



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-1549**

**Appeal MA-010225-1**

**Hamilton Police Services Board**



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## **NATURE OF THE APPEAL:**

The Hamilton Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a videotape made by two police officers of a demonstration which took place at the Hamilton City Hall on May 15, 2001.

The Police located a copy of the videotape and denied access to it, claiming the application of the following exemptions contained in the *Act*:

- law enforcement – sections 8(1)(c), (d) and (g) and 8(2)(a) and, as the videotape may contain the personal information of the appellant, section 38(a);
- invasion of privacy – section 38(b), in conjunction with the presumptions in sections 14(3)(b) (a record compiled as part of an investigation into a possible violation of law) and (h) (a record which indicates an individual's political beliefs or associations) and the considerations in sections 14(2)(e) (unfair exposure to pecuniary or other harm), (f) (the information is highly sensitive) and (i) (disclosure may unfairly damage an individual's reputation).

The requester, now the appellant, appealed the decision of the Police to deny access to the videotape. As mediation of the appeal was not possible, it was moved into the adjudication stage of the appeals process. I decided to seek the representations of the Police, initially. I sent the Police a Notice of Inquiry setting out the facts and issues in the appeal. The Police made submissions in response, the majority of which were shared with the appellant, along with a copy of the Notice of Inquiry. The appellant made submissions in response which were also shared with the Police, who then made additional representations by way of reply.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

The personal privacy exemptions in sections 14(1) and 38(b) apply only to information which qualifies as "personal information". The term "personal information" is defined in section 2(1) of the *Act* to mean, in part, "recorded information about an identifiable individual."

The Police submit that the videotape contains "actual pictures of individuals" who are identifiable to the appellant, as he was involved in the demonstration being videotaped. The Police are of the opinion that "a photograph epitomizes personal information". In its reply submissions, the Police expand on this point by arguing that "an individual's face is very personal information" and that despite the fact that the Police may not be able to identify by name each of the individuals whose image is captured on the tape, "they could easily be identifiable to someone else".

Based on my review of the videotape and the submissions of the parties, I find that the videotape contains information which qualifies as “personal information” as that term is defined in section 2(1). The information clearly is recorded, albeit in video rather than written, form. The videotape reveals the faces and other physical characteristics of the persons the camera has recorded, as well as their locations and movements at certain times. In addition, given the fact that the appellant would be familiar with many of these individuals, I find that they are identifiable. This finding is consistent with previous orders of this office regarding photographs, such as M-528, MO-1378 and MO-1410.

In the present appeal, I find that the videotape which is the subject of the request contains the personal information of the individuals who have been recorded. The appellant indicates that he was present at the demonstration and was among those who were photographed by the Police. Accordingly, I find that the tape also contains the personal information of the appellant.

The appellant submits that it is the responsibility of the Police to contact the individuals who appear on the videotape in order to seek their consent to the disclosure of their personal information to the appellant, as required by section 21(1)(b) of the *Act*, which states:

A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,

that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 14(1)(f).

I note that the obligation to notify third parties under section 21(1)(b) applies only to those circumstances in which the institution, in this case the Police, intends to disclose a record which might contain personal information to a requester. In the present case, the Police have refused to grant the appellant access to the requested record. Accordingly, section 21(1)(b) has no application.

## **INVASION OF PRIVACY**

Section 36(1) of the *Act* gives individuals a right of access to their own personal information held by an institution. Section 38, however, creates certain exceptions to that right of access. Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant and other individuals, the Police have the discretion to deny the appellant access to that information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure of the record to the appellant would constitute an unjustified invasion of another individual's personal privacy (Orders M-1146 and MO-1535).

Section 38(b) of the *Act* introduces a balancing principle. The Police must weigh the requester's right of access to his own personal information against other individuals' right to the protection of their privacy. If the Police determine that release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the Police the discretion to deny access to the requester's own personal information.

Sections 14(2), (3) and (4) 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. Those sections are relevant to the issues under both section 14(1) and section 38(b). Section 14(2) provides some criteria for the head to consider 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(3) lists the types of information disclosure of which are presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information disclosure of which does not constitute an unjustified invasion of personal privacy.

