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

ORDER MO-2648

Appeals MA10-303 and MA10-304

Halton Regional Police Services Board

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NATURE OF THE APPEALS:

The Halton Regional Police Services Board (the police) received a seven-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to the requester's involvement with them. The police processed each part of the request separately and issued separate decision letters for each. These appeals relate to two parts of the request in which the appellant sought access to the following information:

> A. A copy of all records in regards to HRPS 08-82773, including but not limited to the HRPS communication dispatch records, officer notes and email communications of [five specified police officers], including but not limited to the following dates (2007-07-19, 20, 21, 31 and 08-05) [year should be 2008] – which resulted in Appeal MA10-303
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> B. A copy of all records, including but not limited to facsimile cover sheets, email and all records which were provided to the RCMP by the HRPS Professional Standards Unit in relation to me and HRPS 08-82773 – which resulted in Appeal MA10-304

The police identified records responsive to both parts of the request and, after notifying an affected party pursuant to section 21 of the *Act*, provided partial access to the records responsive to the request in parts A and B. The police denied access to police 10-codes, patrol zone information and/or statistical information on the basis that they are exempt from disclosure under the discretionary exemptions in section 38(a), taken in conjunction with the law enforcement exemptions in sections 8(1)(e), and 8(1)(l)of the *Act*. Access to other information from the records was denied on the basis that it was exempt under section 38(b) (invasion of privacy), taken in conjunction with the presumption against disclosure in section 14(3)(b) of the *Act*.

The requester, now the appellant, appealed these decisions.

During the mediation of both appeals, the appellant advised that he is seeking access to the portions of the records withheld by the police, specifically the statement of the complainant (the affected person) and details of the complaint against him. He advised that he does not object to the police's decision to withhold personal identifiers of the affected person such as name, address and date of birth, but he seeks this individual's statement.

The appellant also indicated that he does not object to the police's decision to deny him access to the portions of the records that were withheld in accordance with sections 8(1)(e) and 8(1)(l) of the *Act*. He advised the mediator that he is not seeking access to the 10-codes, patrol zone information and/or statistical information. Therefore, those portions of the records the police denied access to under sections 8(1)(e) and 8(1)(l) of the *Act* are not subject to this appeal and I will not be addressing the application of those exemptions to the information in the records.

In addition, the appellant advised he is not seeking access to those portions of the records which were identified by the police as non-responsive. The appellant accepts that these records relate

to individuals and events unrelated to him. Therefore, the records the police identified as non-responsive are not at issue in this appeal.

Finally, also during mediation, the appellant advised the mediator that he believes that additional records responsive to both parts of his request exist. Specifically, he asserts that additional officer notes and emails, as well as the affected person's statement from Appeal MA10-304 exist and observes that in the records he received there is a reference to email correspondence that was not included in the records provided to him. The mediator spoke to the police's Freedom of Information Coordinator and directly to the officer involved and asked if additional records responsive to Appeal MA10-304 exist. The officer conducted an additional search and confirmed that no additional records exist. The officer advised that all her emails over two years old are expunged and that she provided all of the records in which she recorded her conversations relating to the subject matter of the request in her notebook. The appellant, however, was not satisfied with the additional search conducted by the police and still believes that additional records regarding the subject matter of Appeal MA10-304 exist, specifically additional email correspondence and written documentation of conversations.

With respect to the records responsive to Appeal MA10-303, the appellant asserts that additional records exist, specifically a written statement of the affected person and additional officer notes relating to the subject matter of that incident.

As further mediation was not possible, the files were transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. In both appeals, I sought and received the representations of the police, which were then shared in their entirety with the appellant, who also provided me with representations. I also sought and received reply representations from the Police in Appeal MA10-303 relating to the nature and extent of the searches undertaken for records responsive to the request.

RECORDS:

The records at issue consist of the undisclosed portions of a Police Occurrence Report, a Follow-up Report, a form entitled I/NetViewer – Event Information and several sets of handwritten notes compiled by various police officers on July 19, 2008.

DISCUSSION:

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 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 undisclosed portions of the police officer notes, occurrence report, uniform crime report, follow-up report and I/NetViewer form consist, in part, of the name, address and other personal identifiers of the affected person who made certain allegations of criminal wrongdoing against the appellant. I note that the appellant indicated at the mediation stage of this appeal that he was not taking issue with the police decision to deny access to personal identifiers of the affected person, such as this individual's name, address and date of birth. As the appellant has removed this information from the scope of his request, I will not address the application of the exemption claimed for it further in this order.

With one exception, all of the remaining undisclosed information in the police officer notes, occurrence report, uniform crime report, follow-up report and I/NetViewer form consist of the affected person's description of certain events which she alleges took place involving the appellant. This information is directly responsive to the appellant's narrowed request which seeks access to the statement and the details of the allegations made against him. In my view, the portion of the undisclosed information in these documents describing the affected person's recollection of events qualifies as the personal information of the affected person within the meaning of paragraphs (a), (b) and (h) of the definition of that term in section 2(1). The majority of the information in the undisclosed portions of the records relates to the affected person's perception of events and this individual's state of mind at the time the events were related to the police.

In addition, I find that a portion of the remaining undisclosed records also contain the personal information of the appellant, as it consists of the affected person's recollection of events involving the appellant. I find that this information qualifies as the appellant's personal information as contemplated by paragraph (g) of the definition in section 2(1). Based on my careful review of this information, however, I mind that it is inextricably intertwined with that of the affected person and I am unable to effectively sever it in such a way as to make it relate only to the appellant.

