



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1498

Appeal MA-010115-1

Hamilton Police Service's Board



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NATURE OF THE APPEAL:

The Hamilton Police Service (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of records forwarded to the Crown Attorney by the Police in relation to a particular fraud case in which the requester was the complainant.

The Police identified a number of responsive records, and determined that all of them included the requester's personal information. After notifying three individuals whose interests might be affected by disclosure of certain records, and receiving the consent of one of these individuals, the Police granted partial access to certain records and denied access to the rest, in whole or in part, on the basis of the following exemption claims:

- section 38(a), in conjunction with sections 8(1)(a), (b), (d), (e) and (g), and sections 8(2)(a) and (c) - law enforcement
- section 38(b), in conjunction with section 14(1) - invasion of privacy

The Police relied on the presumptions in sections 14(3)(b), (d) and (g) and the factors in sections 14(2)(e), (f), (g), (h) and (i) in support of the section 38(b) exemption claim.

The Police granted access to all information relating to the one individual who provided consent.

The requester, now the appellant, appealed the Police's decision denying access to the records. In addition, in a subsequent letter, the appellant outlined his reasons for believing that additional responsive records should exist. Specifically, he identified "will say" statements of individuals interviewed during the investigation, interview and other investigative notes of the investigating officers, notes of any meeting held between the investigation officer and defence counsel, and a forensic audit completed on the appellant's behalf. The appellant believed the author of the audit would consent to its release.

Mediation was not successful in resolving the appeal, so the file was transferred to the adjudication stage. I sent a Notice of Inquiry initially to the Police and the two individual who had not consented to disclosure when contacted by the Police (the affected persons). I received representations from the Police and both affected persons. I also received representations from the provincial Ministry of Consumer and Business Services (the Ministry), which is the employer of one of the affected persons.

The Ministry's representations identified the possible application of the exemption in section 9(1)(b) of the *Act* (relations with other governments). Because this is a mandatory exemption, I sent the Police a Supplementary Notice of Inquiry on this issue, together with a copy of the Ministry's representations. The Police declined to provide any additional representations addressing this new issue.

I then sent the Notice to the appellant along with the complete representations of the Ministry and one affected person, and the non-confidential portions of the representations provided by the Police and the other affected person. The appellant did not submit representations.

RECORDS:

The records remaining at issue in this appeal consist of the following:

1. 1-page Fraud Over \$5,000 Report, dated June 5, 1998 (partially disclosed)
2. 2-page Fraud Over \$5,000 Report, dated October 21, 1999 (partially disclosed)
3. 1-page Fraud Over \$5,000 Report, dated January 22, 2001 (partially disclosed)
4. 1-page cover sheet concerning a fraud matter
5. 1-page cover sheet concerning the same fraud matter
6. 1-page narrative prepared by Police in the context of the fraud case
7. 1-page cover sheet on the same fraud matter
8. Long Form Information concerning the fraud charge
9. Promise To Appear concerning the fraud charge
10. 2-page CPIC print out
11. Witness Control Form concerning the fraud charge
12. 2-page case synopsis for the fraud charge (partially disclosed)
13. 4-page statement of a police officer concerning the fraud charge
14. 2 pages of handwritten notes of a police officer concerning the fraud charge
15. 9-page statement of appellant concerning the fraud charge (partially disclosed)
16. 19 pages of handwritten notes of a police officer concerning the fraud charge (partially disclosed)
17. 1-page statement of recycled account with handwritten notations
18. 2 pages of handwritten notes from a police officer concerning the fraud charge

DISCUSSION:

REASONABLENESS OF SEARCH

In appeals where the appellant believes that additional records exist, as is the case in this appeal, the issue to be decided is whether the Police conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Police will be upheld. If not, I may order that additional searches be undertaken.

The Police's Freedom of Information and Privacy Co-ordinator provided the following explanation of the searches undertaken in response to the appellant's request.

When the request was received from the appellant a search for the requested records was conducted. The search as carried out includes an internal search for all police reports relating to the person named in the request by name, utilizing the internal Police Service Records Management System. Once the report is obtained and reviewed, in the event that additional information is required as to status, the officer in charge of the case is contacted and additional information is requested. In this case, I then contacted [named] detective, as he was the Major Fraud Investigator, as well as being named in the request of the appellant. [Named]

detective was asked to provide any information, which he held relating to the Fraud and the appellant, including his notes and his investigative case file. [Named] detective attended the Freedom of Information Branch with his entire case file. He advised at that time he had no notebook notes, only the notes included in the brief. I then contacted all of the investigating officers who were listed on the report, including three [named] detectives. [Two] detectives provided notes, which they had related to the fraud investigation and [the third] detective advised he had no notebook notes, as the file was only temporarily re-assigned to him.