With respect to section 14(3), the Divisional Court has held that once a presumption against disclosure has been established, it cannot be rebutted by one or more of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, if section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to in favour of disclosure.

### **The Position of the Police**

The Police submit that the disclosure of the videotape would constitute a presumed unjustified invasion of personal privacy under sections 14(3)(b) and (h) of the *Act*, which state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (b) 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;
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Specifically, the Police submit that “the record at issue is an Intelligence/Surveillance videotape” which was “prepared in the course of law enforcement and investigation by this Police Service, which is responsible for enforcing and regulating compliance with the *Criminal Code of Canada* as well as Provincial and Municipal legislation”. The Police have also explained in some detail the purposes for the creation of the record and the reasons why the Police felt it was necessary to undertake this investigation. Because of the nature of these submissions, I am unable to describe them in greater detail.

With respect to the application of the presumption in section 14(3)(h), the Police submit that:

. . . it appears that some of the information included in the record at issue may indicate affected individual's “political associations”. The Police have chosen to videotape a group of individuals involved in a demonstration at a specific

location. If a person just happened to be in the vicinity of the protest and walked by without stopping to observe or become involved or if a person did stop to observe the demonstration for curiosity sake but did not agree with the views of this group, . . . then they could be included in with the group. If released, and the video was shown the person not involved may be linked with the protest group. If in fact all of the affected individuals that are shown on the videotape do have the same political views or beliefs as the group performing the demonstration and handing out literature, then their political beliefs and/or associations are clearly demonstrated on the videotape.

The Police also submit that the considerations in sections 14(2)(e), (f) and (i) of the *Act* which weigh against the disclosure of the information contained in the record also apply. These sections state:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The Police argue, with respect to the application of section 14(2)(e), that “the potentiality for this eventuality dictates against disclosure.” The representations of the Police refer to the sensitivity of the recording of information by a police service in any surveillance/intelligence operation as an important part of the consideration under section 14(2)(f). The Police also submit that the release of the video may unfairly damage the reputation of those individuals whose images were captured on the tape who were not associated with the demonstration, as contemplated by section 14(2)(i).

### **The Appellant’s Submissions**

The appellant takes the position that individuals ought to be able to attend at a demonstration without being “targeted by the Police” and that as the persons who appear on the videotape:

are attending a publicly announced demonstration at the seat of democratic decision making in the city, (Council Chambers in City Hall), the balancing principle of section 38(b) leads me to believe that the disclosure would not ‘constitute an unjustified invasion of another individual’s privacy’.

The appellant points out that as he was not given access to portions of the Police representations regarding the application of section 14(3)(b), it is “difficult to glean the significance of their investigation”. In response to the Police arguments regarding section 14(3)(h), the appellant submits that the protest was related to an agenda item for consideration by City Council and that “To draw conclusions relating to political beliefs further than this public interest is in my opinion misguided and dangerous”.

With regard to the application of the consideration listed in section 14(2)(f), the appellant submits:

That the Police performed their task openly by sending an officer know[n] to us underscores the chilling effect on public protest. This is a form of guilt by association, created by the criminalization of dissent, even peaceful, non-violent and creative dissent at a form for such democratic impulses (City Hall). This is a form of McCarthyism that it is in the public interest to reveal and transform. This question relates to the very serious concerns in the community about police surveillance cameras to be installed in the city. Are we all potential suspects in a world under constant surveillance?

He also suggests that the act of videotaping a demonstration in which both the demonstrators and other individuals’ images are recorded “may very well frighten off potential democratic-minded citizens for fear of being labelled as criminals, even though no criminal activity is in any way planned or intended. The appellant also submits that the disclosure of the tape would be unlikely to cause anyone “excessive personal distress”, as is required for the section 14(2)(f) to be applicable.

The appellant also takes the position that damage to a person’s reputation could flow from their association with the organization to which he belongs, as contemplated by section 14(2)(i). He points out that since the date of the demonstration, the group was “nominated and chosen to participate in the YMCA Peace Medal awards for our contribution to serving the interests of peace in Hamilton.”

