ORDER MO-1262

Appeal MA-990230-1

Hamilton-Wentworth Regional Police Services Board

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NATURE OF THE APPEAL:

The Hamilton-Wentworth Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to "all police directives, procedures and policies and memoranda regarding the investigation and handling of Drinking and Driving offences (Impaired Driving, Drive Over 80 mg. and Refused Breath Sample, and Care or Control)."

The Police identified a seven-page section of the Policy and Procedures manual entitled "Alcohol-related Driving Offences" as the only responsive record, and denied access pursuant to sections 8(1)(a), (b), (c) and (e) of the Act.

The requester (now the appellant) appealed this decision.

I sent a Notice of Inquiry initially to the Police, who submitted representations. I found it unnecessary to solicit representations from the appellant.

DISCUSSION:

LAW ENFORCEMENT

The term "law enforcement" is used in sections 8(1)(a), (b) and (c) of the Act. For a record to qualify for exemption under any of these sections, the "matter," "proceeding," "technique or procedure" reflected in the record must relate to "law enforcement" as that term is defined in section 2(1) of the Act.

The Police state:

> Any time an officer is faced with an alcohol-related offence, the information potentially gathered at the scene forms the basis of criminal offences. If substantiated, and if sufficient admissible evidence is uncovered, Criminal Code charges may result. These charges would be laid by the Police Service in its capacity as a law enforcement agency and in accordance with our Policies and Procedures.

I am satisfied that the investigation of various alcohol-related driving offences undertaken by the Police are Criminal Code offences and qualify as a "law enforcement" activity as defined in section 2(1) of the Act.

Ongoing Law Enforcement Matter or Investigation

Sections 8(1)(a) and (b) read as follows:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The purpose of these exemptions is to provide the Police with discretion to deny access to records in circumstances where disclosure could reasonably be expected to interfere with an **ongoing** law enforcement matter or investigation (Orders P-324 and P-403). The Police bear the onus of providing evidence to substantiate that a law enforcement matter or investigation is ongoing, and that disclosure of the records could reasonably be expected to interfere with the matter or investigation (Order M-1067).

The Police submit the following representations regarding sections 8(1)(a) and (b):

> The [Police Service] is required to follow our Policies and Procedures. One such Policy and Procedure is the Police Orders Protocol. Part of this Procedure deals with Reproduction, Use and Security of Police Orders. It states that Police Orders shall not be made available to persons outside the employ of the [Police] without the consent of the Chief of Police and subject to the provisions of [the Act].
>
> When a request is then made pursuant to [the Act] for Policies and Procedures of this Police Service, the policy would then [be] reviewed to ascertain if that individual policy would be available to the public or if there were specific requirements for the protection of the information.
>
> For all these reasons, it is the submission of the Police Service that disclosure of the record in issue could reasonably be expected to interfere with a potential law enforcement matter.

The representations provided by the Police do not deal with any current or ongoing investigation of criminal activity. The Police in fact acknowledge that any possible interference associated with disclosure of the procedures would relate to **potential** rather than **ongoing** investigations. Past orders have made it clear that sections 8(1)(a) and (b) only apply in the context of ongoing investigations. Accordingly, I find that disclosure of the record could not reasonably be expected to interfere with a current and ongoing law enforcement matter and/or investigation and, therefore, the record does not qualify for exemption under either section 8(1)(a) or section 8(1)(b).

Reveal Investigative Techniques

Section 8(1)(c) of the Act states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
>> reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

The Police submit:

> The Policy and Procedure at issue details what each attending officer is required to do, whether it is the arresting officer, breath technician. It not only describes what must be

> done by law but also investigative techniques currently in practice. These techniques are used by police officers when they view a vehicle and when speaking to a person who may be impaired. These techniques if revealed to the public may alter a person's behaviour when stopped by police.
>
> ...
>
> It is also noted that it is necessary to protect law enforcement techniques in many cases. Providing information as to the manner in which police collect information and/or the stage of a particular investigation could have a significant and detrimental effect upon its successful conclusion.

Past orders have made it clear that for an "investigative technique or procedure" to fall within the scope of section 8(1)(c), its disclosure to the public would have to hinder or compromise its effective utilization. If a particular technique or procedure is generally known to the public, then its disclosure would not normally result in hindrance or compromise, and the technique or procedure in question would not within the scope of section 8(1)(c) (see, for example, Orders P-170, P-1487, P-1637 and PO-1653).

I have carefully reviewed the record and the submissions provided by the Police. The procedures set out in the record describe methods for investigating alcohol-related driving offences which, in my view, are commonly known approaches utilized by the Police in conducting investigations of this nature. All of the procedures are generally known to the public, and the representations provided by the Police do not establish that the disclosure of any part of the record could reasonably be expected to hinder or compromise any "technique" reflected in the procedures.

Accordingly, I find that the record does not qualify for exemption under section 8(1)(c) of the Act.

Endanger Life or Physical Safety

Section 8(1)(e) of the Act states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;

The Police submit that disclosure of the record could possibly endanger the life or physical safety of a law enforcement officer or person. The entire representations provided by the Police on this exemption claim are as follows:

> The record at issue details what each involved officer is required to complete in the course of an alcohol-related investigation. This information, if released could possibly endanger the life or physical safety of a law enforcement officer or person. An officer's safety could be

> put into jeopardy if information contained in the policy and procedure is revealed. For example, the number of officers required on the scene and at the time of the breath tests.
>
> Further, the release of the record at issue may endanger a member of the public should the techniques be revealed. A person aware of police techniques as they apply to alcohol-related offences may tend to change their behaviour and by doing so, the safety of a member of the public who is involved, may be affected.

In the recent decision of Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), the Ontario Court of Appeal recently clarified the evidentiary standard required to establish the harm identified in section 14(1)(e) (the equivalent provision to section 8(1)(e) found in the Freedom of Information and Protection of Privacy Act). The Court stated at pages 19-20:

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. ... Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [section 14(1)(e)] to refuse disclosure.

The Police have failed to provide sufficient evidence or other explanation to establish a reasonable basis for concluding that disclosure of the record could be expected to endanger the life or physical safety of a police officer or other person. No specific safety-related risk has been identified and the Police submissions in this respect consist, at most, of generalized assertions of harm, unsupported by any description of facts or circumstances which could lead to a reasonable expectation of endangerment from disclosure. As I found in my earlier discussion, the content of the procedures used to investigate alcohol-related driving offences is widely known to members of the public, in part through the extensive efforts of various police forces over the past several years to sensitize the public to the seriousness of combining drinking and driving. In my view, the rationale provided by the Police as the basis for denying access to this record reflects an exaggerated expectation of endangerment to safety which falls short of establishing a reasonable expectation of the harm contemplated by section 8(1)(e).

Accordingly, I find that the record does not qualify for exemption under section 8(1)(e) of the Act.

ORDER:

1. I order the Police to disclose the record in its entirety, by sending the appellant a copy, by **January 28, 2000**.
2. In order to verify compliance with the terms 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: December 21, 1999
Tom Mitchinson
Assistant Commissioner