



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

ORDER MO-2551

Appeal MA10-17

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 access to information relating to a complaint filed against the requester. Specifically, the requester sought access to two specified occurrence reports and to a report filed by a named police officer, on a particular day.

The Police located the responsive records and issued a decision letter advising that partial access had been granted to a report relating to specified incident (incident #1), but that access has been denied in its entirety to another report relating to a specified incident (incident #2) citing the personal privacy exemption at 38(b) of the *Act*. In their decision letter, the Police further advised that information pertaining to ten-codes, patrol zone and/or statistical codes has been removed from the records, pursuant to the law enforcement exemption at section 38(a) in conjunction with section 8(1) of the *Act*.

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

During mediation, the mediator contacted the individual whose personal information is contained in the records at issue (the affected person), to seek his views on disclosure. The affected person objected to disclosure.

During mediation, the Police decided to reconsider their decision, and as a result, issued a revised decision letter advising that access had been granted to the personal information relating only to the appellant, which is contained in an occurrence report with respect to incident #2. The Police further advised that they continue to deny access to the remaining portions of the records, as disclosure would constitute an unjustified invasion of another individual's privacy.

In response, the appellant indicated that she wished to pursue access to the undisclosed portions of the records, as she takes the position that this information is relevant to a fair determination of her rights, raising the possible application of the factor favouring disclosure in section 14(2)(d) of the *Act*. The appellant further indicated that she is not pursuing access to the "ten-codes", patrol zone information, and/or statistical codes that have been severed from the records. Accordingly, section 8(1), in conjunction with section 38(a) of the *Act*, are no longer at issue in this appeal.

No further mediation was possible and the file was transferred to adjudication where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry setting out the facts and issues in this appeal to the Police and the affected person. I received representations from both, copies of which were sent to the appellant, along with a Notice of Inquiry. Portions of the affected person's representations were withheld from the appellant due to confidentiality concerns. The appellant provided representations in response. I then sent a complete copy of the appellant's representations to the Police and a severed copy of the appellant's representations to the affected person. Portions of the appellant's representations were withheld from the affected person due to confidentiality concerns. I received reply representations from both the Police and the affected person.

RECORDS:

The records remaining at issue consist of the undisclosed portions of two occurrence reports, not including the “ten codes”, patrol zone information, and/or statistical codes. The Police have claimed that the personal privacy exemption in section 38(b) applies to the withheld information in the records.

DISCUSSION:

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 if 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 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;

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 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, PO-2225 and MO-2344].

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 Police submit that the records contain both the personal information of the appellant and the affected person who reported the incidents to Police. Their names, addresses, dates of birth, sex, employment history and phone numbers are listed.

The affected person did not address this issue directly. The appellant submits that paragraph (e) of the definition of personal information in section 2(1) applies as the records contain the personal opinions or views of an individual, in particular, the personal opinions and views of the affected party and his co-workers. She also submits that the records detail “confidential background information and protected work documentation.”

Analysis/Finding

The records consist of two occurrence reports. Based upon my review of the records, I agree with the Police that the records contain the names, addresses, dates of birth, sex, employment history and phone numbers of both the appellant and the affected person in accordance with paragraphs (a) to (d) and (h) of the definition of personal information in section 2(1) of the *Act*. The records also contain the views or opinions of the appellant and the affected person about each other in accordance with paragraph (g) of the definition, as well as the personal opinions or views of these individuals that do not relate to another individual as contemplated by paragraph (e) of the definition.

In circumstances where a record contains both the personal information of the appellant and other individuals, the request falls under Part II of the *Act* and the relevant personal privacy exemption is the exemption at section 38(b) [Order M-352]. Some exemptions, including the personal privacy exemptions at sections 14(1) and 38(b), are mandatory under Part I but

discretionary under Part II and thus, in the latter case, an institution may disclose information that it could not disclose if Part I is applied [Orders MO-1757-I and MO-2378].

However, it is not necessary for me to consider whether the portions of the records that consist of only the appellant's own personal information qualifies for exemption under section 38(b) since its disclosure to her cannot be an unjustified invasion of another individual's personal privacy, as required under that section. Accordingly, I will order the disclosure of the appellant's own personal information to her, where it has not already been made available to her by the Police.

In addition, there are small snippets of text withheld from the occurrence reports that do not contain information that fits within the definition of "personal information" in section 2(1), and I will also be ordering these disclosed to the appellant, accordingly.

I will now consider whether the personal information about the affected person qualifies for exemption under the discretionary exemption at section 38(b) of the *Act*.

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 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 under section 38(b).

If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 38(b) or 14. Neither sections 14(1) or 14(4) apply to the information at issue in the records.

