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

INTERIM ORDER MO-1353-I

Appeal MA-000253-1

Hamilton-Wentworth Regional Police Services Board

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NATURE OF THE APPEAL:

This appeal arises out of a request sent to the Hamilton-Wentworth Regional Police Services Board (the Police) for information concerning an individual who had been employed by the Police. The request was dated July 25, 2000, and stated that it was a formal request for the disclosure of any records relating to particular events concerning an identified individual. The letter also identified that the request was for "all requested records in accordance with the *Municipal Freedom of Information and Protection of Privacy Act"* (the *Act*).

The Police responded by letter dated August 3, 2000. This letter referred to the request and indicated that there was some question as to whether these records were available under the *Act*. The letter went on to state that the records at issue contained "personal information" as defined by the *Act*, and described a number of provisions from section 14 of the *Act* which applied. The Police advised the requester that access was being denied, with reference to the wording of sections 14(3)(b) (presumed unjustified invasion of privacy - law enforcement) and 14(3)(d) (presumed unjustified invasion of privacy - employment or educational history). The letter also stated that there were no "compelling" circumstances outweighing the purpose of the section 14 exemption, and that certain described factors under section 14(2) (public scrutiny and promotion of health and safety) could not be taken into account where disclosure is presumed to constitute an unjustified invasion of privacy. Finally, the letter identified that the Police had also considered the application of sections 32(f) and (g) of the *Act*, but concluded that it did not appear that the requester was seeking the records in the context of performing law enforcement activities.

The requester, now the appellant, appealed the decision to deny access.

The Registrar from the Commissioner's Office notified the Police that the appeal had been filed. The Police advised the Registrar that they had responded to the appellant's letter as a request for information pursuant to section 32 of the *Act*, and not as a request for access to records under Part I of the *Act*. The Police state:

> ... it is virtually impossible for the Police Service to respond to an appeal of a denial of access where it has yet to consider the applicability of the relevant access provisions.

The Police take the position that the request received from the appellant was not a request under Part I of the *Act*. The appellant is of the view that the original request constituted a valid request under Part I, and that the Police's August 3 letter constituted an access decision that could be appealed to this Office.

I sent a Notice of Inquiry to the Police, asking for representations on the issue of whether the appellant's July 25 letter is a valid request under Part I of the *Act*. The Police provided written representations on this issue. It is not necessary for me to hear from the appellant before reaching my decision.

The only issue to be decided at this time is whether the July 25 letter sent by the appellant to the Police is a valid request under Part I of the *Act*. If it is not, then I have no jurisdiction to review the August 3 response as a decision, and the appellant would be required to make a new request in accordance with the requirements of the *Act*. If, on the other hand, the letter is a valid Part I request, the Police are required to

respond in accordance with the applicable provisions of the *Act* and I am in a position to review that decision on appeal.

DISCUSSION:

The Police submit that the letter from the appellant represented a request for disclosure between law enforcement agencies under section 32(f) of the *Act*, not an access request under Part I. In support of this position, the Police provide a contextual background of events leading to the appellant's July 25 letter.

The Police state that, at some point prior to July 25, the office of the Chief of Police (the Chief) received a telephone enquiry from a representative of the appellant seeking records relating to the former employee. This phone call was forwarded to counsel for the Police. Counsel declined to respond to the substance of the request by telephone, but explained the manner in which information of this nature is classified by the Police in compliance with the *Police Services Act*, as well as potential avenues for obtaining the information. The Police state:

> It was indicated that, in accordance with [the *Act*], by which [the Police Service] was bound, Police Service records maybe available, for example, with the consent of the party to whom the information relates, though third party information would likely be severed unless the third parties also agree to release. Alternatively, should the requester be engaged in a law enforcement function and seek the information for that purpose, disclosure unders. 32(f) or (g) may be considered, pursuant to a written request to that effect.
>
> To our knowledge, there was no further related correspondence nor conversation until the letter of July 25, 2000. This letter was forwarded directly to the Chief and not to the Freedom of Information Branch. The letter did not contain a consent to release executed by the person to whom the information related, and sought "**disclosure** of all requested records". In fact, when the author referred to [the *Act*] in paragraph 4, he asked the Chief to consider "disclosure" there under. "Disclosure" is the term used in s. 32(f) and s. 33(g) of [the *Act*].

The Police point out that the required $5 request fee for a Part I access request was not included with the July 25 letter.

