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

ORDER MO-2112

Appeal MA-050421-1

Hamilton Police Services Board

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 Hamilton Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the following information:

> … a copy of the Police Report by [a named police officer], on an incident that occurred on my property at approx 4:15 p.m. on July 13/05, between myself and a PoliceWoman …

The Police located six pages of responsive records, which appeared to contain information about both the requester and other individuals. Before making its access decision, the Police contacted these other individuals under section 21 of the *Act* to determine whether they would consent to the disclosure of their personal information to the requester. None of these individuals consented to such disclosure.

The Police then issued a decision letter that granted the requester partial access to the records. It denied him access to the remaining portions of the records pursuant to the discretionary exemption in section 38(a), in conjunction with the discretionary exemptions in sections 8(1)(c), 8(1)(e), 8(1)(l), 8(2)(a) and 8(2)(c) (law enforcement) of the *Act*, and the discretionary exemption in section 38(b) in conjunction with the factors listed in sections 14(2)(e), 14(2)(h) and 14(2)(i) and the presumption in section 14(3)(b) of the *Act*.

The requester (now the appellant) appealed the Police's decision to this office. During mediation, the appellant stated that he believed that additional records existed because he saw the attending police officer taking notes. The Police confirmed that the police officer took notes but stated it did not consider the notes to be responsive to the request. They suggested that the appellant file a new access request for the notes. In response, the appellant stated that it was reasonable to expect that his request for the police report would include the officer's notes.

This appeal was not settled in mediation and was moved to adjudication. Initially, I issued a Notice of Inquiry to the Police. In response, the Police submitted representations to this office. The Police asked that portions of their representations not be shared with the appellant due to confidentiality concerns. I then issued a Notice of Inquiry to the appellant, along with the non-confidential representations of the Police. In response, the appellant submitted representations to this office.

RECORDS:

The records at issue in this appeal are as follows:

Description of record	**Withheld in full or in part**	**Number of pages**
Occurrence Report	In part	1
Contact with Emotionally Disturbed Person (EDP) Report	In full	1
Occurrence Report	In part	1
Supplementary Persons Report	In full	1

Supplementary Occurrence Report	In part	2

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

In their representations, the Police submit that the access request filed by the appellant stated that he was seeking a "police report." They further submit that his request did not indicate in any way that he was also seeking the notes taken by the police officer who responded to the incident at the appellant's property:

> It was not until the appeal was launched and the appellant spoke with the mediator that the issue of notebook notes arose. If the appellant had initially asked for the police report as well as notes or documents relative to the report, the Hamilton Police Service would have addressed these as responsive records.

Consequently, the Police take the position that the police officer's notes are not responsive to the appellant's request.

The appellant did not provide representations on this issue. However, during the mediation stage of the appeal process, the appellant stated that it is reasonable to expect that his request for the "police report" would have included the notes of the police officer who responded to the incident at his property.

I have considered the submissions of both the Police and the appellant. In my view, although both the appellant and the Police failed to fully comply with section 17 of the *Act*, the Police had

a specific obligation to contact the requester and clarify whether he intended the scope of his request to include the police officer's notes.

In the circumstances of this appeal, the appellant submitted a request for a "police report," by a specific police officer relating to an incident that took place on his property. Upon receiving this request, the Police interpreted the meaning of the word "report" in a strict manner and located two Occurrence Reports, a Contact with the Emotionally Disturbed Person (EDP) Report, a Supplementary Persons Report and a Supplementary Occurrence Report. However, they did not consider the police officer's notes to be a "report" that fell within the scope of the appellant's request.

A police officer's handwritten notes are not, strictly speaking, a report, and I find that the appellant's request was technically not in full compliance with section 17(1)(b) of the *Act*, which requires requesters to provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

However, this office has held that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

In Order MO-2091, Adjudicator Beverley Caddigan dealt with the same responsiveness issue as in this appeal, but with a different police service. She stated that it would have been reasonable to expect the Police to contact the appellant to determine whether "reports" should be read as including relevant notes taken by police officers.