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 14(1). 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), which reads:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Police submit that:

Section 14(3)(b) was raised due to the nature of both of the incidents in question. Each time the [police] officer responded it was due to suspicious circumstances as the appellant was in the vicinity of the complainant's residence taking pictures and posing a possible threat to the complainant and family.

Although no charges were laid the applicable charge would have been Criminal Harassment; Section 264 (1) of the *Criminal Code of Canada*.

Officers responded and the information was collected as part of an investigation into a possible violation of law, however no criminal proceedings were commenced. The appellant was "strongly" advised by the officers not to be in the area of this residence.

The affected person agrees that the records were created by the Police as a result of an investigation into a possible violation of law.

The appellant agrees that there was a Criminal Harassment complaint made against her to the Police.

Analysis/Findings

Based upon my review of the records and the parties' representations, I find that the presumption in section 14(3)(b) applies to the personal information about the affected person in the records as this information was compiled and is identifiable as part of an investigation into a possible violation of law, namely a possible violation of Section 264 of the *Criminal Code of Canada*, which reads in part as follows:

(1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of

- (a) repeatedly following from place to place the other person or anyone known to them;
- (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
- (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
- (d) engaging in threatening conduct directed at the other person or any member of their family.

(3) Every person who contravenes this section is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
- (b) an offence punishable on summary conviction.

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Orders P-242 and MO-2235].

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. As stated 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. Section 14(4) does not apply in this appeal and the appellant has not raised the application of section 16.

Therefore, subject to my consideration of the Police’s exercise of discretion, I find that the discretionary exemption in section 38(b) applies to the personal information of the affected person at issue in the records.

EXERCISE OF DISCRETION

The section 38(b) exemption is discretionary, and permits 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

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:

Exercises of discretion are arrived after careful consideration and review of all relevant factors, with each set of circumstances being considered separately. The response of this institution to the request of the appellant has been arrived at after careful consideration and without prejudice.

After review of section 4(2) this institution has reasonably disclosed as much of the responsive records as possible to the appellant without disclosing material that was exempt and that protected the rights and privacy of other affected individual(s).

The affected person did not address this issue directly in his representations.

The appellant submits that:

I believe the institution took into account irrelevant consideration[s] and failed to take into account relevant considerations when denying me access to the 2 Police reports I requested.

The requester has a sympathetic or compelling need to receive the information.

The relationship between the requester and the affected party is a work relationship.

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 personal information is relevant to a fair determination of rights affecting the person who made the request.

The individual to whom the information relates will be exposed unfairly to pecuniary or other harm.

The disclosure may unfairly damage the reputation of any person referred to in the record.

In reply, the Police rely on their previous representations. They also submit that:

[They are] very respectful of this process being fair and equitable while trying to balance the rights and privacy of all involved parties.

[They] do not feel that the personal opinions or any statements made by the "affected party" will have any bearing on the appellant's ongoing disputes with her employer. They are merely the "personal" opinion of that "affected party".

Each day [the Police] make decisions and follow strict policies and guidelines... [E]ach individual has the right to his or her own personal opinion and should be able to express it without fear of reprisal.

[T]he appellant is angered by issues between herself and her employer and she is merely on a "fishing expedition" to see if the "affected party" made reference to any employment related issues that she would [be] able to use against him or the employer.

The "affected party" did not ask to be drawn into these issues and is an innocent bystander. He didn't ask for the appellant to be outside his residence taking photographs and he had every right as a citizen of this Community to feel threatened by this and to contact the Police to report it.

Analysis/Findings

Based upon my review of the records and the parties' confidential and non-confidential representations, I find that the Police exercised their discretion under section 38(b) in a proper manner in denying access to the personal information of the affected person in the records.

Taking into account all of the circumstances of this appeal, I am satisfied that the Police exercised their discretion with consideration of only relevant factors and principles. I take note that the Police considered the balancing of the appellant's right of access and the protection of privacy of other individuals. The information is significant and sensitive to both the appellant and the affected person and is subject to the presumption at section 14(3)(b). Disclosure of this information constitutes an unjustified invasion of the personal privacy of the affected person under section 38(b).

Accordingly, I find that the Police did not exercise their discretion in bad faith, for an improper purpose or take into account irrelevant considerations in deciding to withhold the personal information of the affected person and I uphold their decision in this regard.

ORDER:

1. I order the Police to disclose to the appellant by **November 2, 2010 but not before October 28, 2010** the information that is highlighted in orange on the copy of the records sent to the Police with this order.
2. I uphold the Police's decision to deny access to the remaining information in the records.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to provision 1.

Original signed by: _____
Diane Smith
Adjudicator

_____ September 28, 2010