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

INTERIM ORDER MO-1585-I

Appeal MA-010193-1

Niagara Regional Police Services Board

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NATURE OF THE APPEAL:

This appeal arises from a request made by an insurer (the appellant) to the Niagara Regional Police Service (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant sought access to records relating to a specified motor vehicle accident in which a van struck and killed an individual riding a bicycle.

The Police granted partial access to the records, but denied access to other records described as "accident reconstruction records", on the basis that they were available to the public for a fee, and thus exempt under section 15(a) of the *Act*, which applies to "publicly available" information.

The appellant appealed the decision of the Police to deny access to the reconstruction records.

I then conducted an inquiry into the appeal, and issued Order MO-1573. In that order, I upheld the decision of the Police that section 15(a) applied to the records. However, I also ordered the Police to re-exercise its discretion under section 15(a), taking into account all relevant factors and circumstances of this case, and using the principles discussed in the order as a guide. In addition, I ordered the Police to provide me with representations on its exercise of discretion, and gave the appellant an opportunity to submit responding representations on the exercise of discretion issue.

The Police provided representations, and the appellant responded, taking issue with the Police's exercise of discretion. The purpose of this order is to rule on the issue of whether or not the Police have appropriately exercised discretion.

DISCUSSION:

EXERCISE OF DISCRETION

Introduction

In Order MO-1573, I stated the following with respect to exercise of discretion:

> The section 15(a) exemption is discretionary, in that it permits an institution to disclose information, despite the fact that it could be withheld because it is publicly available. On appeal, the Commissioner may review the institution's exercise of discretion, to determine whether or not it has erred in doing so, but this office may not substitute its own discretion for that of the institution (see section 43(2)). An institution will be found to have erred in the exercise of discretion, for example, where it does so in bad faith, for an improper purpose, or takes into account irrelevant considerations, or fails to consider relevant considerations. In that event, this office may send the matter back to the institution for a re-exercise of discretion, based on proper considerations.
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> Previous decisions of this office under the "publicly available" exemption have examined the "balance of convenience", to determine whether it would be more convenient in the circumstances for access to be granted under the *Act* as opposed to under the alternate access scheme. For example, in Order P-159, former

Commissioner [Tom] Wright noted that, in exercising its discretion, the Ministry of Health took into account that fact that it would be expensive and time-consuming if the request proceeded under the *Act*, as opposed to through the court office (see also Order P-170). However, in later decisions, this office has suggested that the exemption will not apply unless the balance of convenience favours the institution (see, for example, Orders P-327, M-773). On this point, in BC Order No. 01-51, Commissioner [David] Loukidelis stated:

> The applicant argues that, consistent with the Ontario approach, the "balance of convenience" means the Ministry should not be allowed to rely on s. 20(1)(a), since it can readily give the applicant access to the case law. In the British Columbia context, I prefer to approach the issue by asking whether the public body has considered the exercise of discretion to disclose records despite the fact that it is authorized to refuse access under s. 20(1)(a). This is consistent with the approach I have taken to the exercise of discretion in relation to other of the *Act*'s permissive exceptions … It is also consistent with [former] Commissioner [David] Flaherty's approach to this issue in Order No. 91-1996.
>
> In Order No. 91-1996, my predecessor considered whether the public body had exercised its discretion under s. 20(1)(a) in good faith and not for an improper purpose or based on irrelevant considerations. In Order No. 325-1999, at p. 5, I set out the following non-exhaustive list of factors to be considered by a public body in exercising its discretion to withhold or disclose records under a permissive exception:
>
> In exercising its discretion, the head considers all relevant factors affecting the particular case, including:
>
> · the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;
> · the wording of the discretionary exception and the interests which the section attempts to balance;
> · whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;
> · the historic practice of the public body with respect to the release of similar types of documents;
> · the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
> · whether the disclosure of the information will increase public confidence in the operation of the public body;

- the age of the record;
- whether there is a sympathetic or compelling need to release materials;
- whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and
- when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.

> In light of the first factor, especially, a public body should consider whether the *Act*'s objective of accountability favours giving the applicant access to a requested record under the *Act* even though it could, technically, rely on s. 20(1)(a). If a record can only be purchased with difficulty – *e.g.*, because it is difficult for a purchaser to locate copies – the public body should give access to it despite s. 20(1)(a). In such a case, the public body may choose to rely on s. 20(1)(a) because it reasonably considers that to give access under the *Act* would, despite the ability to charge fees, unreasonably burden it. Further, if the public body can easily provide a copy of a requested record under the *Act*, and doing so will not unreasonably burden the public body even if it charges fees, it should do so.

I agree with Commissioner Loukidelis's approach to this issue. Therefore, the appropriate question to ask under section 15(a) is whether the institution has properly exercised its discretion, which necessarily entails a consideration of the relevant balance of convenience factors. In the circumstances of the section 15(a) exemption, I would add to the list of possible factors for the institution to consider the reasons why the requester seeks the records, whether the requester is an individual or an organization, and whether the records have already been created or whether they are created only after receiving a request. I would also emphasize that, as Commissioner Loukidelis states, the factors are not necessarily exhaustive.