I agree with Adjudicator Caddigan. In the circumstances of this appeal, it is clear from the appellant's request that he wishes to scrutinize the police record holdings relating to the incident that took place on his property, because he believes that the Police acted improperly. In my view, it would have been reasonable for the Police to ask themselves, after receiving the request, whether the appellant had intended the term "police report" to include the notes of the attending officer.

In other words, if the Police had adopted a liberal rather than a narrow interpretation of the request, they would have contacted the appellant and asked him whether he intended the scope of his request to include the police officer's notes. In short, I find that the Police did not comply with their obligations under section 17(2) of the *Act*, which requires an institution to contact the requester if his or her request lacks sufficient detail, and to offer the requester assistance in reformulating the request.

There is, however, no longer any ambiguity about the scope of the request. The appellant clearly stated during mediation that he is seeking the notes of the police officer who responded to the incident at his property. Consequently, I will order the Police to issue an access decision to the appellant on these records.

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. That term is defined in section 2(1) 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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. 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].

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 Police state that the records contain information about identifiable individuals, particularly the neighbours of the appellant. They submit that this information is personal information, as defined in section 2(1) of the *Act*.

The appellant did not provide representations as to whether the records contain personal information.

I have carefully reviewed the records at issue, which contain information about a number of individuals, including the appellant, his neighbours, police officers and physicians.

I find that the records contain the personal information of the appellant, because they include his race, age (birth date) and sex, as specified in paragraph (a) of the definition of "personal information" in section 2(1) of the *Act*, two identifying numbers assigned to him (FPS number and driver's licence number), as specified in paragraph (c), and his address and telephone number, as specified in paragraph (d). In addition, the records include the views or opinions of another individual about the appellant, as specified in paragraph (g), and his name along with other personal information relating to him, as specified in paragraph (h) of the definition.

I find that the records also include the personal information of the appellant's neighbours, because they include the age (birth date) and sex of these individuals, as specified in paragraph (a) of the definition of "personal information" in section 2(1) of the *Act*. They also include the neighbours' addresses and telephone numbers, as specified in paragraph (d), and their names along with other personal information relating to them, as specified in paragraph (h).

Both the Contact with the Emotionally Disturbed Person (EDP) Report and the Supplementary Persons Report, which have been withheld in full, contain the names, badge numbers and job titles of a number of police officers. Moreover, the first Occurrence Report, the Contact with the Emotionally Disturbed Person (EDP) and the Supplementary Occurrence Report contain the names of two physicians who have treated the appellant. The Police have severed these physicians' names from the records at issue, even though the appellant is fully aware of their identities.

In my view, the information in these records relating to the police officers and the two physicians does not qualify as their personal information, because it relates to these individuals in their professional rather than their personal capacities. The personal privacy exemptions in the *Act* can only apply to information that qualifies as "personal information." Accordingly, sections 38(b) or 14(1) cannot apply to the information that relates to the police officers and the two

physicians. As the Police have not claimed any other exemptions for this professional information, it must be disclosed to the appellant.

I will now consider whether the remaining portions of the records that the Police have withheld qualify for exemption pursuant to sections 38(a) and (b) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

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 has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

Law Enforcement

In their decision letter to the appellant, the Police denied access to portions of the records pursuant to the discretionary exemption in section 38(a) in conjunction with sections 8(1)(c), 8(1)(e), 8(1)(l), 8(2)(a) and 8(2)(c) of the *Act*.

Sections 8(1)(c), (e) and (l) state:

> 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;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

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

> 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. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (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 an institution 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* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

The Police provided minimal representations to support their decision to withhold access to portions of the records at issue pursuant to the discretionary exemption in section 38(a) in conjunction with sections 8(1)(c), 8(1)(e), 8(1)(l), 8(2)(a) and 8(2)(c) of the *Act*. The only representations they have made with specific reference to section 8 of the *Act* are as follows:

> Section 8 is a discretionary law enforcement exemption. The affected individuals furnished the investigating officers with information in confidence, and now this Police Service has an obligation to maintain the confidentiality or else the police could not reasonably expect people to come forward with information.
>
> We need to maintain the integrity of investigative 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. The Police Service did not receive consent from the affected parties.

