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

# ORDER MO-1252

## Appeal MA-990186-1

## Hamilton-Wentworth Regional Police Services Board

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## NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Hamilton-Wentworth Regional Police Service (the Police). The request was for access to:

1. All computer requests the Police made for information on the appellant's vehicle in the month of April 1999. Specifically exact times of input by computer and radio requests on Friday, April 16, 1999.

2. Names of officers making calls or requests. The exact times from the computer records of these calls or requests relating to Occurrence #99-548635-0.

3. The exact time an identified constable inputted his onboard computer for information on the requester's vehicle.

4. The exact time a second named constable was called to bring a Breathalyzer to the scene. The second constable's location when he received this request.
   The location of the Breathalyzer at the time of the request.
   When this call was received at dispatch and the time of the second officer's arrival at the scene.
   A copy of the second officer's personal log showing all information regarding this occurrence.
   The second officer's badge number.

The Police identified five pages of responsive records: a one page "Vehicle Occurrence - Driving Offence Crown Sheet - Tow Tag", a one-page typewritten "Occurrence Report" and two "Will Say" statements by two police officers. The Police denied access to these records in their entirety pursuant to sections 8(1)(a), (b) and (f) and 8(2)(a) of the Act.

The appellant appealed the decision of the Police.

A Notice of Inquiry was initially sent to the Police. Because it appeared that the records may contain the personal information of the appellant and that additional responsive records may exist, section 38(a) of the Act and the reasonableness of the search were added as issues in the Notice.

Representations were received from the Police.

## DISCUSSION:

### PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, as recorded information about an identifiable individual.

The records all pertain to the investigation into the allegations of impaired driving involving the appellant. As such, I find that all the records contain the personal information of the appellant.

In addition, one of the "Will Say" statements contains the name and other identifying information of a passenger in the appellant's car at the time of his arrest. Accordingly, I find that this portion of the records contains the personal information of the passenger. The appellant, however, has advised this office that he does not require this information and, therefore, it is not at issue in this appeal.

## DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 38(a) of the Act, the Police have the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 8, would apply to that personal information. The Police claim that sections 8(1)(a), (b) and (f), as well as 8(2)(a) apply to all of the records.

## LAW ENFORCEMENT

### *Law Enforcement Report*

Section 8(2)(a) reads:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

Only a report is eligible for exemption under this section. The word "report" is not defined in the Act. For a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information (Order P-200). Generally speaking, results would not include mere observations or recordings of fact (Order M-1048).

The Police state that the records include a compilation of officers' interviews of suspects and witnesses, interspersed with officers' comments, notations and opinions. The Police submit that:

> In accordance with the provisions of section 42 of the Police Services Act, the [Police Service] is a law enforcement agency which has the function of enforcing and regulating compliance with the law. In the performance of these duties, and in accordance with internal Police Service Policies, Procedures and Regulations, police officers are required to complete reports when conducting law enforcement investigations. These reports, which generally take the form of occurrence reports, are for the purpose of documenting information obtained during the course of an investigation and, where required, providing for effective follow-up. In addition, these reports may be used to assist the Crown Attorney in trial preparation.

> The reports in this case were prepared by officers, or by the Police Service, in the context of investigating criminal allegations. The records were, thus, clearly prepared in the course of law enforcement.

Having reviewed the various documents which comprise the records, I find that they neither collectively nor individually qualify as a "report". These documents consist almost exclusively of factual information, together with observations by the investigating police officers. They do not contain a formal statement or account of the results of the collation and consideration of information. Rather, the contents are more appropriately described as a collection and recitation of "observations and recordings of fact". Therefore, I find that the records do not qualify as a "law enforcement report" and section 8(2)(a) does not apply, regardless of the fact that the records were prepared during the course of a criminal law enforcement investigation by an agency which has the function of enforcing and regulating compliance with the law.

***Ongoing Law Enforcement Matter or Investigation***

Sections 8(1)(a) and (b) read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The purpose of these exemptions is to provide the Police with discretion to deny access to records in circumstances where disclosure could reasonably be expected to interfere with an ongoing law enforcement matter or investigation. The Police bear the onus of providing evidence to substantiate that a law enforcement matter or investigation is ongoing, and that disclosure of the records could reasonably be expected to interfere with the matter or investigation.

