



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1569-F

Appeal MA-010095-1

Hamilton Police Services Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

Counsel for the appellant submitted a request to the Hamilton Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of investigative reports, medical reports and other documentation relating to an incident on a specified date at the appellant's place of employment (the Centre).

The Police issued a decision to the appellant granting partial access to the requested records. The Police denied access to the remaining information in the records on the basis of sections 8(2)(a) and (c) (law enforcement) and section 14 (invasion of privacy), with reliance on the factors in sections 14(2)(e), (f), (g), (h) and (i) and the presumptions in sections 14(3)(a), (b) and (g).

The appellant appealed this decision and an appeal was opened under the above appeal number. The appeal proceeded through mediation and into adjudication. During the inquiry stage of the appeal, the Police issued a supplementary decision granting further access to some of the records and parts of records. Following the receipt of representations I issued Interim Order MO-1524-I in which I disposed of most of the issues on appeal.

In Interim Order MO-1524-I, I noted that Pages 82, 83, 84 – 86, 87, 150 – 158, 159 and 160 – 172 of the records originated from the Centre, which falls under the jurisdiction of the Ministry of the Solicitor General and Correctional Services, now the Ministry of Public Safety and Security (the Ministry). I decided that, although these records are in the custody of the Police, the mandatory provision in section 9 of the *Act* (which concerns information received in confidence from other governments), and section 38(a) (discretion to refuse requester's own information), must be considered prior to any other decision being made with respect to their disclosure.

In order to avoid further delay in dealing with the majority of the records at issue in this appeal, I decided to defer my decision regarding these 19 pages. Therefore, it remains to be determined whether Pages 82, 83, 84 – 86, 87, 150 – 158, 159 and 160 – 172 are exempt pursuant to the exemptions in sections 9 and 38(a) of the *Act*. This order constitutes my final decision with respect to the remaining records at issue in Appeal MA-010095-1.

In the Supplementary Notice of Inquiry that I prepared and sent to the parties with respect to this deferred issue, I indicated that if I determine that section 9 has no application, I will go on to consider whether the information contained in these records is exempt under any of the exemptions originally claimed by the Police. I noted further that if it is necessary to proceed to the second step, I would rely on the representations previously submitted by the parties identified in the original Notice of Inquiry.

I decided to seek supplementary representations from the Police, initially, on the first question to be determined, that is, whether sections 9 and 38(a) apply to these 19 pages. I also decided to notify the Centre (which was not previously notified at the time the original Notice of Inquiry was sent out) to seek its views relating to the application of section 9 to Pages 82, 83, 84 – 86, 87, 150 – 158, 159 and 160 – 172. The Centre was also invited to comment on whether the information at issue qualifies as "personal information".

The Ministry submitted representations on behalf of the Centre. The Ministry takes the position that the records were provided to the Police in confidence and submits that they are exempt under section 65(6) of the provincial *Act*.

The Police did not submit representations on whether sections 9(1) and 38(a) apply to the records received by the Centre.

I sent the Ministry's representations in their entirety to the appellant and provided him with an opportunity to respond to them and/or to provide additional representations on this issue. I also invited the appellant to comment on the representations originally submitted by the Police. The appellant did not submit representations in response.

RECORDS:

The records at issue are comprised of:

- Pages 82 and 83 are memoranda to file;
- Pages 84 – 86 are "Employee/other Information Reports";
- Page 87 is a Ministry of the Solicitor General Occurrence Report;
- Pages 150 – 158 and 160 – 172 are staff shift sign-in sheets; and
- Page 159 is a Shift Co-ordinator's form.

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined as "recorded information about an identifiable individual". In Order MO-1524-I, I concluded that:

All of the records at issue either refer directly to the appellant, or they pertain to the Police investigation into the matter. In the circumstances, I find that they all contain the personal information of the appellant. Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access. Because the records at issue all contain the appellant's personal information, my analysis of the basis for withholding this information will be conducted under section 38 of the *Act*

In my view, these conclusions are equally applicable to the information contained in the records remaining at issue in this appeal.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/RELATIONS WITH GOVERNMENT

Under section 38(a) of the *Act*, the Police have the discretion to deny an individual access to his 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 information.

I asked the parties to address whether section 9(1)(b) of the *Act* applies to the information at issue in this appeal. This section provides:

A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

the Government of Ontario or the government of a province or territory in Canada;

Introduction

In order to deny access to a record under section 9(1), the institution must demonstrate that the disclosure of the record could reasonably be expected to reveal information which the institution received from one of the governments, agencies or organizations listed in the section and that this information was received by the institution in confidence (Order M-128).

