



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2446

Appeal MA08-323

Halton Regional Police Services Board



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NATURE OF THE APPEAL:

The Halton Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

All Occurrence Reports pertaining to [specified address] between [specified dates] including, but not limited to officers notes, radio calls, telephone calls, 911 calls and any other documentation that was generated, completed or authorized pursuant to the above-noted premises during the relevant period of time.

The Police located the responsive records and, after not receiving the consent of a person whose personal information may be in contained in the records (the affected person), issued a decision letter denying access in full to the 911 call recording, but providing partial access to the police officers' notebooks. The Police severed the personal information in the records under sections 14(1) (personal privacy) and 8(1) (law enforcement) of the *Act*. The Police removed non-responsive information, and also noted that "No Report" had been created for this incident.

The requester, now the appellant, appealed this decision.

During mediation the appellant removed the issue of the Police's search for responsive records and the non-responsive information in the records from the appeal. However, the severances under sections 14(1) and 8(1) remained at issue. During mediation, the mediator raised the application of section 38(a) and (b) (right of access to one's own personal information) as the appellant is an individual named in the records. As mediation did not resolve the issues in this appeal, I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the Police and the affected person initially. I received representations from the Police only, a copy of which was sent to the appellant, along with a Notice of Inquiry. Portions of the Police's representations were withheld due to my concerns about confidentiality. I received representations from the appellant. I then sent a copy of the appellant's representations to the Police, seeking reply representations. I received reply representations from the Police.

RECORDS:

The records consist of a 911 call recording and excerpts from two police officers' notebooks. The Police have claimed that section 8(1) applies to the police officers' division, district, bureau, pistol serial, handcuff and aerosol spray numbers contained on the cover pages and the police operational codes contained on pages 192, 195, 154 and 157 of the police officers' notes. They have claimed that section 38(b) (personal privacy) applies to remaining information severed from the records.

DISCUSSION:

PERSONAL INFORMATION

I will first determine whether the information at issue in the records (except for the information for which the Police claim that section 8(1) applies) contain “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, 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.)]. The information must also 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 and 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 and PO-2225].

Section 2.1 of the *Act* modifies the definition of the term “personal information” by excluding an individual’s name, title, contact information or designation which identifies that individual in a “business, professional or official capacity”. Section 2.2 further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as “personal information” for the purposes of the definition in section 2(1).

The Police submit that the records contain the mixed personal information of the affected person and the appellant including their names, addresses, dates of birth, telephone numbers and statements.

The appellant did not provide representations on this issue.

Analysis/Findings

The records were created following the affected person’s 911 telephone call to the Police about the appellant’s attendance at the affected person’s place of business. The Police then attended at the affected person’s place of business and made notes in their notebooks about the appellant’s attendance there.

Upon my review of the records, I find that they contain the personal information of both the appellant and the affected person. The Police have provided the appellant with disclosure of some of the information in the police officers’ notebooks. I find that portions of records that remain at issue contain the personal information of the affected person. This personal information consists of the affected person’s date of birth, as well as his home and cell phone numbers and his home address. This qualifies as the affected person’s personal information in accordance with the definition of that term in section 2(1).

I find that other than this personal information of the affected person, the information that remains at issue in the records is not the affected person’s personal information. This is information associated with the affected person in a business capacity, and includes his opinions or views of the appellant, as well as the affected person’s name which appears with this personal information of the appellant.

In particular, I find that the entire 911 call recording made by the affected person, except for his cell phone number, and most of the information at issue in the police officers' notebooks, such as the affected person's name, his title, the address of the place of business and the information provided to the affected person by the Police about what his response should be about keeping the appellant from attending at the affected person's place of business, is not personal information. As no other exemptions have been claimed for this information, I will order it disclosed.

As a result of my finding that the records contain the affected person's and the appellant's personal information, sections 38(a) and (b) apply in the circumstances of this appeal.

PERSONAL 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 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.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b). If paragraph (a), (b) or (c) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The information does not fit within paragraphs (a) to (e) of section 14(1) nor does section 14(4) apply.

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). 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 Police rely on the presumption in section 14(3)(b). They submit that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law. They state that:

[they] were called to investigate an unwanted person on a private property, a trespass, thereby quite possibly a violation of law. The undisclosed information was compiled as part of a law enforcement investigation and disclosure would constitute an unjustified invasion of the privacy of the affected party, except to the extent that it is necessary to prosecute a violation of law...

The personal information contained within the notebook entries and the 911 call contains information gathered from a third party, necessary to compile the investigative file for the Police. The information was compiled in order to investigate a trespass onto private property.

Therefore since the personal information relates to records compiled as part of an investigation into the incident, disclosure of this material would constitute as an unjustified invasion of personal privacy, without written consent.

The appellant does not address the applicability of section 14(3)(b) in his representations.

Analysis/Findings

Upon my review of the personal information at issue, I find that it was compiled and is identifiable as part of an investigation by the Police into a possible violation of law as contemplated by section 14(3)(b). The already disclosed information from the record reveals that the Police were investigating whether a charge of trespass pursuant to the *Criminal Code of Canada* should be laid against the appellant.

The presumption in section 14(3)(b) applies to the personal information at issue even though criminal proceedings were not commenced. The presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law [Order P-242].