The Police elaborate as follows:

> It is not the position of the Police Service that all letters seeking records directed to the Chief of Police are to be processed outside Part I. As a rule, where the Chief receives a request for information, it is forwarded to the Freedom of Information Branch for appropriate action. Part I access requests are dealt with by the FOI Branch in the

> prescribed manner. An FOI file is opened and the $5.00 fee obtained before a decision is rendered. Decision letters clearly specify any Part I exemptions from disclosure being relied upon, in each and every case.
>
> Where the Chief receives a request which is apparently for disclosure under s. 32(f) or (g) of [the *Act*], he will generally forward it to the FOI Branch for subsequent referral to the appropriate department or person for consideration. On occasion, however, depending on the nature of the request, the Chief may formulate a response. In the normal course, the majority of the requests for information received from law enforcement agencies are s. 32(f) or (g) disclosure requests. (Police emphasis)

The Police determined that the June 25 letter represented a request for disclosure under sections 32(f) and/or (g), based on "its form and content, and given the background noted above", and a response was sent to the appellant by the Chief following what appears to have been consultation with the Freedom of Information Branch and legal counsel.

The Police acknowledge that the Chief's response to the appellant made mention of certain provisions found in Part I of the *Act* (ie. references to terms used in sections 14 and 16), but maintain that this was in response to general references to these provisions made by the appellant in his letter. The Police also acknowledge that the response states that disclosure of the requested information would constitute an unjustified invasion of privacy and that there was no "compelling public interest" in disclosure, but explain this by stating that "it was not clear whether the requester intended to refer to s. 16 or s. 32(h) in this regard." The Police also point out that specific Part I exemptions were not enumerated, which is the standard practice for processing Part I access requests received by the Police.

The Police go on to submit:

> The Chief also made mention of the preliminary issue of the accessibility of the records sought under [the *Act*], in any event. He did so for the purpose of putting the requester on notice that should it make an access request under Part I, the provisions of s. 52 may be applicable. You will note that in paragraph 2 [of the Chief's response letter] the Chief stated that: "In the event such records are potentially available, the Police Service would be required to abide by all provisions of that legislation, including those which protect the personal privacy of persons to whom the records relate." This statement clearly indicates that consideration as to the availability of the records under Part I was not being undertaken at that point.

The Police end their representations with the following submissions:

> As noted, it is our position that the appellant did not make a request under Part I of the *Act*. The $5.00 fee did not accompany the request, the requester consistently sought "disclosure" under the *Act* and the entire matter was dealt with within the background context described above.
>
> The Chief did, in fact, in the last paragraph of his letter, suggest other methods by which information could be obtained by the applicant under Part I of the legislation. Where disclosure is not provided under s. 32(f) or (g), the requester is generally advised that he or she is free to make an access request under Part I. The Police Service agrees that greater clarity in that regard is preferable.

I do not accept the Police's position.

Section 17(1) of the *Act* and sections 5.2 and 11 of Regulation 823 made under the *Act* describe the procedure for initiating an access request:

> 17. (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.
>
> Regulation 823
>
> 5.2 The fee that shall be charged for the purposes of clause 17(1)(c) or 37(1)(c) of the Act shall be $5.
>
> 11. A request for access to a record under Part I of the Act or for access to or correction of personal information under Part II of the Act shall be in Form 2 or any other written form that specifies that it is a request made under the Act.

There would appear to be no dispute that a written request was made by the appellant to the Police as the institution he believed had custody or control of the requested records (section 17(1)(a)), and the Police appear to have no difficulty in identifying the location of the requested personal information based on the information provided by the appellant (section 17(1)(b)). The July 25 letter also states clearly that the

appellant is seeking access to records under the various provisions of the *Act*, thereby satisfying the requirements of section 11 of the Regulation. The appellant made no reference to any particular sections of the *Act*, but in support of his request, the appellant described a number of Part I provisions, specifically sections 14 and 16. The closing paragraph of his letter emphasized what the appellant describes as the most important reason for his request, that being that "the compelling public interest in disclosure of the requested records clearly outweighs the personal privacy interest". This phrase is a direct quotation from section 16 of the *Act*, which is relevant only in the context of a Part I request.

The Police attribute considerable significance to the use of the term "disclosure" in the appellant's July 25 letter. In my view, the use of this term has no bearing on the issue before me. Although the word "disclosure" is used in section 32 of the *Act*, it also appears a number of times in Part I of the *Act*. Section 14 includes a number of references to "disclosure", and whether or not to disclose a record is the very issue under consideration in the balancing of interests under section 14(1)(f). The word "disclosure" is also used twice in section 16 of the *Act*.

The appellant did not pay the $5 request fee prescribed by section 17(1)(c) of the *Act* and section 5.2 of Regulation 823 at the time the request was submitted to the Police. However, in my view, this technical deficiency can be remedied without prejudice to the Police by simple payment of the fee at this time, and is not itself sufficient to render the request void.