## **Findings**

While I have some sympathy with regard to the concerns raised by the appellant about the videotaping by the Police of peaceful demonstrations, it is not within my purview to comment on the efficacy of such actions. Rather, these concerns might be more appropriately addressed by way of representations to the Police Services Board.

The Police indicate in their reply submissions that the videotape was compiled for a specific law enforcement purpose, to be used by their Intelligence Branch in furtherance of their intelligence gathering mandate. I find that the videotape was compiled as part of a police investigation into a possible violation of law and that the presumption in section 14(3)(b) applies in the present circumstances. As noted above, the only way in which a presumption under section 14(3) can be rebutted is if one of the limitations listed in section 14(4) apply or if there exists a public interest in the disclosure of the record which clearly outweighs the purpose of the section 14(1)

exemption. I find that none of the factors under section 14(4) apply and there does not exist the requisite public interest in the disclosure of the record under section 16.

As the presumption in section 14(3)(b) applies to the videotape, I find that its disclosure would constitute an unjustified invasion of the personal privacy of the individuals whose images appear on the tape. As such, the record qualifies for exemption under section 38(b).

### **Exercise of Discretion**

In Order PO-2022-I, Assistant Commissioner Tom Mitchinson reviewed the steps required under the provincial *Act* for institutions in exercising their discretion to disclose information when a record is subject to a discretionary exemption. He found that:

In Order MO-1277-I, I outlined in some detail the steps required by an institution in properly exercising discretion. I stated:

In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed.

In Order P-344, I considered the question of the proper exercise of discretion as follows:

... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.

In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

In considering the representations provided by the institution in Order MO-1277-I, I found that all relevant circumstances had not been considered, and I returned the matter to the institution for a proper exercise of discretion. [See also Orders MO-1287-I and MO-1318-I]

Similarly in this appeal, the representations of the Ministry clearly do not constitute a proper exercise of discretion. There is no indication that the particular circumstances of the appellant's request or the contents of the record itself were taken into account by the Ministry in reaching its section 49(a) decision. The *Act* recognizes a higher right of access to records containing a requester's personal information, and it is not acceptable for an institution, such as the Ministry in this case, to simply establish the requirements of an exemption claim without taking the additional step of deciding whether or not it will disclose the record despite the fact that it qualifies for exemption.

I adopt the Assistant Commissioner's observations regarding the obligations of institutions when exercising their discretion and find that they are equally applicable to the present appeal, under the municipal *Act*. The Police have provided me with representations with respect to the exercise of discretion not to release the requested videotape to the appellant. The Police submit that:

This Police Service identified the need to maintain the integrity of information, as well as the integrity of information it has yet to obtain. The Police Service wished to ensure that the privacy rights of affected individuals are protected. Finally, the reputation of affected persons may be adversely affected, which could have repercussions upon personal and professional lives, if release and subsequent circulation occurs.

This institution takes note of the fact that privacy legislation provides for a balancing between the rights of an appellant to access and the rights of an individual to privacy. We consider each situation on a case-by-case basis. In our view there is no basis to determine that the purpose of this exemption is outweighed by the need for disclosure. Further, an individual's right of access is not absolute.

In conclusion, the Hamilton Police Service protects personal information of affected individuals in accordance with the provisions of MFIPPA, where appropriate. The personal information of affected individuals in this case is highly sensitive. The response of this institution to the request of the appellant has been arrived at after careful consideration. Exercise of discretion are engaged in after review of all relevant factors, with each set of circumstances being considered separately. We have followed the established procedures, policies and IPC decisions, attempting at all times to balance the rights of the appellant with those of affected individuals, keeping in mind public policy concerns as reflected in the Legislation.



Based on these submissions, I find that the Police have properly evaluated the considerations in favour of disclosure and those weighing against the release of the information in the record and have exercised discretion in an appropriate manner. Because I have found that the videotape is exempt from disclosure under section 38(b), it is not necessary for me to consider whether it is also exempt under section 8 of the *Act*.

**ORDER:**

I uphold the decision of the Police not to disclose the videotape.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ June 14, 2002