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

ORDER MO-1709

Appeals MA-030106-1, MA-030122-1 and MA-030135-1

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NATURE OF THE APPEALS:

The Town of LaSalle Police Services Board (the Police) received three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

1. A videotaped statement given by the requester to the Police on January 14, 2003. It was later determined that this interview actually took place on January 23, 2003. (Request 10-2003, Appeal Number MA-030106-1);

2. A Police occurrence report prepared following an incident involving the requester that took place on March 29, 2002. (Request 07-2003, Appeal Number MA-030122-1); and

3. Any records relating to a visit by two identified individuals to the offices of the Police on February 9, 2003. (Request 08-2003, Appeal Number MA-030135-1)

With respect to the first request, the Police located the requested videotape and denied access to it, citing the law enforcement exemptions in sections 8(2)(a) and (c) the *Act*.

With respect to the second request, the Police located the requested occurrence report and granted access to portions of it. Access to the remaining parts of the occurrence reports was denied under the discretionary exemptions in sections 38(a) and (b) and 8(2)(a) and (c).

With respect to the third request, the Police initially also claimed the application of sections 8(2)(a) and (c).

The requester, now the appellant, appealed each of the three decisions from the Police.

During the mediation stage of the first appeal and within the time granted by the Commissioner's office for it to do so, the Police issued a supplementary decision letter to the appellant. In this decision, the Police denied access to the videotape under the discretionary exemption in section 38(b) (invasion of privacy), with reference to the presumptions in sections 14(3)(a) (medical, psychiatric or psychological history), (b) (compiled as part of a law enforcement investigation), (g) (personal evaluations or recommendations), (h) (the information indicates racial or ethnic origin) and the considerations listed in sections 14(2)(f) (highly sensitive information) and (i) (unfair damage to an individual's reputation) of the *Act*. The Police also relied on the discretionary exemption in section 38(a), taken in conjunction with the exemptions originally claimed, sections 8(1)(a) and (c) (law enforcement) of the *Act*.

Following discussions with the mediator, the Police issued a further decision letter in the third appeal withdrawing the application of the exemptions claimed and indicating that no records responsive to the third request exist. The appellant maintains that records responsive to this request should exist.

As further mediation was not possible, the matter was moved to the adjudication stage of the process. I provided the Police with three separate Notices of Inquiry setting out the facts and issues in each of the three appeals. I received submissions from the Police with respect to each of the appeals, the non-confidential portions of which were then shared with the appellant. In

response to the Notices of Inquiry for each of the appeals, I received representations from the appellant relating to Appeals MA-030106-1 and MA-030122-1.

DISCUSSION:

The appellant and the institution are the same in each of these appeals, and the issues under consideration are related. Therefore, I have decided to adjudicate them in one decision that will resolve all of the outstanding issues raised in all three appeals.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Only information which qualifies as "personal information" can be exempt from disclosure under the invasion of privacy exemption in section 38(b) of the *Act*.

Appeal Number MA-030106-1

The Police submit that the videotape, the sole record at issue in this appeal, contains the personal information of the appellant and two other identifiable individuals including the name, address and telephone number of one of these persons.

The appellant has not made any specific representations on this issue.

I have reviewed the videotape and find that it contains the personal information of the appellant, including his name, address and telephone number (section 2(1)(d)), along with other personal information relating to him (section 2(1)(h)). In addition, the videotape also contains the personal information of another individual, including her name, telephone number and a partial address (section 2(1)(d)). The record also contains the personal information of a third individual as it includes this person's name and other personal information about her (section 2(1)(h)).

Appeal Number MA-030122-1

Neither the Police nor the appellant have addressed the question of whether the occurrence report at issue in this appeal contains personal information within the meaning of section 2(1).

Based on my review of the record, I find that it contains the personal information of the appellant, including his date of birth (section 2(1)(a)), medical and psychiatric history (section 2(1)(b)), as well as his name and other personal information relating to him (section 2(1)(h)).

The record also contains the personal information of two other individuals, including their dates of birth (section 2(1)(a)) and their names, along with other personal information about them (section 2(1)(h)).

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. [See 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.

Appeal Number MA-030106-1

The Police submit that the presumptions in sections 14(3)(a), (b), (g) and (h) of the *Act* apply to the personal information contained in the videotape which is the record at issue. In addition,

they indicate that the considerations listed in section 14(2)(f) and (i) of the *Act* also apply to this personal information.

The appellant has not made any relevant representations on this issue.

In Order MO-1196, Assistant Commissioner Tom Mitchinson addressed a similar situation in which an appellant sought access to information which he himself had provided to the institution. The Assistant Commissioner found that:

> A number of previous orders have found that non-disclosure of personal information which was originally provided to an institution by an appellant would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (See Orders M-444, M-613, M-847, M-1977 and P-1263, for example). These orders all determined that applying the presumption to deny access to information which the appellant provided to the institution would, according to the rules of statutory interpretation, lead to an "absurd" result. I find that the same reasoning applies to the personal information of the appellant in this case.
>
> In my view, to apply the presumption in section 14(3)(b) to those portions of the record which contain information which is about or was provided by the appellant, or of which he is clearly aware, would lead to an absurd result.

I adopt the reasoning contained in this decision for the purposes of the present appeal. The appellant is seeking access to a videotape containing a statement which he provided to the Police. The videotape only contains statements that came directly from the appellant or information communicated to him by the Police. I find specifically that all of the personal information in the videotape originated with the appellant himself.

