



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1665

Appeal MA-020347-1

Hamilton Police Services Board

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 certain records relating to the requester. On July 6, 2001, the Police issued a decision granting access to some of the requested information. Access to other responsive records was denied on the basis that they were exempt under the following discretionary exemptions in the *Act*:

- law enforcement - sections 8(2)(a) and (c);
- discretion to refuse requester's own information – section 38(a); and
- invasion of privacy – section 38(b), relying on the presumptions in sections 14(3)(b) (compiled as part of a law enforcement investigation), (d) (relates to employment or educational history) and (g) (consists of personal recommendations or evaluations) and the considerations listed in sections 14(2)(e) (unfair exposure to pecuniary or other harm), (f) (highly sensitive information), (g) (unlikely to be accurate or reliable), (h) supplied in confidence) and (i) (may unfairly damage an individual's reputation).

The requester did not appeal the decision of the Police to deny access at that time. On July 30, 2002, the requester submitted another request for the same information. Following notification of certain third parties under section 21 of the *Act*, the Police again denied access to some of the responsive records, on the same basis as set out in its original decision letter of July 6, 2001. The requester, now the appellant, appealed the decision of the Police to deny access. She also indicated that she had filed a Notice of Disagreement with the Police and that this letter should be included in the records found to be responsive to her request.

During the mediation stage of the appeal, the Police agreed to disclose two additional records to the appellant. In addition, the appellant agreed to address the correction request issue directly with the Police.

As further mediation was not possible, the matter was moved to the adjudication stage of the appeals process. I sought the representations of the Police initially, as they bear the onus of demonstrating that the exemptions claimed for the records apply to them. The Police made representations, the non-confidential portions of which were shared with the appellant, along with the Notice of Inquiry. The appellant also made submissions in response.

RECORDS:

The records at issue consist of the undisclosed portions of Records 2, 4, 6, 7-9, 10, 11, 12, 13, 17, 18, 19-20, 24-25, 26-29, 30-31, 32, 39-41, 43, 44-45, 46, 47, 48, 50, 51 and 52. Each of these records are occurrence reports prepared by police officers in the course of their investigations of allegations of criminal wrongdoing by either the appellant or other identifiable individuals.

DISCUSSION:

PERSONAL INFORMATION

The personal privacy exemption in section 38(b) applies only to information that qualifies as personal information. Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual, including the individual's name if 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 (section 2(1)(h)).

I have reviewed the contents of the records and have determined that each of them contains the personal information of both the appellant and other identifiable individuals within the meaning of section 2(1). The personal information includes the names, addresses, telephone numbers, age, sex and race, as well as other personal information, relating to these individuals.

INVASION OF PRIVACY

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.

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, 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. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [Order PO-1764]

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The Police rely on the "presumed unjustified invasion of personal privacy" in sections 14(3)(b), (d) and (g) of the *Act* and the factors listed under sections 14(2)(e), (f), (g), (h) and (i) of the *Act*. While not specifically referring to it, the appellant appears to be relying on the factor listed in section 14(2)(d). These sections state:

- (2) 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,
 - (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
 - (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
 - (f) the personal information is highly sensitive;
 - (g) the personal information is unlikely to be accurate or reliable;
 - (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
 - (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
- (3) 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;
 - (d) relates to employment or educational history;

- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

Operation of the presumption in section 14(3)(b)

The Police submit that:

The records at issue were compiled and are identifiable as part of an investigation into a possible violation of law. In these police reports, the violations of law were Threatening, Prohibited Weapon, Mischief and Break and Enter.

...

The records at issue were 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; its powers are governed by Bill 107 of the *Police Services Act*. As such, s.14(3)(b) and s.38(b) are applicable. [Order PO-1715]

The presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law. Thus there is a presumption raised that disclosure of the record at issue would be an unjustified invasion pursuant to s.14(3)(b).

I have reviewed the contents of each of the records, or parts of records, remaining at issue. In my view, each of them was compiled and is identifiable as part of a law enforcement investigation undertaken by the Police into a possible violation of the *Criminal Code*. As such, I find that the presumption in section 14(3)(b) applies to all of the undisclosed information contained in the records.

As noted above, as a result of the decision in *John Doe*, it has been well-established that a presumption under section 14(3) cannot be rebutted by any of the factors under section 14(2), either alone or taken together. Accordingly, I find that the disclosure of the personal information contained in the records would constitute a presumed unjustified invasion of the personal privacy of the individuals referred to in these documents. They are, therefore, exempt from disclosure under section 38(b).

Exercise of Discretion

As noted, section 38(b) is a discretionary exemption. Once it is found that records qualify for exemption under this section, the Police must exercise their discretion in deciding whether or not to disclose it. I have reviewed the representations of the Police with respect to the considerations they took into account when determining not to disclose the remaining information in the records to the appellant. I note that the appellant has received all of the information in the records which relates only to herself. Based on the representations of the Police, I am satisfied that the Police properly exercised their discretion in responding to this request.

Because of the manner in which I have addressed the application of section 38(b) to the records, it is unnecessary for me to determine whether they are also exempt from disclosure under sections 8(2)(a) or (c) or 38(a).

ORDER:

I uphold the decision of the Police to deny access to the undisclosed portions of the records.

Original signed by: _____
Donald Hale
Adjudicator

July 2, 2003