Since receiving the Notice of Inquiry where it stated that the appellant had identified additional records not provided by police, I conducted a further search for records as follows:

I attended the Fraud Branch and once again spoke to [named] detective. I asked him about the records, which the appellant feels have not been provided but that do exist.

- Will say statements of individuals interviewed during the investigation. – The only interviews conducted were with the appellant and the accused. The statement of the appellant was in the records at issue. There is a synopsis of the interview of the accused included in the evidence of [named] detective. There was no formal statement from the [Ministry].
- Interviewing notes of investigating officer. – These are the notes of [named] detective. He advised that the only notes he had were included in the records. (Evidence of [named] detective along with the 2 pages of handwritten notes).
- Notes of meetings held between the investigation officer and defence counsel. – The investigator advised that the information provided in the records at issue, starting from the first cover sheet to end of the evidence of the appellant, as well as the ... Forensic Audit formed the Crown Brief. A copy of this Crown Brief was sent to the Crown Attorney. This is the record at issue and was provided by the investigator when he was asked for all of the information involving the Fraud Investigation. I inquired if there were any notes from the Crown Attorney or defence. [Named] detective advised that would be with the Crown's copy of the brief. The investigator advised that the Crown Brief at the courts would contain all correspondence etc. from the Crown attorney and defence since once it is turned over to the courts it becomes the record of the Crown. To clarify, the Crown Brief was submitted by [named] detective, it then becomes property of the Crown Attorney and any court action would be added to the brief at the courts...

- Forensic Audit. – The forensic audit was included in the investigative case file of [named] detective. On Feb. 9, 2001 I contacted the appellant and asked him if he required a copy of this audit. He had provided a copy to the investigating officer for the file. I advised the appellant that it would cost him \$0.20 per page if he wanted a copy back from the Police. He advised that he had a copy of the audit and did not want to pay for it. Therefore, I did not include the Forensic Audit in the records at issue as the appellant clarified his request and advised he did not require this document. On September 20, 2001, I provided an additional decision letter to the appellant advising that he could have full access to the Forensic Audit and the cost was \$41.40. To date the appellant has not come to pick up these records.

[Named] detective and myself then went to the storage area for the Fraud Investigative Case Files...I once again reviewed and examined the entire file and everything was the same as the records at issue. The only additional information I found in the Investigative case file was 7 phone message sheets (5 from the appellant and 2 from [the Ministry]). I have enclosed copies of these along with these representations. The institution has no problem releasing the 5 phone sheets but feel the other 2 messages should be protected. There were no other records or information identified.

The Police also noted, with reference to the “notes of meetings held between the investigation officer and defence counsel,” that the Crown file was destroyed by the Police, as part of their standard record processing procedure where a charge of this nature has been withdrawn.

As stated earlier, the appellant was provided with a copy of the non-confidential portion of the Police’s representations, but chose not to provide submissions in response.

From my review of the records and the search details provided by the Police, I find that the various searches for records undertaken by the Police at both the request and the appeal stages were reasonable, and that they adequately address all issues raised by the appellant.

As far as the seven phone message sheets are concerned, I will include a provision in this order requiring the Police to disclose the five sheets that pertain to telephone calls made by the appellant to the named detective. I will deal with the two message sheets relating to calls involving the Ministry in my discussion below.

PERSONAL INFORMATION

The section 14 personal privacy exemption applies only to information which qualifies as “personal information”, as defined in section 2(1) of the *Act*. “Personal information” means, in part, recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] 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 [paragraph (h)].

The Police submit:

The information which forms part of this investigative report is clearly personal information as defined in s. 2(1) of [the *Act*], in that it is information about identifiable individuals, including but not limited to, the appellant, and the accused. The information includes names, addresses and date of birth. The personal information also includes personal opinions and views of individuals interviewed about other individuals named. There is information relating to criminal allegations and statements relating to these allegations. The names of individuals appear in conjunction with other personal information relating to both that person and to others. Parts of this investigation are highly sensitive and inherently personal information of the suspect.

One of the affected persons in this appeal (affected person #1) was the individual investigated by the Police and charged with fraud. Affected person #1 submits that the information contained in the records is his personal information.

