



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1583

Appeal MA-020010-1

Hamilton Police Services Board

NATURE OF THE APPEAL:

This appeal concerns a decision of the Hamilton Police Services Board (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to:

Any and all information relating to me in any form in the custody of this Service including all correspondence. This would include The Board of Commissioner of Police, Chief of Police, Deputy Chiefs of Police, Senior Officers and all related persons under their command.

The appellant further requested a cost/expenditure breakdown relating to an investigative team sent to Waterloo to assist in a *Police Services Act* investigation.

Accompanying the appellant's request was a consent form signed by an affected person authorizing the Police to provide the appellant with any information pertaining to the affected person that relates to the appellant.

The Police issued a decision letter denying access to the records requested pursuant to section 38(a) in conjunction with sections 8(1)(c), 8(1)(d), 8(1)(e), 8(1)(g) and 8(2)(a) (law enforcement), and section 38(b) in conjunction with section 14(3)(b) (personal privacy).

The appellant appealed the Police's decision to this office.

Mediation was attempted but was unsuccessful.

I, initially, sent a Notice of Inquiry to the Police, which outlined the facts and issues in the appeal, and I received representations in response. The non-confidential portions of the Police's representations were shared with the appellant, along with the Notice, and the appellant submitted representations in response.

RECORDS:

There are four records at issue in this appeal consisting of Intelligence/Surveillance Reports prepared by the Police, Investigative Services Division (11 pages in total).

DISCUSSION:

PERSONAL INFORMATION

It is necessary to decide, firstly, whether the records contain personal information, and if so, to whom that personal information relates, for the answer to these questions determines which parts of the *Act* may apply.

Under section 2(1) of the *Act*, "personal information" is defined as recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

On my review of the records at issue, I find that all of the records contain the personal information of the appellant and portions of the records contain the personal information of other individuals.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the *Act*, the Police have the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions would otherwise apply to that information. The exemptions listed in section 38(a) include the exemptions claimed with respect to the records at issue, namely, the following law enforcement exemptions: sections 8(1)(c), 8(1)(d), 8(1)(e), 8(1)(g) and 8(2)(a).

LAW ENFORCEMENT

Introduction

The portions of section 8 that are at issue in this appeal read:

- (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
 - (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
 - (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
 - (e) endanger the life or physical safety of a law enforcement officer or any other person;
 - (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (2) A head may refuse to disclose a record,
 - (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

An institution relying on the section 8 exemption must establish that it is reasonable to expect that the harms set out in these sections will ensue if the information in the records is disclosed.

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the words “could reasonably be expected to” in the provincial equivalent to section 8(1):

The words “could reasonably be expected to” appear in the preamble of section 14(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.)].

Due to the nature of the records at issue in this appeal, I will first address the possible application of the section 8(1)(g) exemption.

Section 8(1)(g): intelligence information

Introduction

Section 8(1)(g) provides an institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information.

In Order M-202, former Adjudicator Asfaw Seife stated the following regarding the meaning of the term “intelligence information”:

The term “intelligence” is not defined in the *Act*. The Concise Oxford Dictionary, eighth edition, defines “intelligence” as “the collection of information, [especially] of military or political value”, and “intelligence department” as “a [usually] government department engaged in collecting [especially] secret information”.

The Williams Commission in its report entitled *Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980*, Volume II at pages 298-99, states:

Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offenses. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In

this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.

In my view, for the purposes of section 8(1)(g) of the *Act*, “intelligence” information may be described as information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.

These views have been adopted in subsequent orders of this office (see, for example, Orders P-650 and MO-1261), and I adopt them for the purposes of this appeal.

Representations

The Police submit:

An Intelligence/Surveillance Report contains information collected by the Police [...] in a covert manner. Surveillance is one technique as is the use of associates and informants. In this particular case, the information was obtained through surveillance and subsequent Intelligence/Surveillance Reports submitted. Surveillance is a specific form of gathering intelligence information and intelligence records are specific to law enforcement. Surveillance is highly confidential and sensitive and in many cases relating to the surveillance of an individual, th[e] Police [...] would look at the information and the reasons for the surveillance and refuse to confirm or deny the existence of the Intelligence/Surveillance Reports. In this case, the appellant already knew that the [...] Police [...] conducted surveillance on him, therefore we reviewed the reports and information and made a decision to deny the reports.

