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

ORDER MO-1956

Appeal MA-040182-1

County of Wellington

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The County of Wellington (the County) received a request from a representative of an individual under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the individual's file with the County's social services department. The request arises from the individual's appeal to the Social Benefits Tribunal (SBT) of a decision of the County's Administrator for Ontario Works to deny benefits, because of an allegation that she was living with another individual.

The County identified records responsive to the request and granted access to certain documentation, but denied access to all of the information contained in the requester's Eligibility Review Office (ERO) files because, it said, there was an investigation taking place at the time. In its initial decision letter the County did not identify the specific sections of the *Act* that it relied upon to deny access to this information.

The requester (now the appellant) appealed the County's decision.

During mediation, and after this office advised the County that there were deficiencies in its initial decision letter, the County provided a revised decision along with an Index of Records. In its revised decision letter the County advised that it was relying on the exemptions in sections 8(1)(b) and (c) of the *Act* (law enforcement) to deny access to the undisclosed information.

Also during mediation the appellant's representative advised that some of the documents listed in the Index of Records were provided by the appellant and should be disclosed. The County maintained its denial of access.

The matter did not resolve at mediation and it moved to the adjudication stage. I sent a Notice of Inquiry to the County, initially, outlining the facts and issues and inviting it to make written representations. Because it appeared to me that the records might contain the personal information of the appellant and the personal information of other individuals, I decided to add sections 38(a) and (b) (discretion to refuse access to one's own personal information/personal privacy of another individual) as issues in the appeal. The County submitted representations in response to the Notice. In its representations the County asked that a portion of their representations be severed for confidentiality reasons.

Attached to the County's representations was a letter that the County sent to the appellant's counsel, marked as Appendix A. Although not explaining why, the letter set out that of the twelve records that were originally at issue, only portions of Records 2, 3, 6 and 10, were now being withheld.

The Notice of Inquiry along with a copy of the non-confidential representations of the County was then sent to the appellant's representative for a response. The appellant, through her representative, in turn provided representations.

As the appellant's representations raised issues to which I determined the County should be given an opportunity to reply, I sent the representations accompanied by a covering letter to the County inviting its reply representations. In particular, I asked the County to address the appellant's assertion that the Index of Records was not complete and the letter attached to the

County's representations as Appendix A was not accurate. I also invited the County to provide a revised Index of Records and/or Appendix setting out the list of responsive documents, indicating the specific exemption claimed for each record and identifying which ones have been turned over to the appellant.

The County filed representations in reply, enclosing a revised Index of Records. In its Reply the County explained that it had inadvertently disclosed to the appellant other Records that it had intended to remain confidential. This is why, the County said, only portions of Records 2, 3, 6 and 10 remained withheld.

I then sent a copy of the County's Reply and the revised Index of Records (with personal information removed) to the appellant's representative asking whether she could confirm receipt of the documents that the County indicated were sent, and to provide any other comments that she wished on the revised Index. In her responding letter the appellant's representative confirmed that only certain portions of the records listed as number 2, 3, 6 and 10 in the revised Index of Records remain at issue. She also enclosed a consent signed by the appellant authorizing the release to her representative of any information and/or records pertaining to the appellant's son, who is under the age of sixteen.

RECORDS

As reflected in the parties' representations, only the withheld portions of the following records remain at issue:

Record 2 Benefit Unit Summary (3 pages).

Record 3 Eligibility Review Detail (4 pages).

Record 6 One page handwritten note (undated).

Record 10 One page handwritten note (undated).

In response to an inquiry from our office the County confirmed that, although it could not be certain with respect to handwritten notations on the right hand side of Record 10, the source of the balance of the information on Records 6 and 10 was the appellant. The County advised that the information was obtained during telephone conversations between the appellant and representatives of the County.

DISCUSSION:

PRELIMINARY ISSUES

Section 54(c) of the *Act* permits the exercise of rights under the *Act* on behalf of persons under sixteen, in the following manner:

> Any right or power conferred on an individual by this *Act* may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

There is no dispute that the appellant's son is under the age of sixteen, and based on the information before me I am satisfied that she has lawful custody of her son. Accordingly, in light of the wording of the request, I find that the appellant is entitled to rely on section 54(c) of the *Act* and exercise her son's right of access to the records. This would also entitle her to direct disclosure to her representative, as she could do with her own information.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (g) the views or opinions of another individual about the individual, and
> >
> > (h) 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;

To qualify as "personal information", it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as "personal information" if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The County submits that the records contain the personal information of the appellant and other identifiable individuals, including an individual who was alleged to be living with the appellant.

The appellant submits that the information in the records relates to her son, herself and the person who allegedly resided with them in the specific rental unit. The appellant submits that she is well aware of the personal information of all three and has already been provided with extensive information about them through file disclosure relating to the proceedings before the SBT.

The appellant also submits that any document containing information relating to an individual in a professional, official or business capacity should be produced, and should there be a complaint from someone who is not identified in a business capacity, that name can be severed.