As stated above, the appellant's request was for records relating to a particular fraud case in which he was the complainant. On my review of the records, I accept the position of the Police that all of the records contain information relating to the Police investigation of affected person #1 on suspicion of fraud, and that this information qualifies as the "personal information" of affected person #1, as defined in section 2(1) of the *Act*. I also accept that some, but not all, of the records contain the personal information of the appellant, which came into the custody of the Police in the context of the fraud investigation and subsequent activities. Specifically, I find that Records 4-11, 13, 14, 17 and 18 contain the personal information of affected person #1 only; and that Records 1-3, 12, 15 and 16 contain the personal information of both the appellant and affected person #1.

The second affected person in this appeal (affected person #2) is an employee of the Ministry who provided information to the Police in the context of the investigation. Affected person #2 claims that the information about her qualifies as "personal information" under the *Act*. I disagree. Previous decisions of this office have drawn a distinction between an individual's personal and professional capacity. The gist of these orders is that information associated with a person in his or her professional capacity is not "about the individual" in a personal sense, and does not fall within the scope of the definition of "personal information" in section 2(1) (See, for example, Orders P-257, P-427, P-1412, P-1621). In this case, I find that the information concerning affected person #2 contained in the records relates exclusively to her in a professional capacity and as such does not constitute her personal information.

The two remaining phone message sheets identified for the first time in the Police's representations consist of the name and business phone number of affected person #2. This publicly available, professional capacity information does not qualify as the personal information of affected person #2 and should be disclosed along with the other five phone message sheets containing the appellant's personal information.

RECORDS CONTAINING THE PERSONAL INFORMATION OF BOTH THE APPELLANT AND AFFECTED PERSON #1

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. I will consider the application of the section for all records containing the personal information of the appellant - Records 1, 2, 3, 12, 15 and 16.

Section 38 provides a number of exceptions to this general right of access under section 36(1). This section introduces a balancing principle in circumstances where a record contains the personal information of both a requester and another individual. If the institution determines that disclosing the information would constitute an unjustified invasion of the other individual's personal privacy, section 38(b) gives the institution discretion to deny the requester access to his own personal information on that basis.

Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy. Section 14(2) provides some criteria for the institution to consider in making this determination, and section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In the present appeal, the Police rely on section 14(3)(b), which provides:

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 the information in the records was compiled and is identifiable as part of an investigation into a possible violation of law, specifically a charge of fraud under the *Criminal Code*. The Police state that, "The investigation was conducted and the reports and crown brief submitted. The charge was laid, but was withdrawn in court."

Previous decisions of this office have determined that the absence of charges being laid or pursued does not negate the application of section 14(3)(b) (PO-1715 and MO-1451). However, it is also clear from past decisions that records created after an investigation has been completed do not fall within the scope of the section 14(3)(b) presumption (See Order M-1086).

From my review of the records, I find that Records 1, 2, 3 and 16 were all prepared by various police officers in the context of investigating the appellant's complaint of possible fraud involving affected person #1. All of these records pre-date the laying of any charges and fall

squarely within the scope of section 14(3)(b). Records 12 and 15, on the other hand, were prepared following the completion of the Police investigation and in preparation for the fraud trial. These two records are not investigatory in nature, and consist of a case synopsis, some of which includes the appellant's personal information as complainant; and the statement of evidence that the appellant would have provided at trial. Applying the reasoning of past orders, I find that these records are documents that were generated after the Police investigation had been completed and charges were laid and as such were not compiled for the purpose of the investigation itself, as required in order to fall within the scope of the section 14(3)(b) presumption (See Orders M-734 and M-841).

The appellant has been provided with partial access to Records 12 and 15. The Police argue that certain factors outlined in section 14(2) that favour privacy protection are relevant to the undisclosed portions of these records. Specifically, the Police argue that the withheld information is highly sensitive (14(2)(f)); is unlikely to be accurate and reliable (14(2)(g)); was supplied in confidence (14(2)(h)); would expose affected person #1 unfairly to harm (14(2)(e)); and would unfairly damage the reputation of affected person #1 (14(2)(i)).

The appellant declined to provide any submissions on the possible application of any of the factors in section 14(2) that favour disclosure.

Having reviewed the undisclosed portions of Records 12 and 15, I find that they contain information concerning allegations made about affected person #1 that were not pursued in court by the Crown. In the specific circumstances of this case, I find that the factors in section 14(2)(f) and (i) are relevant considerations with respect to this information, and that these factors outweigh any inherent considerations favouring disclosure of this information that may exist.

