



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-409

Appeal M-9400245

Port Hope Police Services Board



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Port Hope Police Services Board (the Police) received a request for access to a copy of a report concerning an investigation by the Chief of Police into an incident which occurred in December 1992 (the report). The requester indicated that the report was presented to the Police at a Police Services Board meeting on April 7, 1993.

The Police granted access to those portions of the report that related to the requester. Access to the remainder of the document was denied under section 14(1) of the Act. The requester appealed this denial of access.

A Notice of Inquiry was provided to the Police, the appellant and an individual who was involved with the incident described in the report (the affected person). As it appeared that some of the information at issue might relate to the appellant as well, the Police were asked to comment on the applicability of the exemption provided by section 38(b) of the Act.

Representations were received from counsel acting on behalf of both the Police and the affected person. In these representations, counsel raised sections 6(1)(b) and 7(1) of the Act as additional exemptions which he claimed also applied to the report. The raising of additional exemptions at a late stage in the appeals process will be addressed as a preliminary matter below.

In summary, the Police now rely on the following exemptions to deny access to those portions of the report which have not been disclosed:

- closed meeting - section 6(1)(b)
- advice or recommendations - section 7(1)
- invasion of privacy - sections 14(1) and 38(b)

DISCUSSION:

PRELIMINARY MATTER

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

By the Police

On April 19, 1994, the Commissioner's office provided the Police with a Confirmation of Appeal which indicated that an appeal from the decision of the Police had been received. The Confirmation of Appeal also indicated that, based on a policy adopted by the Commissioner's office, the Police would have 35 days from the date of this correspondence (i.e. May 25, 1994) to raise any additional discretionary exemptions not claimed in the decision letter. No additional exemptions were raised during this period.

On August 22, 1994, in response to the Notice of Inquiry, counsel for the Police submitted representations. It was at this time that the Police raised, for the first time, the application of the discretionary exemptions provided by sections 6(1)(b) and 7(1) of the Act. The Police were then asked to comment on why these exemptions were being raised at this stage of the appeals process and why their application should be considered by the decision maker.

Previous orders issued by the Commissioner's office have determined that the Commissioner has the power to control the process by which the inquiry process is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and a limit on the time during which an institution can raise new discretionary exemptions not originally raised in its decision letter.

In Order P-658, I set out the reasons why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. I concluded that in cases where a discretionary exemption(s) is claimed late in the appeals process, a decision maker has the authority to decline to consider the discretionary exemption(s). In the circumstances of that case, the institution gave no explanation nor did it advance any "extenuating circumstances" which may have justified the four-month delay in raising the additional discretionary exemptions. I adopt this approach for the purposes of this appeal.

In his supplementary representations addressing the late raising of the exemptions provided by sections 6(1)(b) and 7(1), counsel for the Police provides three reasons as to why I should now consider the application of these exemptions. I will deal with each of these in turn. (I will consider the raising of these exemptions by the affected party in my discussion which follows).

Counsel for the Police acknowledges that the Police were aware of the notification provided in the Confirmation of Appeal giving them until May 25, 1994 to claim discretionary exemptions. However, counsel points to the covering letter that accompanied the Notice of Inquiry dated July 28, 1994 as providing the rationale for the late raising of these exemptions. Among other things, this letter stated that "If you believe that there are any additional factors which are relevant to this appeal, please refer to them."

While I appreciate that there may be some ambiguity regarding the scope of this statement, in my view it is clear that it is **not** an invitation to raise additional discretionary exemptions in submissions. This matter was specifically dealt with in the Confirmation of Appeal and counsel acknowledges this fact.

Counsel's second point is that Order P-658 is distinguishable from the present appeal. He notes that Order P-658 referred to the **Notice of Inquiry** giving the institution 35 days from the date of the Notice to claim any discretionary exemptions. Counsel indicates that, in the present appeal, the Notice of Inquiry provided the Police with 22 days, extended to 25 days, to provide submissions. Counsel claims "submissions" includes the raising of additional discretionary exemptions.

I can appreciate counsel's attempt to distinguish the two situations. However, in both P-658 and the present appeal the relevant facts and timing are the same. Order P-658 resulted from an appeal filed under a pilot project in the Commissioner's office at a time during which different names were used for appeals-

related documents. The Notice of Inquiry referred to in Order P-658 is essentially the same document, setting out the same information and time periods, as the Confirmation of Appeal in the present case. I understand counsel's confusion. However, this point is without merit.