Section 2(1) of the Act defines "law enforcement" to mean (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, and (c) the conduct of proceedings referred to in clause (b).

I am satisfied that the investigation of allegations of impaired driving under the Criminal Code qualifies as a "law enforcement" activity as defined in section 2(1) of the Act.

According to the Police, the law enforcement matter or investigation is ongoing. The Police submit:

> This matter is currently before the Criminal Court subsequent to a criminal charge having been laid.
> In accordance with criminal procedure, information in relation to a criminal charge is obtained through the criminal disclosure system under the auspices of the Crown Attorney's Office, which is now responsible for the case. The Police Service is not at liberty to disclose material to an accused without the consent and authorization of the Crown Attorney's Office once a matter has been set for trial and the Crown has assumed carriage of the file.
>
> To permit a "parallel" disclosure process, while there is an ongoing criminal trial, would be contrary to the efficient and effective administration of criminal justice, and is not contemplated by either MFIPPA nor the disclosure requirements as enunciated by decisions of the Supreme Court of Canada in R. v. Stinchcombe. Rather, the criminal justice process mandates that should an accused seek additional information in relation to a criminal charge, such requests are to be made through the Crown Attorney's Office. The Police Service is required to respond to disclosure directions received from the Crown.
>
> Information provisions within the context of the criminal trial process must remain under the direction of the Crown Attorney to ensure that appropriate and relevant information is provided to an accused, while inappropriate information is protected. If issues arise with respect to disclosure, there are procedures in place for courts to make rulings as to whether or not information should be provided and/or is relevant to a charge before the court. To permit a concurrent system to operate whereby an accused obtains information with respect to a charge, which may or may not be relevant, would interfere with the operation of the criminal justice system.

As far as section 8(1)(a) is concerned, since the matter is currently before the Court, the law enforcement matter is ongoing. The Police assert that disclosure would interfere with an active law enforcement matter, but their representations focus exclusively on the relationship between the Police and the Crown Attorney's Office in such matters and only in a general sense. The Police do not explain how disclosure of the specific information contained in the records could interfere with this particular ongoing law enforcement matter and based on the material before me, I am unable to draw any such conclusion.

The Police submit that disclosure to any accused person under the Act while there is an ongoing trial would interfere with the operation of the criminal justice system. The Police submit that any request for information within the context of the criminal trial process must remain under the direction of the Crown, and that all rulings with respect to disclosure in that context should be made by the courts in order to ensure the effective and efficient administration of criminal justice.

There is nothing in the Act which suggests that it is not available to an accused person while there is an ongoing trial. In fact, section 51 could be interpreted as indicating that the two mechanisms can operate

concurrently without affecting each other (Order PO-1688). Section 8(1)(a) presents the opportunity for an institution to exercise its discretion to refuse access if, in any particular case, disclosure could reasonably be expected to interfere with a law enforcement matter. In this case, the Police have not presented any evidence to suggest that disclosure of these records in these circumstances would interfere with the appellant's trial, or the administration of justice as a whole. In fact, it appears that much of what is at issue in these records would likely have been included in the materials disclosed to the appellant by the Crown Attorney. The Police have not provided information from the particular Crown Attorney confirming what was or was not disclosed, or provided any reasons why disclosure of any parts of the records would interfere with the appellant's trial.

Accordingly, based on the evidence and arguments provided by the Police and my review of the records, I am not persuaded that disclosure of the records could reasonably be expected to interfere with a law enforcement matter, and I find that section 8(1)(a) is not applicable.

With respect to the application of section 8(1)(b), the Police state that the appellant has been charged and the matter is currently before the Court. Because the law enforcement matter has now reached the prosecution stage, I am not persuaded that disclosure of the records could reasonably be expected to interfere with an ongoing investigation (Order P-1584). Therefore, I find that section 8(1)(b) is no longer applicable.

***Right to a Fair Trial***

Section 8(1)(f) of the Act states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

The Police have not made any representations on the application of this exemption claim and given that it is the appellant who is on trial and the records contain his personal information, I find that section 8(1)(f) has no application in the circumstances of this appeal.

Accordingly, I find that the requirements of sections 8(1)(a), (b) and (f) have not been established by the Police, and therefore, the records do not qualify for exemption under section 38(a) of the Act.