These representations bear little connection to the specific section 8 exemptions claimed by the Police. In short, I find that the Police have failed to provide sufficiently detailed and convincing evidence to establish that disclosure of the withheld portions of the records could reasonably be expected to:

- reveal investigative techniques and procedures currently in use or likely to be used in law enforcement [section 8(1)(c)]; or

- facilitate the commission of an unlawful act or hamper the control of crime [section 8(1)(l)].

They have also not provided me with sufficiently detailed representations to establish whether disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person [section 8(1)(e)]. In various portions of both their confidential and non-confidential representations, they suggest that safety may be an issue if the withheld information is disclosed, but they do not provide any submissions on the specific application of section 8(1)(e) to the information that is actually contained in the records.

The Police have also failed to provide me with sufficient representations to support their claim that the records at issue should not be disclosed because:

- they are reports 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 [section 8(2)(a)];

- they are law enforcement records and 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 [section 8(2)(c)].

In short, I have virtually no evidence before me, other than the brief passages from the Police's representations cited above, that would support the Police's decision to deny access to portions of the records pursuant to the discretionary exemption in section 38(a) in conjunction with sections 8(1)(c), 8(1)(e), 8(1)(l), 8(2)(a) and 8(2)(c) of the *Act*.

I would note, however, that the Police have withheld "police codes" from the records at issue. This office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to "10 codes" (see Orders M-93, M-757, MO-1715 and PO-1665), as well as other coded information such as "900 codes" (see Order MO-2014). These orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:

> In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

Although the Police have not provided any representations as to why they severed police codes in the records at issue, I accept that this information may be withheld pursuant to section 8(1)(l)

of the *Act*. Consequently, I find that the police codes in the records at issue qualify for exemption under section 38(a) in conjunction with section 8(1)(l) of the *Act*.

However, I find that the Police have failed to discharge the burden of demonstrating that the balance of the withheld portions of the records falls within the discretionary exemption in 38(a) in conjunction with the sections 8(1)(c), 8(1)(e), 8(1)(l), 8(2)(a) and 8(2)(c) of the *Act*. Consequently, I will now determine whether this remaining information qualifies for exemption pursuant to the discretionary exemption in section 38(b) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

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 exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met. Section 14(1) sets out certain exceptions to the general rule against the disclosure of personal information that relates to an individual other than the requester. The only exception which may have some application in the circumstances of this appeal is set out in section 14(1)(f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, if the disclosure does not constitute an unjustified invasion of personal privacy.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The parties' representations

The Police submit that the discretionary exemption in section 38(b) of the *Act* applies to the information at issue. In particular, they submit that the presumption in 14(3)(b) is applicable, and the "considerations contained in s. 14(2) of [the *Act*] are not appropriately applied in this case." They further submit that they have engaged in a careful balancing of access and privacy rights:

> … we have examined the information in its entirety and weighed the appellant's right of access to his own information against the affected individuals' right of privacy. It is the belief of this institution that disclosure of the information contained in the record would constitute an unjustified invasion of personal privacy of the third [parties].

Moreover, the Police submit that even if the section 14(3)(b) presumption does not apply, the following considerations listed in section 14(2) are relevant:

- section 14(2)(e) (pecuniary or other harm),
- section 14(2)(h) (supplied in confidence), and
- section 14(2)(i) (unfair damage to reputation).

The appellant's representations do not address whether the discretionary exemption in section 38(b) applies in the circumstances of this appeal. Instead, he argues that, "In response to the request of third parties not to have their statements released, I can only say that there [are] two sides to every story … and I should be allowed to respond to theirs."

Analysis and findings

I have carefully reviewed the records at issue and considered the representations of both the Police and the appellant.