The words “could reasonably be expected to” appear in the preamble of section 9(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated “harms”. In the case of most of these exemptions, in order to establish that the particular harm in question “could reasonably be expected” to result from disclosure of a record, the party with the burden of proof must provide “detailed and convincing” evidence to establish a “reasonable expectation of probable harm” [see Order P-373, two court decisions on judicial review of that order in *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 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

It is clear on their face, as I noted in Order MO-1524-I, that the records originated from the Centre. I am satisfied that the Police received them from the Centre during their investigation into the incident involving the appellant that occurred at that location.

With respect to whether the information was received by the Police in confidence, the Ministry states:

[T]he records originating from the [Centre] remaining at issue in Appeal MA-010095-1 have been prepared and maintained in an employment context. It should be noted that the appellant did not immediately return to work following the [specified] incident. The appellant ultimately applied for Long Term Income

Protection (LTIP) benefits and also filed a claim with the Workplace Safety and Insurance Board [WSIB]. In addition, on March 9, 2001, the appellant, a member of the Ontario Public Service Employees Union, filed a grievance in accordance with the procedure set out in the Central Working Agreement between the Ontario Public Service Employees Union and the Crown in Right of Ontario as represented by Management Board of Cabinet...

...

The Ministry submits that the records at issue are excluded records that are outside the jurisdiction of the [Act] in accordance with sections 65(6)1 and 3. It is the Ministry's position that the records at issue are employment-related records that were provided in strict confidence to the [Police] for the purpose of investigating the circumstances of the [specified] workplace incident. The records contain information about a sensitive workplace incident in a secure correctional facility environment...

In Order PO-2015, which specifically addressed Records 82, 83, 84, 85, 86 and 87 (in respect of an appeal brought by the appellant of a decision of the Ministry for records in its custody relating to the incident), I concluded:

[B]ecause the records at issue relate directly to the subject matter of the appellant's grievance and WSIB claim, I am satisfied that they qualify as records about "labour relations" and/or "employment-related" matters for the purposes of section 65(6)3...In the circumstances, I am satisfied that the records were collected, prepared, maintained and used by the Ministry in relation to meetings, consultations, discussions and communication about labour relations and/or employment-related matters in which the Ministry has a current and active interest.

In that order, the Ministry's primary argument centred on the fact that the appellant had filed a WSIB claim and grievance and that the grievance had not yet been heard. In this case, the records would likely have been provided to the Police immediately following the incident and prior to any employment-related actions taken by the appellant. In my view, however, the timing is not a significant factor in determining whether section 65(6)3 applies to the records at issue in that appeal as well as the remaining records at issue in this appeal, which are similar in nature.

In addition to the findings I made in Order PO-2015, I find that it was reasonably foreseeable that this serious workplace incident would result in the Ministry's interest being actively engaged in these records at the time they were prepared and/or collected, maintained and used in relation to the Police investigation (pursuant to section 65(6)3). On this basis, I find that the Ministry would have been entitled to withhold these records from the appellant from the time they were created. This factor, combined with the seriousness of the incident for the Ministry leads me to conclude that the Ministry had a reasonable expectation that the Police would exercise caution in

disclosing the contents of these pages. On this basis, I am satisfied that they were received in confidence from a ministry of the Government of Ontario.

Exercise of Discretion under section 38(a)

Although the Police did not submit representations on the application of section 9(1)(b) of the *Act*, their original representations address the exercise of discretion generally in respect of the other exemptions claimed by them. Specifically, the Police state:

In exercising this discretion, the Police Service took into account all relevant circumstances. The Police Service was careful not to take into account extraneous, irrelevant or unreasonable considerations, and based its decision on realistic concerns.

...

The Police Service needs to maintain the integrity of information and evidence compiled during an investigation. If this information can be released without consent, then it will affect the abilities of the police to conduct such investigations.

Given my findings above that the records were received from the Ministry with a reasonable expectation of confidentiality, and the fact that the Ministry not only did not consent, but that it actively objects to their disclosure, I am satisfied that the decision of the Police to withhold them from disclosure reflects a proper exercise on discretion in the circumstances.

Accordingly, I find that the records at issue in this appeal are exempt pursuant to sections 9(1)(b) and 38(a) of the *Act*.

ORDER:

I uphold the decision of the Police to withhold Pages 82, 83, 84 – 86, 87, 150 – 158, 159 and 160 – 172 of the records from disclosure.

Original signed by:
Laurel Cropley
Adjudicator

September 12, 2002