Having reviewed the information contained in the remaining records at issue, I find that all of them pertain to an investigation into whether the appellant was entitled to receive family benefits assistance. On that basis, as Adjudicator Donald Hale did in Order P-1624, I find that all of the records at issue contain the personal information of the appellant. I further find that, in addition to the appellant's personal information, the severed information contains personal information which relates to other identifiable individuals.

Because of the application of section 54(c), the appellant stands in the shoes of her son for the purposes of the *Act*, and is entitled to receive any information to which he would have a right of access under the *Act*, and to direct the disclosure of that information to her representative.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Under section 38(a), an institution may refuse to disclose personal information to the individual to whom the information relates if the exemptions in sections 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 12 or 15 would apply to the disclosure of that personal information. [Emphasis added]

LAW ENFORCEMENT

In its revised decision letter the County took the position that the information severed from the Records is exempt from disclosure under sections 8(1)(b) and (c) of the *Act*, which read as follows:

> 8. (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.
>
> (c) reveal investigative techniques and procedures that are currently in use or likely to be used in law enforcement.

As set out in the Revised Index provided by the County, the records that it claimed were subject to the exemption in section 8(1)(c) were disclosed. As a result my analysis will deal only with the exemption in section 8(1)(b).

General principles

Law Enforcement

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) of the *Act* as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

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

Under section 8(1)(b) the County 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.)]. It is not sufficient for the County to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se*

fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*, cited above].

Section 8(1)(b)

In her representations the appellant does not dispute the position of the County that the investigation conducted by the ERO in this case meets the definition of "law enforcement".

In keeping with the rulings of this office in Orders P-139, P-967, P-969 and P-1624, I find that the investigation by the ERO was an investigation undertaken with a view to a law enforcement proceeding. In my opinion, the determination by the Director whether or not to impose the sanction of terminating the appellant's benefits meets part (b) of the definition of "law enforcement" and the definition of a law enforcement investigation for the purpose of section 8(1)(b) of the *Act*.

Is the investigation ongoing?

The purpose of the section 8(1)(b) exemption is to provide the County with the discretion to preclude access to records only in circumstances where disclosure would interfere with an ongoing law enforcement investigation [Orders MO-1067, P-403 and P-1624].

The appellant submits that once a decision has been made to terminate Ontario Works benefits, and disclosure made in accordance with the *Ontario Works Act, 1997*, there is no longer any ongoing investigation.

The County indicates that the investigation by the ERO is completed and the appellant has asked for a review by the SBT of the Director's decision to terminate her assistance. However, relying on the ruling in Order P-589, the County submits that until another matter that the County describes as a proceeding, which I can not disclose due to the County's confidentiality concerns, has been completed, the investigation remains ongoing.

I do not agree with the County's position. In my opinion, the relevant investigation to be considered in this appeal is the one affecting the appellant, not another type of matter as referenced in the County's confidential submissions.

As a result, there is nothing in the record or the submissions of the County which would lead me to believe that the relevant investigation in this appeal, involving the appellant and the ERO, remains ongoing.

Accordingly, I find that the investigation by the ERO, which is the subject of the records at issue in this appeal, is no longer ongoing. These records cannot, therefore, be subject to the exemption in sections 8(1)(b) and 38(a).

INVASION OF PRIVACY

I have found above that all of the records at issue contain the personal information of the appellant. In addition, some of severed information contains personal information which relates to other identifiable individuals, including the appellant's alleged co-resident and her son.

Where a record contains the personal information of both the appellant and other individuals and the County determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, section 38(b) provides the County with the discretion to deny the appellant access to that information. This involves a weighing of the appellant's and her son's right of access to their own personal information against the other individual's right to protection of their privacy.

To determine whether the disclosure of another individual's personal information would or would not be an unjustified invasion of the personal privacy of the individual to whom the information relates under 38(b), the factors and presumptions in sections 14(2), (3) and (4) provide guidance.

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; and 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 under section 14(3), 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 (*John Doe*)] though it 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 exemption.

Because of the application of section 54(c), releasing the appellant's son's information to her or her representative pursuant to her direction, would not constitute an unjustified invasion of his personal privacy. Accordingly, the information severed from Record 2 that relates to the appellant's son should be disclosed. I will now address the other severances from Records 2, 3, 6 and 10.

If any one of the presumptions in section 14(3) applies to the information in Records 2, 3, 6 and 10, it is unnecessary to consider the application of other presumptions in that section.

Section 14(3)(b) of the *Act*, states:

> 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 County submits that the information contained in Records 2, 3, 6 and 10 was compiled as part of an investigation conducted by the ERO into a possible violation of law.

The appellant submits that:

> The County cannot argue that it is temporarily withholding documents for the purpose of SBT and at the same time take the position that it is relying upon [section] 14(3)(b). Furthermore if the County does intend to disclose the material at the SBT then the balance of 14(3)(b) applies to permit disclosure. Furthermore, if 14(3)(b) applies it should only apply to the portion of the record that contains personal information.