Counsel's third point is that the appellant is not prejudiced by the Police raising new discretionary exemptions at this time. He indicates that it is the position of the Police that the value of the information requested by the appellant does not diminish with time.

I cannot agree with this submission. I note that the appellant first requested information regarding this matter in April 1993. While that part of the request dealing with the subject matter of the report was perhaps not as clear as it could have been, the Police made no attempt to clarify it with the appellant. I also note that the request did refer to the date on which the report was presented at a meeting of the Police Services Board. Therefore, it would not have been difficult to identify the document the requester wanted and determine all applicable exemptions at that time. Accordingly, I conclude that any further delays occasioned by now providing the appellant with an opportunity to address the application of sections 6(1)(b) and 7(1) of the Act would result in prejudice to the appellant.

Therefore, I find that none of the submissions provided by counsel for the Police qualify as the "extenuating circumstances" necessary to remove this appeal from the policy parameters established by the Commissioner's office. On that basis, I will not consider the application of sections 6(1)(b) and 7(1).

By the Affected Person

As I have previously indicated, the representations submitted by counsel for the Police were also submitted on behalf of the affected person. Counsel correctly notes that the affected person did not receive a Confirmation of Appeal wherein she was required to advance any new discretionary exemption claims within 35 days. Accordingly, counsel maintains that the discretionary exemption claims provided by sections 6(1)(b) and 7(1) of the Act were advanced by the affected person at her first opportunity and are relevant factors to be considered by me in deciding this appeal.

As I have rejected the Police submissions as to why I should now consider these exemptions, I will now examine whether I should address them in the context of having been raised by the affected person.

In Order P-257, former Assistant Commissioner Tom Mitchinson considered the raising of exemptions by an affected person as follows:

As a general rule, with respect to all exemptions other than sections 17(1) and 21(1) [of the provincial Freedom of Information and Protection of Privacy Act, the equivalent of sections 10(1) and 14(1) of the Act], it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the commissioner's office, since the record would have been released ... In my

view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

I agree with this view and adopt it for the purposes of this appeal. The facts of the present appeal are slightly different from those which gave rise to Order P-257 in that the institution now seeks to rely on the same discretionary exemptions claimed by the affected person. However, I believe that the general principle articulated in Order P-257 is equally applicable to the present appeal.

In this case, I find that a proper application of section 14(1) of the Act to the record will address the interests of all the parties, and that it is not necessary for me to consider the arguments of the affected person with respect to sections 6(1)(b) and 7(1) of the Act.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the views and opinions of another individual about the individual and 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 Police claim that the undisclosed portions of the report contain the personal information of the affected person as they are the personal views and opinions of the author of the report about the affected person. I do not agree.

The affected person is an elected official of the Town of Port Hope and, at the relevant time, had been appointed as Chair of the Police Services Board by a resolution of the Town of Port Hope Municipal council. The comments included in the report relate to the affected person's actions performed and instructions given while functioning in both official capacities. Furthermore, what counsel for the Police and affected person characterizes as "views and opinions" may be more accurately considered to be a recitation, by the author of the report, of the facts and circumstances surrounding the involvement of the affected person in the incident in question.

Accordingly, I conclude that the portions of the record at issue do not contain any personal information of

the affected person.

However, I am of the view that there are three passages of the report containing the personal information of the report's author and another individual. As I noted previously, portions of the report which have been disclosed contain the personal information of the appellant.

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.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant 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.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, 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.

I am of the view that the information relating to the author of the report may be considered highly sensitive (section 14(2)(f)). The information related to the other individual can be said to describe this person's income (section 14(3)(f)). In the absence of any factors favouring disclosure, I find that disclosure of this personal information would result in an unjustified invasion of the personal privacy of these two individuals. Therefore, I find that this information is exempt pursuant to section 38(b) of the Act and should not be disclosed.

ORDER:

1. I order the Police to disclose to the appellant the record in its entirety with the exception of the three passages that I have highlighted on the copy of the record which is being provided to the Freedom of Information and Privacy Co-ordinator of the Police with a copy of this order.
2. I order the Police to disclose the non-highlighted portions of the record to the appellant within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the

Police to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ October 25, 1994