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

ORDER MO-2175

Appeal MA06-318

Hamilton Police Services Board

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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:

> Occurrence Report, Report from Hamilton Police COAST [Crisis Outreach and Support team] Unit dated [an identified date].
>
> Occurrence Report from other party [a named individual and an identified address].

The Police located three pages of responsive records. Following notification of an affected individual pursuant to section 21 of the *Act*, the Police issued a decision granting partial access to a two-page General Occurrence Report. Access was denied to the remainder of the two-page General Occurrence Report, and an additional one-page "General Report", on the basis of the exemptions found in sections 8(1)(l) (facilitate commission of an unlawful act), 8(2)(a) and (c) (law enforcement) and 14(1) (invasion of privacy), with reference to the presumptions in sections 14(3)(a), (b), and (g), and the factors in sections 14(2)(a), (e), (f) and (i) of the *Act*.

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

During mediation, the appellant confirmed that he was appealing the decision to deny access to the withheld portions of the records, and that he was also appealing on the basis that additional records responsive to his request ought to exist. In support of his position that additional records exist, the appellant maintained that he had seen a female police officer interview the named individual's husband on a particular date, and take notes of the interview. The Police subsequently conducted a further search for responsive records, and located 2 additional records. The nature of these records were discussed between the parties, and the appellant indicated that neither of these records are at issue in this appeal.

Also during mediation, the Police agreed to contact the two officers involved in this matter, in order to attempt to locate responsive records pertaining to the named individual's husband. One of the officers stated that he had not interviewed the husband and therefore did not have notes of an interview. The Police also advised that the other officer did not meet with the named individual's husband.

Finally, as the records at issue appear to contain the appellant's own personal information, the mediator identified sections 38(a) and (b) (discretion to refuse requester's own information) as possible issues in this appeal.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry, setting out the facts and issues in the appeal and inviting representations on them, to the Police. The Police provided representations in response. In their representations, the Police state that they are no longer relying on the exemptions in sections 8(2)(a) or 8(2)(c), and those sections are no longer at issue in this appeal.

In addition, after sending the Notice of Inquiry to the Police, I received correspondence from the appellant in which he identifies and discusses a number of issues in this appeal.

I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the representations of the Police, to the appellant. I did not receive any further representations from him. The appellant advised me, however, that he was relying on the information provided by him to this office in his earlier correspondence.

RECORDS:

The records remaining at issue consist of portions of a 2-page Occurrence Report (pages 1 and 2), and all of a one-page General Report (page 3).

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the *Act* states:

> "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].

Findings

The Police take the position that the withheld portions of the 2-page Occurrence Report, and all of the one-page General Report, contain the personal information of the appellant, as well as the personal information of other individuals, including their name, address, date of birth and phone number.

I have examined the records at issue, both of which relate to an incident involving the appellant and others. The records contain the name and address of the appellant, as well as information about communications between the appellant and an identified police officer. In addition, the records also contain the name and address of another individual, as well as other information about this individual, including statements this individual made to the Police. In my view, the records contain the personal information of the appellant in accordance with paragraphs (d) and (h) of the definition of the term "personal information" in section 2(1) of the *Act* (Orders MO-1245, MO-1795). I also find that portions of the records contain the personal information of another identifiable individual, in accordance with paragraphs (d) and (h) of the definition of the term "personal information" in the *Act*.

However, on my review of the records, I find that not all of the information that was severed by the Police and not disclosed to the appellant contains the personal information of identifiable individuals other than the appellant. In particular, I find that one of the severances made to page one of the records, and three brief severances made to page two of the records, do not contain the personal information of identifiable individuals other than the appellant for the purpose of section 2(1). These four severances contain information relating to named Police employees or officers. In my view, this information is associated with these individuals in their professional or

official capacity, and is not, accordingly, "about" these individuals. In addition, I am satisfied that the disclosure of this information would not reveal something of a personal nature about these individuals. As a result, I find that those severances do not contain "personal information" as that term is defined in section 2(1) of the *Act*. As no other exemptions have been claimed for those portions of pages one and two, I will order that they be disclosed to the appellant.

In addition, I find that the patrol zone information found on pages one and three of the records does not contain the personal information of any other identifiable individuals. The Police have claimed the discretionary exemption in section 38(a), in conjunction with section 8(1)(l), to those portions of the records. I will review the possible application of those sections to these portions of the records, below.

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 deciding 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.

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

In this appeal, the Police rely on the "presumed unjustified invasion of personal privacy" in 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;

As identified above, the records consist of portions of the 2-page Occurrence Report, and a one-page General Report. The Police state that the presumption in section 14(3)(b) "was used due to the fact that the [Police were] contacted in order to investigate a neighbour trouble dispute". The Police also provide additional confidential representations in support of their position that the presumption in section 14(3)(b) applies.

The material provided by the appellant focuses on certain concerns he has about the actions of various officials and others; however, the appellant does not address the issue of whether the presumption in section 14(3)(b) applies to the records.