Surveillance in itself is a known police investigative technique but how the surveillance is conducted or carried out is the procedure that must be protected.

Th[e] Police [...] believes that the Intelligence/Surveillance Reports are Intelligence records. Disclosure of these records could very well [...] reveal law enforcement intelligence information respecting organizations or persons [...] The release of the records would show the techniques and procedures used by the surveillance teams and would hinder or compromise the effective utilization of surveillance as a tool in policing.

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[I]n order for a record to qualify for exemption under section 8(1)(g) of the *Act*, the Police must establish that disclosure of the record could reasonably be expected to:

- (a) interfere with the gathering of law enforcement intelligence information respecting organizations or persons, or
- (b) reveal law enforcement intelligence information respecting organizations or persons.

The Police state the Intelligence/Surveillance Reports are records for which this exemption is claimed, reveal information that was gathered “in the course of investigations initiated upon the request of law enforcement officials consequent to suspected criminal activity”.

The purpose of section 8(1)(g) is to provide the institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information. Previous orders have defined intelligence information.

The term “intelligence” has been defined as “information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information that is compiled and identifiable as part of the investigation of a specific occurrence.” [Orders M-202, P-650, P-999]

Further, “OPP Criminal Intelligence Records are records specifically relating to Police investigations and disclosing the contents of such records could, for example, interfere with a law enforcement matter, interfere with an investigation, reveal law enforcement intelligence information respecting organizations or persons or reveal the contents of a report prepared in the course of law enforcement, inspections or investigations.” [Order 106]

The Williams Commission in its report entitled Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980, Volume II at pages 298-99, states:

Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offenses. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that

the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of previous incidents, which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.

Surveillance is used by the Intelligence Branch in a clandestine manner. Information is gathered by Intelligence branches of police agencies and used for the maintenance of law and order. The Police state further that the gathering of intelligence information enables the police to take a pro-active approach in dealing with individuals or groups and their activities.

Intelligence information is maintained in a highly confidential area and very few individuals have access to it or knowledge of its existence. Additionally, information which is contained within a Police Intelligence/Surveillance report is highly confidential and extremely sensitive. [...] The only individuals who are privy to this information are members of the Intelligence Branch. Surveillance is an investigative police tool. In effect, disclosing this information would undermine the usefulness of this police technique. If every suspicion were to be confirmed in the law enforcement realm, the police would never be able to undertake an investigation with complete anonymity for fear of repercussions.

The [...] Police [...] submits that the records at issue are Intelligence/Surveillance Reports and therefore their disclosure would reveal the intelligence information gathered during the Police surveillance of the appellant and his activities.

The appellant submitted representations in response and asked me to hold them in confidence. I have accepted this request. I have carefully considered the appellant's representations and find that they do not assist me in determining whether the section 8(1)(g) exemption applies.

Findings

In the circumstances, I am satisfied that the Police gathered the information in the records in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law. Therefore, disclosure of the records could reasonably be expected to reveal law enforcement intelligence information and section 8(1)(g) applies. Unfortunately, I am unable to provide more detailed reasons for my finding since to do so would reveal confidential information.

To the extent that these records contain the personal information of the appellant, I am satisfied, on the material before me, that the Police have exercised their discretion appropriately under section 38(a) in refusing the appellant access to his personal information.

As I have found the records at issue exempt from disclosure under the section 38(a)/8(1)(g) exemption, it is not necessary for me to consider the application of section 38(a) in conjunction with sections 8(1)(c), 8(1)(e), 8(2)(a), or section 38(b) in conjunction with section 14(3)(b).

ORDER:

I uphold the decision of the Police to deny access to the records at issue.

Original signed by:
Bernard Morrow
Adjudicator

October 28, 2002