



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

ORDER MO-1382

Appeal MA-000250-1

Peel Regional Police Services Board



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NATURE OF THE APPEAL:

This appeal arises from a request made to the Peel Regional Police Services Board (the Police), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) on May 17, 2000. The requester asked the Police to give her copies of photographs of herself taken by the police.

The Police refused to release copies of the photographs to the appellant, citing sections 38(a), 8(1)(a), 8(1)(b) of the *Act*. The Police did allow the appellant to view the photographs. The appellant appealed the decision to deny her copies of the photographs.

A Notice of Inquiry was sent to the Police and the appellant summarizing the issues in dispute in this appeal. The Police were asked to make initial representations, and the appellant was given the opportunity to file her representations in response to those of the Police.

The Police, in their representations, did not dispute that the photographs of the appellant are her personal information within the meaning of section 2(1) of the *Act*. The representations state that the photographs are documentary evidence to be adduced in a criminal trial, currently scheduled for February 1, 2001. The appellant is expected to be a witness for the Crown in that trial. The Police state that, following the appeal period after completion of the trial, the appellant can again request the photographs and access will be granted.

The Police restricted their submissions to the application of discretionary exemption in section 8(1)(a), in conjunction with section 38(a) of the *Act*. Accordingly, the only issue remaining in this appeal is whether or not the Police can appropriately rely on section 8(1)(a) in exercising their discretion under section 38(a) to refuse to allow the appellant to have access to her personal information, specifically the photographs.

CONCLUSION:

I am not persuaded that disclosure of these records could reasonably be expected to interfere with a law enforcement matter. I find that section 8(1)(a) is not applicable in the circumstances of this appeal and accordingly, the records do not qualify for exemption under section 38(a).

DISCUSSION:

Under section 38(a) of the *Act*, the Police have discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 8 would apply. In this appeal, in determining whether or not the Police had discretion under section 38(a) to refuse to provide access to the records, I must consider the application of section 8(1)(a).

Section 8(1)(a) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,
interfere with a law enforcement matter;

The words "could reasonably be expected to" appear in the preamble of section 8(1), as well as in several other exemptions under the *Act* dealing with a variety of anticipated "harms." Previous orders of this Office have found that in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of the record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order P-373 and *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 and 40 (Div. Ct.)].

The use of the word "interfere" contemplates that the particular law enforcement matter is still ongoing [see Orders M-258, M-302, M-420 and M-433]. The purpose of the exemption contained in section 8(1)(a) is to provide an institution with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter. The institution bears the onus of providing evidence to substantiate that, first, a law enforcement matter is ongoing, and second that disclosure of the records could reasonably be expected to interfere with the matter [see Order M-1067].

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. In this case, I am satisfied that the criminal proceeding currently underway is a "law enforcement" matter within the meaning of the legislation.

I note that, because the prosecution has already commenced, disclosure of the record could not be found to interfere with an ongoing law enforcement **investigation**. In this case, the investigation is complete and the Police have accordingly abandoned their reliance on section 8(1)(b) [see Orders P-1584 and MO-1252].

Turning to the possible application of section 8(1)(a), since it is not disputed that this matter is scheduled for trial in February 2001, there is no question that it must be considered an **ongoing** law enforcement matter within the meaning of the subsection. The Police assert that disclosure would interfere with the ongoing trial. However, their representations on this issue state only that:

The preservation of documentary evidence is necessary to protect the integrity of the Criminal Trial process. Premature release could bring the administration of justice into disrepute.

The Police do not explain with any particularity how the disclosure of the specific information at issue in this appeal, namely, the photographs of the appellant, could interfere with this ongoing law enforcement matter. Based on the material before me, I am unable to draw such a conclusion.

The Police have not presented evidence or argument to support their submission that the disclosure of the photographs would interfere with the trial, or the administration of justice as a whole. In fact, the records at issue have already been viewed by the appellant, and may have been included in the materials disclosed by

the Crown Attorney to the accused. The Police have not provided evidence from the Crown Attorney involved in the prosecution confirming what was or was not disclosed to the appellant pursuant to the Crown's disclosure obligation in the context of the criminal proceeding.

In relying on section 8(1)(a) as the basis for refusing to allow the appellant to have access to her personal information, it is incumbent on the Police to provide cogent reasons why disclosure of the records would interfere with the trial or the administration of justice generally [see Orders MO-1318-1 and MO-1252].

Having considered the representations of the Police and the circumstances of this case, I am not persuaded that disclosure of these records could reasonably be expected to interfere with a law enforcement matter. I find that section 8(1)(a) is not applicable in this appeal. Accordingly, the records at issue do not qualify for exemption under section 38(a).

ORDER:

I order the Police to disclose the records to the appellant by **January 15, 2001**.

Original signed by: _____ December 21, 2000
Katherine Laird
Adjudicator