In my view, the application of the presumptions in sections 14(3)(a), (b), (g) and (h) or the considerations in sections 14(2) to this record would lead to an absurd result. As a result, I find that the disclosure of the videotape to the appellant would not constitute an unjustified invasion of personal privacy under section 14(1). Accordingly, this exemption has no application to the record.

Appeal Number MA-030122-1

The Police indicate that they are relying, among others, on the presumption in section 14(3)(b) which reads:

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

The Police have provided me with confidential representations in support of this position which were not shared with the appellant. I am not able, therefore, to describe them in detail in this order. The appellant's representations do not address this issue.

I have reviewed the contents of the occurrence report which comprises the record in this appeal and agree that the personal information contained in it was compiled and is identifiable as part of an investigation into a possible violation of law. As a result, the presumption in section 14(3)(b) applies to the personal information in this record. The appellant has not claimed the application of the "public interest override" in section 16 and the exceptions in section 14(4) do not apply. I find that the record at issue in this appeal is, accordingly, exempt from disclosure under section 38(b).

The Police have provided me with submissions with respect to the manner in which they exercised their discretion not to disclose the entire record to the appellant. Based on those representations and my review of the record, I am satisfied that the Police exercised their discretion in a proper manner.

LAW ENFORCEMENT

Appeal Number MA-030106-1

In addition to the invasion of privacy exemption in section 38(b), the Police also rely on the discretionary exemption in section 38(a), taken in conjunction with sections 8(1)(a) and (c) and 8(2)(a) and (c), to deny access to the videotape at issue in Appeal Number MA-030106-1. Because I have found that the occurrence report at issue in Appeal Number MA-030122-1 is exempt under section 38(b), I need not consider whether it also qualifies under section 38(a).

Section 38(a) reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

Sections 8(1)(a) and (c) and 8(2)(a) and (c) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (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;
>
> (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Sections 8(1)(a) and (c)

For the law enforcement exemption in section 8(1)(a) to apply, the law enforcement matter in question must be a specific, ongoing matter. The exemption in section 8(1)(a) does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

In order to meet the "investigative technique or procedure" test under section 8(1)(c), the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487].

The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

The Police have provided me with confidential representations in support of its position that the videotape sought by the appellant is exempt on this basis. Again, I am unable to refer to these representations in any detail in this order. The appellant's representations do not specifically address the application of these exemptions to the record.

Based on the submissions of the Police and my review of the videotape, I am satisfied that its disclosure to the appellant could not reasonably be expected to interfere with a law enforcement matter, nor would its disclosure reveal investigative techniques within the meaning of sections 8(1)(a) or (c). In my view, the Police have not provided the kind of detailed and convincing evidence necessary to establish a "reasonable expectation of harm" under these exemptions.

Section 8(2)(a) and (c)

The word "report" referred to in section 8(2)(a) means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The purpose of section 8(2)(c) is to protect individuals who have provided information to a law enforcement agency during a law enforcement investigation, or who have authored a record in this context, the nature of which may expose them to civil liability. This may include information of a speculative nature, innuendo and hearsay. The exemption is not intended to protect a police officer's routine recordings of observations and actions [Order MO-1192].

In my view, the videotape in question does not meet the requirements for a "report" at it does not represent a formal statement or account of the results of the collation and consideration of information. Rather, the videotape contains the appellant's own perception of events and does not include any analytical or interpretive component on the part of the Police, as is required under section 8(2)(a).

Similarly, the videotape does not record any of the types of information described above as "speculative", "innuendo" or "hearsay", other than the views of the appellant himself. The tape contains only the comments and observations of the officers conducting the interview, along with those of the appellant. As a result, I find that the exemption in section 8(2)(c) does not apply to the videotape.

Accordingly, I conclude that sections 8(1)(a) and (c) and 8(2)(a) and (c), and therefore section 38(a), have no application to the videotape which is the record at issue in Appeal MA-030106-1.

REASONABLE SEARCH

Appeal Number MA-030135-1

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In response to the Notice of Inquiry, the Police provided me with representations concerning the searches undertaken for records responsive to this request. The Police indicate that "a thorough search of its records management system" was undertaken for any record pertaining to the visit on February 9, 2003 by two identified individuals to the office of the Police. Searches were conducted using variations of the appellant's name and his address as key words to define the search parameters. The Police located a "consent to release" form executed by the two named individuals and disclosed it to the appellant, pursuant to another request from him under the *Act*. No further records relating to this request were, however, located.

The Police indicate that they also undertook a manual search for responsive records in the locked file room which houses individual occurrence reports and information which is not part of a court brief. Again, the Police did not locate any records containing information responsive to this request.

A third search for responsive records was undertaken in the Sergeants' office by the Freedom of Information Co-ordinator. Again, no records were found relating to the events of February 9, 2003 involving the two named individuals.

The appellant did not provide me with any representations in response to the Notice of Inquiry in this appeal.

Based on my review of the representations of the Police, I am satisfied that they made a reasonable effort to identify and locate records responsive to this request. I will, accordingly, dismiss this appeal.

ORDER:

1. I order the Police to disclose the videotape which forms the record in Appeal Number MA-030106-1 to the appellant by providing him with a copy by **December 17, 2003** but not before **December 10, 2003**.

2. I uphold the decision of the Police to deny access to the undisclosed portions of the occurrence report at issue in Appeal Number MA-030122-1.

3. I dismiss Appeal Number MA-030135-1.

Original signed by: November 12, 2003
Donald Hale
Adjudicator