The appellant submits that privacy laws cannot be used to allow for "trial by ambush" at an administrative tribunal and any evidence not disclosed prior to the hearing cannot be relied on at the hearing. She says that that disclosure of the personal information contained in the records is relevant to a fair determination of her rights under section 14(2)(d) in order to allow her to prepare properly for the pending hearing before the SBT. The appellant says that while she has received disclosure of the County's case before the SBT, if there is other information which the County seeks to successfully introduce, she will require an adjournment.

Previous orders have held that records compiled and identifiable as part of an investigation into the entitlement of a person to collect benefits under the *Family Benefits Act*, the predecessor to the *Ontario Works Act, 1997*, qualifies as an investigation into a possible violation of law [Orders P-223, P-969, P-1209 and P-1624]. I see nothing in the current legislation that would lead me to conclude any differently now. In my view, the records at issue in this appeal were compiled and are identifiable as part of an investigation by the ERO into a possible violation of the provisions of the *Ontario Works Act, 1997* with respect to entitlement to benefits. As such, I find that the presumption in section 14(3)(b) applies to such information.

Although the appellant seeks to invoke the application of section 14(2)(d), as indicated above, once a presumption under section 14(3) is found to apply, the only way it can be rebutted is if the information falls under section 14(4) or where section 16 is found to apply. It cannot be rebutted by any of the circumstances in section 14(2), including section 14(2)(d). This result is dictated by the findings of the Divisional Court in *John Doe* (cited above). Section 14(4) of the *Act* does not apply in the circumstances of this appeal. The appellant did not invoke the application of section 16 of the *Act*. Subject to the discussion of "absurd result", below, the information severed from Records 3, 6 and 10 therefore qualifies for exemption under section 38(b).

Absurd Result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-613]

- the requester was present when the information was provided to the institution [Order P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

Except for the right hand portion of Record 10, the County confirmed that the balance of Records 6 and 10 were prepared as a result of a conversation with the appellant and consist of her own personal information or information which originated from her. The information in the right hand portion of Record 10, although not expressly confirmed by the County as received from the appellant, contains information that is clearly within her knowledge. As the information severed from Records 6 and 10 were provided by the appellant or are clearly within her knowledge, I find that, in the circumstances of this appeal, it would be an absurd result to withhold this information. That information is therefore not exempt under section 39(b).

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 38(b) is a discretionary exemption, I must also review the County's exercise of discretion in deciding to deny access to the balance of the information severed from Record 2 and the information severed from Record 3.

On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

I may find that the County erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose

- it takes into account irrelevant considerations

- it fails to take into account relevant considerations

In these cases, I may send the matter back to the County for an exercise of discretion based on proper considerations [Order MO-1573].

The County's representations identify the considerations it took into account in deciding to exercise its discretion not to disclose the remaining records at issue.

The County states that it exercised its discretion. It submits that it has a policy of encouraging the public to make allegations of impropriety by those in receipt of public funds and to encourage reports from the public. It submits that alternative access to the records is available, at the appropriate time, through the hearings process before SBT, which the County says has already been done. The County states that it is concerned that the personal information of others involved in the investigation and the ERO's investigative techniques will be spread throughout the community if the information is released to the appellant. This, it says, will impede its ability to receive tips of alleged wrongdoing as well as its ability to evaluate allegations of contraventions without having to spend an inordinate amount of staff of other resources to be able to confirm the allegations.

The appellant takes issue with the County's exercise of discretion. The appellant states that she is not aware of the policy alluded to by the County although there had been a fraud hotline in the past. The appellant states that the ERO has been investigating wrongdoing since 1997 and its investigative techniques have been general knowledge for many years. The appellant states that the position of the County has been inconsistent throughout this appeal and criticizes the manner in which the County dealt with the request for records and conducted itself during this appeal. For example, the appellant states that the County produced some very sensitive and personal information that relates to an individual who is alleged to have resided with the appellant yet refused to produce Record 2, which would reveal his name and date of birth.

Analysis and Findings

In my view, although its processes could have been better, the County considered the relevant factors in their exercise of discretion and did not consider irrelevant ones. A substantial amount of material that was originally withheld was ultimately provided by the County. I find that in all the circumstances the County's exercise of discretion was proper.

ORDER:

1. I order the County to disclose the withheld portions of Records 6 and 10, and parts of the withheld portion of Record 2 by sending them to the appellant by **September 23, 2005**. For greater certainty, I have highlighted the exempt information in Record 2 on the copy provided to the County with this order. The highlighted information is **not** to be disclosed.

2. I uphold the County's decision to deny access to the withheld portion of Record 3 and to the portions of Record 2 that are highlighted on the copies provided to the County with this order.

3. In order to verify compliance with provision 1 of this order, I reserve the right to require the County to provide me with a copy of Records 2, 6 and 10 as disclosed to the appellant.

Original Signed By: August 25, 2005
Steven Faughnan
Adjudicator