In responding to the appellant, the Chief of Police makes a number of statements which would appear to indicate that the request was being treated under Part I of the *Act*. He acknowledges that the responsive records contain "personal information", the threshold issue for dealing with the section 14(1) personal information exemption claim. He then paraphrases the requirements of section 14(1) in detail. His letter continues:

> It is the opinion of the Police Service Freedom of Information Branch, shared by Police Service Legal Counsel, that your request does not apparently fall within any of the exceptions which would permit disclosure of information of this nature. Specifically, I am advised that a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the information was compiled and is identifiable as part of an investigation into a possible violation of the law and/or relates to employment or educational history, which is the case in the situation at hand. Furthermore, we are unable to conclude that there exists a "compelling" circumstance which outweighs the purposes of the exemptions from disclosure, based on the information available to us. While it may be that disclosure of the documents could assist in the interests of public scrutiny and the promotion of public health and safety, it is our opinion that the jurisprudence establishes that where a disclosure is presumed to constitute an unjustified invasion of personal privacy, factors such as these, which may support disclosure, cannot be taken into account.

This paragraph constitutes a detailed description of the operation of section 14(1)(f) of the *Act*, the interplay among the various presumptions and factors in sections 14(2) and (3), and the relationship between section 14(1) and the public interest override provided by section 16 of the *Act*. The discussion is clearly and exclusively related to the treatment of a Part I request and has no bearing on the sections 32(f) and (g) proactive disclosure provisions.

The Chief's letter would appear to support my position, when it goes on to state:

> We have **also** considered the application of s. 32(f) and s. 32(g) which permit the Police Service to disclose information to another law enforcement agency in Canada. However, again based on the information provided, it would not appear that [the appellant] seeks these records in the context of performing law enforcement activities. As such, the discretionary sharing provisions are not applicable. (my emphasis)

This five-line statement at the end of a detailed two-page discussion is clearly not the focus of the Chief's response.

Therefore, based on the actions taken by the Police in response to the June 25 letter, in my view, it is reasonable to conclude that the Police treated the letter in a manner consistent with its characterization as a Part I request. That being the case, it is incumbent on the Police to ensure that any technical deficiencies are drawn to the attention of the requester. I make this finding in discharging my supervisory responsibilities for the proper administration of Ontario's access and privacy legislation (see Order M-618, as well as comments of the Divisional Court in *John Doe v. Ontario (Information and Privacy Commissioner) (1993)*, 13 O.R. (3d) 767).

In my view, it is not reasonable to assume that requesters necessarily have a detailed and comprehensive knowledge of all technical requirements of the *Act* at the time a request is submitted. Requesters have an obligation to adhere to all statutory requirements, but institutions may have a corresponding obligation, in certain circumstances, to advise requesters where defects are apparent. I find that the Police did have a duty to advise the requester of the requirement of a request fee in the circumstances of this matter. It was not acceptable for the Police to:

(a) receive a letter which, based on its content, could reasonably be interpreted as a Part I request;

(b) decline to contact the requester for clarification;

(c) respond to the request after consultation with both legal counsel and the Freedom of Information Branch in language consistent with treating the request under Part I; and then

(d) rely on the non-payment of the required request fee as a basis for arguing that it is not a proper request.

The June 25 request was, at most, ambiguous. It used language consistent with Part I, yet didn't include a request fee. A phone call for clarification would have resolved any ambiguity and, in my view, the Police were obliged to take this step. Sound and customer-focused public administration requires it.

It is also significant to note that the Police suffer no prejudice in treating the appellant's letter as a Part I request. The August 3 reply is adequate to identify the section 14(1) mandatory personal information exemption claim as the basis for denying access to the responsive records. If the Police wish to raise any other discretionary exemption claims, the procedures of this Office on appeal permit the Police to do so. When confirming an appeal, all institutions receive notice from the Registrar allowing for discretionary exemption claims to be added to the scope of an appeal within 35-days. This practice has been endorsed by the Divisional Court in the judicial review of Order P-883 (*Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.)), and was available to the Police in this appeal.

In summary, I find that the July 25, 2000 letter from the appellant is properly characterized as a request for access to records under Part I of the *Act*, subject to the payment of the required request fee to the Police. I will include a provision in this order which addresses these payment requirements.

INTERIM ORDER:

1. The appeal is allowed and I find that the July 25, 2000 letter from the appellant is a valid access request under Part I of the *Act*, subject to Provision 2 of this Interim Order.

2. If the appellant does not pay the $5 request fee to the Police, as required by section 37(1)(c) of the *Act* and section 5.2 of Regulation 823, by **November 2, 2000**, and provide this Office with evidence of payment, then the appeal is dismissed.

3. Although the 35-day time period for raising discretionary exemptions has expired, given the particular circumstances of this appeal and assuming Provision 2 is complied with, the Police may raise additional discretionary exemption claims by notifying the appellant and this Office no later than **November 9, 2000**.

Original signed by: October 26, 2000
Tom Mitchinson
Assistant Commissioner