Findings

I have carefully reviewed the records at issue in this appeal and I am satisfied that they were compiled by the Police in the course of their investigation of the circumstances surrounding the incident involving the appellant and others. I find that all of the information at issue in this appeal was compiled and is identifiable as part of the Police investigation into a possible violation of law under section 14(3)(b). The presumption still applies, even though no charges were laid in this case (Orders P-223, P-237 and P-1225). Accordingly, I find that the disclosure of the personal information contained in the records is presumed to constitute an unjustified invasion of the personal privacy of the affected person and other identifiable individuals under section 14(3)(b) of the *Act*.

In his representations, the appellant identifies a number of reasons why he is interested in obtaining the records at issue. In addition, the appellant indirectly raises the factor in section 14(2)(d) in support of his position that he ought to have access to the records, as he refers to

contemplated legal actions. However, as set out above, 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 section 14(2) (*John Doe v. Ontario*).

The records at issue contain the personal information of the appellant, as well as other identifiable individuals, and I have found that the presumption in section 14(3)(b) applies to this information. In addition, I find that the exception set out in section 14(4) does not apply, and the appellant has not raised the application of the "public interest override" in section 16. Accordingly, I find that the undisclosed portions of the records are exempt from disclosure under section 38(b) of the *Act*.

The section 38(b) exemption is discretionary and permits the Police to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Police'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).

The Police disclosed certain portions of pages one and two to the appellant, and denied access to other portions of pages one and two, and all of page three. I have reviewed the circumstances surrounding this appeal, as well as the Police's representations on the manner in which they exercised their discretion, and I am satisfied that the Police have not erred in the exercise of their discretion not to disclose the remaining portions of the records under section 38(b).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/FACILITATE COMMISSION OF AN UNLAWFUL ACT

As set out above, 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.

The Police have relied on section 38(a) to deny access to certain undisclosed portions of the records (the severed patrol zone information found on two pages of the records). Under section 38(a), an institution has the discretion to deny access to an individual's own personal information in instances where the exemption in section 8 would apply to the disclosure of that personal information.

The Police claim that section 8(1)(l) applies to the "patrol zone information" in the records. Section 8(1)(l) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

The appellant does not address this issue in the material he provided to this office.

Previous orders have established that the disclosure of police patrol zone information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime (see Orders M-781, MO-2065). Having reviewed the record at issue, and in keeping with the findings made in those previous orders, I find that the patrol zone information is properly exempt under section 38(a), in conjunction with section 8(1)(l).

REASONABLE SEARCH

As identified above, the appellant takes the position that additional records responsive to his request should exist. In support of his position, the appellant maintains that he saw a female Police Officer interview the named individual's husband on a particular date, and take notes of the interview. During mediation, the Police conducted a further search for responsive records, and also contacted the two officers involved in the investigation of this matter in an effort to locate responsive records. One of the officers stated that he had not interviewed the husband and, therefore, did not have notes of an interview. The Police also advised that the other officer did not meet with the named individual's husband.

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. The *Act* does not require the Police to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the *Act*, the Police must establish that they have made a reasonable effort to identify and locate records responsive to the request.

In their representations on the search issue, the Police take the position that they conducted a reasonable search for the records. In support of their position, they review the steps taken to respond to the request, and state:

> Initially when the appellant made the request, he was specific about the date of the occurrence and the fact that it was the COAST unit that had responded …
>
> Our first step is to query the requestor's name on our in-house records management system to obtain the occurrence report number. The occurrence was printed off of that system and we identified the officers involved in the report. The officer that initiated the report was [a named officer]; … as [the named officer] does not perform patrol duties she submitted this report and request a follow up be completed by reassigning it to the COAST unit. … the information that [the named officer] documented in the report led us to contacting the [named] COAST officer, to seek clarification from him as to whether the investigation was concluded or ongoing (which is a normal requirement before we release reports.)
>
> [The named COAST officer] responded … via email confirming [that the investigation] had been concluded and that he had submitted a supplementary report which gets attached to [the] original report.

The Police then state that, after identifying the responsive records, the Police responded to the request, and were subsequently notified that the appellant had appealed the decision of the Police. The Police then identify the steps taken by them once they were aware that the appellant believed additional responsive records exist. In their representations, the Freedom of Information Co-ordinator for the Police states:

> [During mediation] I received a phone call from [the Mediator] advising me that the appellant believes there should be more records relating to the … husband and specifically … that he had seen a female officer with a clipboard speaking to the … husband. There was no reference to this on our original occurrence done by [the first named officer] or on the supplemental report done by [the named COAST officer] ...
>
> I conducted another search for additional records by doing another in-house query on our records management system and checking any other reports that the appellant had been involved in regardless of the fact that they had not specifically been requested [in the appellant's request letter]. [Documents] that referred to the … husband were located.