In addition, a small part of one of the officers' notebook entries contains information that only relates to the appellant and can easily be severed from those portions that contain the personal information of the affected person. As this personal information relates only to the appellant, I will order that it be provided to him as its disclosure would not result in an unjustified invasion of the personal privacy of another individual. I have provided the police with a highlighted copy of this portion of the records. Only the highlighted portions of this record are to be disclosed to the appellant.

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 exemptions from this right. The police submit that the undisclosed portions of the records at issue are exempt from disclosure under the discretionary exemption in section 38(b). 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 any of the presumptions listed in section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under sections 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 take the position that because the records were prepared and relate to a criminal investigation, the presumption in section 14(3)(b) applies. This section 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;

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]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

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]. If no section 14(3) presumption applies and the exception in section 14(4) does not apply, 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 under section 38(b) [Order P-239].

The undisclosed portions of the records remaining at issue consist of information provided to the police by the affected person in relation to a complaint against the appellant. The information relates primarily to the affected person's medical condition and describes an incident in which she alleges the appellant assaulted her. As indicated above, the appellant states that he is not interested in obtaining access to the affected person's personal information, but is only interested in gaining access to her "statement" and the details surrounding her allegations against him. I have carefully reviewed the records and conclude that they were compiled as part of an investigation into a possible violation of the *Criminal Code* by the police. As such, I find that they fall within the ambit of the presumption in section 14(3)(b).

The appellant has not argued the application of any of the exceptions in section 14(4), nor has he suggested that there exists any public interest in the disclosure of the personal information under section 16. In addition, the appellant has not referred to any of the considerations favouring the disclosure of the personal information in the records that are listed under section 14(2)

Accordingly, I find that the remaining undisclosed personal information contained in the records is exempt from disclosure under the discretionary exemption in section 38(b), as its disclosure would result in a presumed unjustified invasion of the personal privacy of the affected person.

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)].

The police provided me with an explanation as to the manner in which they exercised their discretion not to disclose the withheld personal information contained in the records to the appellant. In their representations, the police indicate that they disclosed all of the information contained in the records which would not result in the disclosure of the affected person's personal information and balanced the appellant's right of access to his own personal information against the affected person's right to privacy.

The appellant's representations do not address this issue, despite being invited to do so in the Notice of Inquiry provided to him.

Based on the information provided to me and my own examination of the information that was both disclosed and not disclosed to the appellant, I find that the police exercised their discretion in an appropriate fashion and did not rely on any improper or irrelevant considerations in doing so.

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist [Order MO-2246].

The appellant takes issue with the adequacy of the searches undertaken by the police for two specific types of records relating to the two appeals before me:

- "a written statement made, prepared and/or provided to the [police] by the [affected person] in regard to [the occurrence described in the request]."
- emails exchanged between a specified Halton Police Inspector and her counterpart at the RCMP.

The appellant argues that the existence of a written statement was confirmed by telephone and in conversations he had with the investigating police officers and provided me with arguments in favour of a finding that such a record ought to exist. The police responded to this evidence in their reply representations by indicating that further searches beyond those initially undertaken were made by the investigating officers personally. However, none of the officers were able to locate a copy of the statement and instead suggest that because of the passage of time and the fact that charges were not laid with respect to this incident, the statement received from the affected person may have been purged.

The appellant also appears to suggest that if the police no longer maintain a copy of certain email correspondence passing between its inspector and the RCMP inspector, they ought to make a request to the RCMP to obtain the recipient's copy of the email correspondence that was exchanged.

In my view, the police have provided a sufficiently detailed explanation of the steps they have taken to locate the affected person's statement which was the subject of the request in Appeal MA10-303. The police indicate that two separate searches were undertaken by each of the officers involved in the investigation which is the subject of the identified occurrence and that none of the searches has uncovered the requested record. I find that the police have taken reasonable steps to identify and locate the requested statement, despite being unable to find it.

With respect to the email correspondence between the police inspector and the RCMP inspector, the police indicate that they are unable to locate copies of what was electronically exchanged between the two police agencies as these emails were purged, due to the passage of time, in accordance with the police records retention policy. The police have provided the appellant with

the FAX cover page, confirmation sheet and a severed version of the actual document sent by the police to the RCMP. They have, however, been unable to locate any email correspondence which may have passed between them pertaining to this incident involving the appellant.

Based on the representations of the police and the information provided by them regarding contact with the RCMP inspector who may have been sent responsive emails, I am satisfied that the searches conducted for responsive records were reasonable. With respect to the appellant's suggestion that the police ought to have contacted the RCMP in order to obtain the recipient inspector's copy of any emails received from the police, I note that the police are not under any obligation under the *Act* to request such information from another police body. If the RCMP were governed by the *Act*, or its' provincial equivalent, the police may have decided that it was appropriate to transfer that part of the request dealing with any email correspondence from the RCMP inspector to the RCMP. However, because the RCMP is a federal institution under the federal *Access to Information Act* (the *ATIA)*, such a transfer was not possible. The appellant may wish to consider making such a request to the RCMP for these records, if he has not done so already.

In conclusion, I find that the searches conducted for responsive records were reasonable and I dismiss that aspect of the appeals.

ORDER:

1. I order the police to disclose to the appellant the highlighted portions of the record which I have provided to the Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order by **September 29, 2011**, but not before **September 23, 2011**.

2. I reserve the right to require the police to provide me with a copy of the record that is disclosed to the appellant.

3. I uphold the police decision to deny access to the remaining records at issue.

4. I find that the searches undertaken for responsive records were reasonable and I dismiss that part of the appeals.

Original Signed By: August 25, 2011
Donald Hale
Adjudicator