**REASONABLENESS OF SEARCH**

Where a requester provides sufficient detail about the records which he is seeking and the Police indicate that further records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that further records do not exist. However, in my view, in order to properly

discharge their 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.
The appellant's request was quite detailed and specific. The Police identified only five pages of responsive records and based on the information contained therein, it appeared that not all aspects of the appellant's request had been addressed by the decision of the Police. Accordingly, the reasonableness of the search by the Police for all records responsive to the request was added as an issue in this inquiry.

The Police state that in the preparation of their representations in this appeal they again reviewed the request. In so doing the Police submit the following:

> The Police Service does not maintain and cannot generate a record of requests made by members of the Service for information on vehicles. Requests of this nature are made to the Canadian Police Information Centre (CPIC), which is an agency independent from this Service. The [Police Service] does not have the capabilities to produce a record of queries made to CPIC by its members.
>
> ...
>
> Depending on the timing of a request, the Police Service may be able to generate a Computer-Aided Dispatch (CAD) report which **may** provide the time a Constable is dispatched to a scene. Entries onto the CAD System are made by officers and/or Communications Operators. Exact times may or may not be recorded.
>
> Unless his/her location is entered onto the system by the officer for some reason, CAD will not give an officer's location when he or she receives a request.
>
> Unless a specific entry is made by an officer, the CAD System will not give the location of a "breathalyzer' at the time of the request.
>
> The CAD System **may** provide a notation of time a call is received and the time of an officer's arrival at the scene depending on the circumstances. Accuracy will vary depending on a number of factors, including whether a time is logged immediately or later on in the call.
>
> Members of the [Police Service] do not maintain "personal logs". Officers are to note times and other relevant information in issued notebooks. Copies of all officers' notebooks have been obtained by the appellant through Crown disclosure.

The Police also provide the "second officer's" badge number in their representations, but do not indicate whether this information was disclosed to the appellant and, it appears that this has not occurred.

In response to the specific issue regarding the search by the Police for responsive records, the Police go on to submit:

> Upon receipt of this request, the Police Service conducted a search for the relevant occurrence. After determining that the matter was currently before the Criminal Court, no further searches were conducted. CAD information as described [above] would be searched if the Crown directed or if the Police Service was subpoenaed in the course of a criminal trial

Based on the evidence provided to me by the Police it is clear that the search by the Police was neither reasonable nor thorough. In fact, it would appear that the position of the Police is that as long as a matter is before the Courts there is no need to search for any records beyond that of the original occurrence reports. This is particularly distressing given the apparently time sensitive nature of a request for CAD information.

This, in my view, is unacceptable and contrary to the provisions and intent of the Act. In addition, it also not acceptable for the Police to provide a response to some of the aspects of the appellant's request in their representations (eg. CPIC and badge number information) that should have been included, but were not, in their access decision.

Therefore, I find that the efforts made by the Police to search for and locate all records relating to the request were not reasonable. I will, therefore, include a provision in this order requiring the Police to conduct further searches to ensure that all responsive records have been identified. The Police will be required to provide the appellant and me with a detailed outline of these additional search activities, and if further responsive records are identified, to include these records in an access decision within the time frame set out in the order provisions.

## ORDER:

1. I order the Police to disclose the records to the appellant in accordance with the highlighted copy of the records which I have attached to the Police copy of this order (the highlighted portions are **not** to be disclosed) before **December 20, 1999**.

2. 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 records which are disclosed to the appellant pursuant to Provision 1.

3. I order the Police to conduct a further search for additional records responsive to **all** aspects of the appellant's request; in particular but not restricted to police officer's notebooks and "CAD System" records.

4. I order the Police to communicate the results of this search to the appellant by sending him a letter summarizing the search results on or before **December 20, 1999**.

5. If additional responsive records are located, I order the Police to issue an access decision concerning those records in accordance with sections 19, 21 and 22 of the Act, treating the date of this order as the date of the request.

6. I order the Police to provide me with copies of the correspondence referred to in Provisions 4 and 5, as applicable, by sending a copy to me when they send this correspondence to the appellant.

Original signed by November 29, 1999
Holly Big Canoe
Adjudicator