This presumed unjustified invasion of personal privacy under section 14(3), cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), cited above]. 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*, cited above]. Section 16 has not been raised by the appellant and, as stated above, section 14(4) is inapplicable in this appeal.

Accordingly, subject to my review below of the Police’s exercise of discretion, I conclude that disclosure of the affected person’s date of birth, as well as his home and cell phone numbers and his home address is presumed to constitute an unjustified invasion of the personal privacy of the affected person under section 38(b).

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

I will now determine whether the discretionary exemption at section 38(a) in conjunction with the section 8(1) exemption apply to the police operational codes in the police officer notebooks

and the police officers' division, district, bureau, pistol serial, handcuff and aerosol spray numbers contained on the cover pages of these police officers' notebooks.

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.

In this case, the institution relies on section 38(a) in conjunction with sections 8(1)(e) and (l).

Sections 8(1)(e) and (l) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (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.

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) 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, or
- (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.)].

Where section 8(1) 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.)].

In the case of section 8(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (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* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Neither the Police nor the appellant provided representations on the applicability of sections 8(1)(e) and (l) to the information at issue.

I note that this office has applied section 8(1) to exempt police operational codes. This office has consistently found that section 8(1)(l) applies to these codes (for example, see Orders M-93, M-757, MO-1715, MO-2414 and PO-1665). These orders adopted the reasoning stated in Order PO-1665 by Adjudicator Laurel Cropley:

In my view, disclosure of the “ten-codes” would leave OPP [Ontario Provincial Police] 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.

I agree with Adjudicator Cropley’s reasoning and find that it is relevant in the circumstances of this appeal.

I am satisfied that disclosure of the police operational codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that this information that has been withheld from the appellant qualifies for exemption under section 8(1)(l) of the *Act*.

The Police have withheld the police officers’ division, district, bureau, pistol serial, handcuff and aerosol spray numbers from the cover pages of the two police officer notebooks. One of the cover pages contains all of these numbers, whereas the other cover page does not contain the bureau and pistol serial numbers. In Order PO-2455 (upheld on judicial review on this point in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 231 O.A.C. 230), Adjudicator Steven Faughnan determined that section 14(1)(l) of the provincial *Act*, the equivalent of section 8(1)(l) of the *Act*, applied to the disclosure of entire serial numbers of guns contained in a police database. He found that knowledge of the serial number could be used by criminals to re-serialize illegal guns. This could hamper the ability of police agencies to identify such weapons if they are used for criminal act. He stated:

Nevertheless, bearing in mind the need to approach the law enforcement exemption in a sensitive manner, and also the difficulty in predicting future events in a law enforcement context, I am satisfied that some information could permit the cross-referencing or other misuse of a firearms serial number in the database, and its disclosure could reasonably be expected to facilitate unlawful acts or hamper the control of crime.

I agree with and adopt this reasoning concerning the pistol serial number contained on the cover page of the police officer notebook and find that section 8(1)(l) applies to this information.

The Police have also withheld the police officers' division, district, bureau, handcuff and aerosol spray numbers from the police officer notebooks' cover pages. In the absence of "detailed and convincing" evidence to establish a "reasonable expectation of harm", I cannot find that disclosure of this information could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person or that disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Therefore, I find that sections 38(a) in conjunction with 8(1)(e) and (l) do not apply to the police officers' division, district, bureau, handcuff and aerosol spray numbers. As no other exemption has been claimed for this information, I will order it disclosed.

EXERCISE OF DISCRETION

I will now determine whether the Police exercised their discretion in a proper manner under section 38(a) concerning the police operational codes and the pistol serial number and under section 38(b) concerning the affected person's date of birth, home and cell phone numbers and home address.

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

Neither the Police nor the appellant provided representations specifically addressing the Police's exercise of discretion. However, the Police's submissions reflect the manner in which discretion was exercised. Having regard to the Police's representations, I am satisfied that they have properly taken into account only relevant factors, in exercising their discretion to withhold the portions of the records that I have found subject to sections 38(a) and (b). I am also satisfied that the Police did not exercise their discretion in bad faith, for an improper purpose or took into account irrelevant factors.

With respect to the information that was not disclosed to the appellant, I am satisfied that the Police properly exercised their discretion to withhold the police operational codes and the pistol serial number having regard that the purpose of the section 38(a) in conjunction with section

8(1)(l) exemption is to prevent the commission of an unlawful act or hamper the control of crime.

I also find that the Police properly exercised their discretion to withhold the affected person's date of birth, home and cell phone numbers and home address having regard that the purpose of section 38(b) is to protect the privacy of identifiable individuals. I agree with the Police's representations that this information is sensitive and disclosure could lead to significant personal distress.

Having regard to the above, I find that the Police properly exercised their discretion in deciding to withhold the information I found exempt under sections 38(a) and (b).

ORDER:

1. I order the Police to disclose **by September 14, 2009 but not before September 9, 2009**, all of the information in the records except for the affected person's date of birth, home and cell phone numbers and home address and the police operational codes and the pistol serial number contained in the police officers' notebooks and the affected person's cell phone number in the 911 call recording.
2. For ease of reference I have highlight the information that should *not* be disclosed to the appellant on the copy of the police officers' notebooks that accompany this order to the Police.
3. 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 disclosed to the appellant pursuant to provision 1, upon my request.

Original signed by: _____
Diane Smith
Adjudicator

August 7, 2009