In the circumstances of this case, the Police were asked in the initial Notice of Inquiry to make representations that indicate what factors were considered in deciding to exercise discretion in favour of applying the exemption. The Police provided representations on the balance of convenience factors, which are set out above. While I see no apparent error on the face of those representations, it is not clear to me whether the Police have taken into account all of the relevant circumstances of this case, including any listed above that may be applicable. Accordingly, I will require the Police to re-exercise its discretion in accordance with the above.

Representations

The Police submit:

> In response to any requests for records, which include reconstruction data, I base my decision to use section 15(a) on the following considerations:
>
> First and foremost is the consideration of whether the public system of access, which currently exists and which entails considerable fees, will render the records inaccessible to the requester. This determination is based on the word of the requester whose responsibility I would consider it to demonstrate that the fees would, in fact, be prohibitive. This, in conjunction with the requester's need for the records, would be a consideration as to the use of section 15(a).
>
> Should, for instance, the requester require the record for a compelling or sympathetic reason and could not afford the fees, as permitted by the by-law, I would consider release of the records under the *Act*. Again, I consider it the responsibility of the requester to apprise me of any such compelling or sympathetic need. In the absence of such, I may cite section 15(a) as the preferred method of access, considering the technical nature of the records and the considerable expertise of the reconstruction personnel.
>
> A further consideration in the case of reconstruction records would be whether or not the records currently exist.
>
> In spite of fee considerations or a compelling need for the record, should the record not exist, at the time of the request, which is the case with some reconstruction records, I may feel the need to cite section 15(a).
>
> In the case at hand, the requester is a lawyer who represents [named insurer]. I felt, in this case, therefore, that the fee would not be a bar to access. Based as well, on my belief from a conversation with the requester's assistant, that the requester was interested in obtaining all information with respect to this motor vehicle collision, (which might entail records that would have to be created), I cited section 15(a).

To summarize, in deciding to claim the section 15(a) exemption, the Police considered that:

1. There is no compelling or sympathetic reason why the appellant needs the records;
2. It does not appear that the appellant is unable to afford the fees under the alternative access scheme;
3. The records are technical in nature and required considerable expertise of reconstruction personnel to create; and

4. The request included both records that exist and records that the Police would have to create.

I have summarized below the reasons why the appellant takes issue with the Police's exercise of discretion:

- the Police are in error by stating that some of the records the appellant seeks would have to be created; in fact, the appellant has made it clear to the Police and to this office that it is seeking only records that currently exist;
- the balance of convenience favours the appellant, since all the Police have to do is photocopy the records and provide them to the appellant;
- the Police are the only source of this information;
- a relevant circumstance is that the records are being sought to defend an individual from civil claims arising from a motor vehicle accident; while the insurer has assumed the defence, the individual is required at law to indemnify the insurer with respect to any award made against him and paid out by the insurer;
- the individual, as a party to the civil litigation, would be entitled to production of the records under rule 30.10 of the Rules of Civil Procedure; relying on the exemption would force litigants to use court processes (*i.e.*, bring motions) to secure the records, thus unnecessarily wasting the resources of the parties, the courts and the responding police agencies; and
- the spirit of the *Act* suggests that the Police should exercise its discretion in favour of the appellant; it is the balance of convenience, and not the possibility of tremendous commercial profit, which must be the guiding principle in the exercise of discretion.

In these circumstances, there are two bases on which I could find that the Police erred in exercising its discretion: (a) if the Police failed to take into account relevant circumstances; or (b) if the Police took into account irrelevant circumstances.

Did the Police fail to take into account relevant considerations?

The appellant's submissions suggest that the Police failed to take into account a number of relevant circumstances. I am not persuaded that this is the case.

First, it is inherently obvious that the Police are the only source of the requested records. This would normally be the case in any situation in which an individual requested Police accident reconstruction records. Therefore, I am not convinced that the Police have erred by not stating explicitly in their representations that they have taken this fact into account.

In addition, based on the circumstances, it is clear that the Police are aware of the reasons for the request, which are typical for requests of records of this nature. Again, I am not convinced that the Police have erred by not explicitly stating that they took into account the reasons for the request.

The appellant's points regarding the use of court and litigant resources, and use of the by-law as a profit-making scheme, are what I regard as public policy factors that may or may not have been taken into account by the municipality in adopting the by-law. Whether or not these factors are valid (and I make no findings in this regard), I am not persuaded that these are relevant factors the Police must take into account in assessing an individual request.

To conclude, I find that there are no relevant factors that the Police ought to have but failed to take into account.

Did the Police take into account irrelevant circumstances?

I accept the appellant's point that it has made it clear to the Police and this office that only existing records are being sought. Accordingly, I find that the Police erred in assessing the balance of convenience by considering that the request included records the Police would have to create (listed factor number 4). In my view, this is a significant factor that weighs in favour of disclosure under the *Act*, and the Police should have taken it into account.

I am not persuaded that the Police erred in taking any of the other three listed factors into account.

Conclusion

The Police erred in exercising discretion under section 15(a), by taking into account an irrelevant consideration. Therefore, I will order the Police to re-exercise discretion.

ORDER:

1. I order the Police to re-exercise its discretion under section 15(a) of the *Act*, taking into account the fact that the appellant seeks only records that currently exist.

2. I order the Police to provide the appellant and I with representations on its exercise of discretion no later than **November 15, 2002**.

3. The appellant may submit responding representations on the exercise of discretion issue no later than **November 22, 2002**.

4. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues that may be outstanding.

Original Signed By: November 4, 2002
David Goodis
Senior Adjudicator