Exercise of Discretion

Section 38(b) is a discretionary exemption claim. That means that the Police may exercise discretion and disclose the personal information of affected person #1 even if doing so would constitute an unjustified invasion of his privacy. The Police submit:

... it is submitted that section 14(3) creates a presumption of an unjustified invasion of privacy, which cannot be overcome in this case. As such, there is no discretion involved in this determination. Basically, since the presumption section applies without override, any discretion, which may otherwise be utilized under section 14, is not available.

Thus while section 38(b) does provide potential for utilizing a balancing principle, that principle is not applicable where a presumption in section 14(3) is relied upon.

In my view, the Police have inaccurately described their responsibilities in properly exercising discretion when dealing with a section 14(3) presumption. The existence of a presumption, which arguably heightens the degree of sensitivity surrounding the potential disclosure of personal information, does not eliminate the need to consider disclosure when faced with a

section 38(b) exemption claim. In order to properly exercise discretion, the Police must consider the individual circumstances of the appeal, including factors personal to the appellant, and must ensure that decisions regarding access conform to the policies, objects and provisions of the *Act*. The same factors are not relevant in every circumstance, but it is important to recognize that all factors that are relevant receive careful consideration.

It is not possible to properly exercise discretion without taking into account the particular and specific circumstances of an individual appeal. The Police cannot adopt a fixed rule or policy and apply it in all situations. To do so would constitute a fettering of discretion and would represent non-compliance with the Police's statutory responsibility when dealing with appeals stemming from requests for personal information under Part II of the *Act*.

Based on the portion of the Police's representations quoted above, I would have determined that discretion was not properly exercised in the circumstances of this appeal. However, the Police go on in their representations to state:

... It is the view of the Police Service that the information not released that was provided by the appellant, or relates to the appellant is inextricably intertwined.
...

Even should balancing be appropriate, we have examined the information in its entirety and weighed the appellant's right of access to his own information against the affected individuals' right to the protection of privacy. It is the belief of this institution that disclosure of the information contained in the records at issue would constitute an unjustified invasion of the personal privacy of affected individuals referred to in the protected information.

This institution provided the appellant with partial access to the records at issue. The information that was severed from the report was done at the request of the affected individual. The affected individuals have a vested interest in the information as it contains their personal information as well as the information that they provided to Police for the investigation. This institution in keeping with the spirit of the Act released as much as possible without disclosing information subject to exemption.

Based on these additional representations, I accept that the Police considered the particular and specific circumstances of this case and made decisions regarding disclosure based on a defensible balancing of the rights of the appellant to access his personal information and affected person #1's right to privacy. A great deal of information contained in Records 1, 2, 3, 12, 15 and 16 has already been disclosed to the appellant, and I am satisfied that efforts were made by the Police to maximize the amount of disclosure while at the same time considering the nature and type of personal information contained in the withheld portions of these records.

**RECORDS CONTAINING ONLY THE PERSONAL INFORMATION OF
AFFECTED PERSON #1**

When records contain the personal information of individuals other than a requester, the mandatory personal privacy exemption in section 14(1) applies. Under this provision, and institution must deny access to this personal information unless one of the exceptions provided in sections 14(1)(a) through (f) are present. On the basis of consent (section 14(1)(a)), the Police disclosed the personal information of one of the individuals contained in certain records. The only other exception with potential application in the circumstances of this appeal is section 14(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy

Both the Police and affected person #1 submit that disclosure of records containing the personal information of affected person #1 would constitute an unjustified invasion of his privacy, for various reasons outlined in their representations.

In the absence of representations from the appellant addressing this issue or pointing to the relevance of any factors favouring disclosure of records that do not contain his personal information, or other evidence supporting a finding that disclosure of this personal information would not constitute an unjustified invasion of the personal privacy of affected person #1, I am unable to find that the section 14(1)(f) exception applies. Accordingly, the personal information of affected person #1 contained in Records 4-11, 13, 14, 17 and 18 qualifies for exemption under the mandatory requirements of section 14(1) of the *Act*, and should not be disclosed.

Because of my findings under sections 14(1) and 38(b), it is not necessary for me to consider sections 9(1)(b) and 38(a) of the *Act*.

ORDER:

1. I order the Police to disclose the seven phone message sheets to the appellant by providing him with a copy of those records by **January 17, 2002**.
2. I uphold the decision of the Police to withhold access to Records 4-11, 13, 14, 17 and 18, and the undisclosed portions of Records 1-3, 12, 15 and 16.

3. To ensure compliance with this order, I reserve the right to require the Police to provide me with a copy of the materials sent to the appellant in accordance with Provision 1.

Original signed by:

Tom Mitchinson
Assistant Commissioner

December 27, 2001