The Police have withheld personal information relating to the appellant from the following records: the first Occurrence Report, the Contact with Emotionally Disturbed Person (EDP) Report, the second Occurrence Report, and the Supplementary Occurrence Report. I find that the information that relates solely to the appellant can be severed without resulting in an unjustified invasion of the personal privacy of another individual. Disclosure of a requester's own personal information to him cannot be an unjustified invasion of another individual's personal privacy. Accordingly, this information is not exempt under section 38(b), and I will order it disclosed.

The Police have not disclosed the personal information relating to the appellant's neighbours from the following records: the Contact with Emotionally Disturbed Person (EDP) Report, the

second Occurrence Report, the Supplementary Persons Report and the Supplementary Occurrence Report. In my view, this information falls within the ambit of section 14(3)(b) of the *Act* which 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;

I find that the Police were called to investigate an incident which gave rise to the creation of the records at issue. The personal information of the appellant's neighbours in these records was compiled by the Police and is identifiable as part of their investigation into a possible violation of the Criminal Code or other laws. Consequently, I find that the section 14(3)(b) presumption applies to this personal information.

The Divisional Court's decision in the *John Doe* case, cited above, precludes me from considering whether the section 14(3)(b) presumption can be rebutted by either one or a combination of the factors set out in section 14(2). However, a presumed unjustified invasion of personal privacy under section 14(3) can be overcome if section 14(4) or the "public interest override" at section 16 applies.

I have considered the application of the exceptions contained in section 14(4) of the *Act* and find that the personal information at issue does not fall within the ambit of this section. Moreover, the public interest override at section 16 does not apply, because the appellant has not referred to it.

Accordingly, I find that the personal information of individuals other than the appellant (i.e., the appellant's neighbours) is exempt under section 38(b) of the *Act*.

EXERCISE OF DISCRETION

The sections 38(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution 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 either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that:
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Police submit that they took into account all relevant circumstances and were careful not to take into account extraneous, irrelevant or unreasonable considerations. They state that the following factors were applied in exercising their discretion to refuse disclosure of the information at issue:

- Whether there is sympathetic or compelling need to release the information. The Hamilton Police Service reviewed the request from the appellant to see if there was compelling need to release the information.

- The Hamilton Police Services considered the statements of the affected individuals to be their opinions and views, and thus qualify as personal information pursuant to s. 2(1) of the *Act*.

- The … [legislation] allows for the exercise of discretion after consideration of the balance between the requester's right of access and that of the individual's right of privacy. No argument has been presented that would clearly outweigh the purpose of the exemption.

The appellant's representations did not address whether the Police had exercised their discretion pursuant to sections 38(a) and (b) of the *Act*, and whether this office should uphold that exercise of discretion.

In my view, the Police considered the relevant factors in their exercise of discretion and did not consider irrelevant ones. I find that the Police's exercise of discretion was proper.

ORDER:

1. I order the Police to issue a decision letter to the appellant with respect to the notes taken by the police officer named in the appellant's request who responded to the incident at his property on July 13, 2005. This decision letter must be issued in accordance with sections 19, 21 and 22 of the *Act*, treating the date of this order as the date of the request.

2. I uphold the Police's decision to deny access to those portions of the records that contain the personal information of the appellant's neighbours and any police codes. I have highlighted the exempt portions in green on a copy of the records that I am sending to the Police. To be clear, the Police must *not* disclose the green highlighted portions to the appellant.

3. I order the Police to disclose the remaining information in the records that I have found does not qualify for exemption under the *Act*, including the personal information of the appellant and the professional information of the police officers and the two physicians. These portions of the records are not highlighted on the copy that I am sending to the Police. To be clear, the Police must disclose to the appellant any information on the records that I have not highlighted in green.

4. I order the Police to provide a copy of the records to the appellant by **December 6, 2006** but not before **December 1, 2006**.

5. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: October 31, 2006
Colin Bhattacharjee
Adjudicator