not a remote third party trying to access information about the perpetrator which might create the necessary lack

of justification for the release of the requested information. Rather, he is the "victim" of the perpetrator and suffered physical injury at the hands of this person. The appellant argues that, given these facts, the head should not have found that there would be an unjustified invasion of the "suspect's" privacy.

Exercise of discretion under section 38(b)

The Police indicate that, in exercising their discretion under section 38(b), they considered that the "suspect" was contacted and refused to consent to the disclosure of his personal information. They also considered that it is appropriate to lean on the side of privacy in the balancing of rights of the parties given the finding of the Divisional Court in John Doe. Finally, the Police point out that disclosure under the Act is effectively, disclosure to the world. In my view, the Police have based their exercise of discretion on appropriate considerations. Accordingly, the withheld portions of the records are properly exempt under section 38(b) of the Act.

Because of these findings, it is not necessary for me to review the Police's exercise of discretion under section 38(a).

ORDER:

I uphold the decision of the Police.

Original signed by: February 23, 1999
Laurel Cropley
Adjudicator