The Police then confirm that, during mediation, the appellant stated that these documents were not responsive to the request, and that he was not interested in them. The Police then state:

> Also as a result of mediation I contacted both officers to seek further clarification. [The named officer], to ask if she had attended the residence (possibly being the female that the appellant insists he saw) and [the named COAST officer], asking if he had spoken to the … husband. Both of those turned up negative as [the named officer] does not leave the station and [the named COAST officer] advised he had not had any conversations with [other individuals] in this matter and had only dealt with the appellant. Neither officer had anything further to add to this.

The Police also provide additional information about the searches that were conducted, following which the Freedom of Information Co-ordinator for the Police states:

> Once all of those avenues had been exhausted I performed one more search, and that was to contact the COAST office directly and ask if there had been a female COAST person that had responded with [the named COAST officer]. This person would be a nurse and not a Police Officer. [The named COAST officer's] partner at the time had been a female, however she does not wear a uniform, nor did she fit the description or speak to anyone other than the appellant.

The appellant did not provide representations in response to the Police's representations on the search issue. In the material submitted earlier by the appellant, however, the appellant maintains that additional responsive records should exist. In support of his position, the appellant refers to a possible discrepancy in the dates of the information requested. He also argues that, given the circumstances of the incident, an interview of the identified individual's husband ought to have

occurred. In addition, the appellant states that he "personally witnessed the interview and the statement being given approximately seven hours before the COAST Unit visited my home", although he concedes that he did not hear what was said in the interview. Finally, the appellant refers to numerous incidents involving various individuals, and the concerns he has about them.

Findings

As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*. The *Act* does not require the Police to prove with absolute certainty that records or further records do not exist. In order to properly discharge its obligations under the *Act*, the Police must provide me with sufficient evidence to show that they have made a reasonable effort to identify and locate records responsive to the request.

In this appeal the appellant believes additional responsive records should exist, and refers to various incidents which occurred and the concerns he has about them. He also refers to a conversation which he "personally witnessed" and which he maintains took place between a police officer and an identified individual on the morning of a day when the police also attended at his property. He relies on this information to support his position that additional responsive records ought to exist.

I have carefully reviewed the information provided to me by the parties on the issue of whether the search conducted by the Police was reasonable. The appellant believes additional responsive records should exist, and has provided evidence in support of his position. In the circumstances, however, I am satisfied that the Police's search for records responsive to the request was reasonable.

To begin with, many of the incidents referred to by the appellant (some of which occurred after the request was made) have little or no relevance to the issue of whether the Police made a reasonable effort to search for records responsive to the request in this appeal. Furthermore, although the appellant takes the position that the Police should have interviewed an identified individual, the question of what action the Police should have taken in dealing with a situation is not at issue in this appeal. The sole issue left for me to determine is whether the search conducted by the Police for records responsive to the request was reasonable.

The appellant's statement that he personally witnessed a conversation between a police officer and an identified individual is very relevant to the issue before me, and I have carefully reviewed the material provided by the parties in light of that statement. I note that, although the appellant states that he witnessed the conversation, he has not provided evidence that he heard what was discussed between the police officer and the individual (although he believes that the conversation related to him).

The representations of the Police clearly identify the steps taken by the Police in response to the appellant's request, and also identify the further steps taken in response to the appellant's position that addition responsive records exist. These steps include running queries on the

Police's computer system, locating responsive records and cross-referencing those records to other records, and contacting the police officers and others involved in this matter.

With respect to the appellant's specific position that notes of an identified interview ought to exist, the Police have indicated that the original request did not include a request for this information. Notwithstanding their position that the request did not include this specific information, the Police indicate that they conducted further searches for records, and that they:

> … conducted another search for additional records by doing another in-house query on our records management system *and checking any other reports that the appellant had been involved in* regardless of the fact that they had not specifically been requested [in the appellant's request letter]. [emphasis added]

As a result of this additional search, no additional records were located (other than two that the appellant indicated he was not interested in).

Based on the evidence provided to me, I find that the searches conducted by the Police for responsive records were reasonable. Even if I were to accept that the appellant witnessed an interview conducted between the Police and an identified individual (and I have no reason to believe that this statement is not accurate), I am not satisfied that this means that additional responsive records exist with the Police. If this conversation took place as submitted by the appellant, it could have involved other matters or incidents not related to the appellant, in which case any records relating to this event would not be responsive to the request.

In the circumstances, and based on the information provided to me, I find that the Police's search for records was reasonable.

ORDER:

1. I order the Police to disclose to the appellant one of the severances made to page one of the records, and three brief severances made to page two of the records, by **April 25, 2007**. For greater certainty, I have highlighted those severances which the Police are to disclose, on the copies of those pages sent to the Police along with this order.

2. I uphold the decision by the Police to withhold the remaining severed portions of the records.

3. I find that the Police have conducted a reasonable search for records responsive to the request.

4. I reserve the right to require the Police to provide me with a copy of the portions of the records which are disclosed to the appellant pursuant to Provision 1, upon request.

Original signed by: March 22, 2007
Frank DeVries
Adjudicator