

ORDER MO-1597

Appeal MA-010142-2

Hamilton Police Services Board

NATURE OF THE APPEAL:

This appeal concerns a decision of the Hamilton Police Services Board (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to the following:

All information police have, including investigative notes, pertaining to a harassment complaint I first made in October 1998 and the subsequent investigations undertaken by [a named detective] (and any other officers who might have participated) of Professional Standards, beginning in December 2000, regarding both this harassment complaint which was reassigned, and my police complaint arising out of police response to my initial harassment complaint.

The Police issued a decision letter (decision letter #1) granting the appellant partial access to a supplementary occurrence report. The Police indicated in their decision letter that all information pertaining to other individuals would be removed since the appellant had advised the Police that he was only interested in his personal information.

Subsequently, the Police issued a revised decision letter (decision letter #2) to replace decision letter #1. Decision letter #2 granted the appellant partial access to this supplementary occurrence report. Decision letter #2 also confirmed that the appellant had been previously provided partial access to the notebook of a named detective. The Police indicated in decision letter #2 that access was being denied to part of the supplementary occurrence report pursuant to sections 38(a), with reference to sections 8(2)(a) (law enforcement) and 38(b), with reference to section 14 (invasion of privacy) of the *Act*. Specific reference was made to sections 14(2)(e), 14(2)(f), 14(2)(g), 14(2)(i), 14(3)(b) and 14(3)(g) of the *Act*.

The appellant appealed the Police's decision and appeal file MA-010142-1 was opened. The appellant stated in his letter of appeal that, in addition to the supplementary occurrence report identified by the Police, he believed that additional responsive records should exist. The appellant also explained that he previously requested that the Police attach a statement of disagreement to his file, and that as of the date of his letter of appeal, he had not received a response from the Police. During the mediation stage of the appeal, however, the parties agreed that this issue would be addressed in a separate appeal.

With respect to the scope of the appellant's request, the appellant explained that he was requesting access to: (1) all records that he submitted to the Police in support of his harassment complaint and police complaints; (2) all records produced by the Police regarding these complaints, which the appellant had not already been granted access to; and (3) the portions of records which were previously withheld from the appellant by the Police, excluding names of individuals which he supplied to the Police.

The Police, however, took issue with the scope of the appellant's request. The Police stated that at the time he made the request, the appellant agreed to narrow the scope of his request to records that were produced by the Police, excluding those that he received as a result of a previous access request. In view of this, the Police identified only one record (the supplementary occurrence report described above) as responsive to the narrowed request.

Further mediation was not possible and the appeal was moved to the adjudication stage.

An IPC adjudicator sent a Notice of Inquiry to the Police seeking representations with respect to the issues in that appeal. In response, the Police issued a new decision letter (decision letter #3). In decision letter #3, the Police identified the supplementary occurrence report that is currently at issue in this appeal, as well as additional records responsive to the appellant's request, and granted partial access to them. Although the Police indicated that information pertaining to individuals other than the appellant had been removed from the records, the Police did not indicate on what basis this information had been severed. Based on this new decision, it also appeared that the Police were no longer taking issue with the scope of the appellant's request.

The appellant then wrote to this office outlining his concerns with respect to decision letter #3. In his letter the appellant identified the issues in dispute as follows:

- i.) any information (excepting names as described above) that has been severed from the records I have been provided with.
- ii.) the several documents I submitted to police in support of my complaints, enumerated in my letter to [the mediator] of July 5, 2001, in addition to the records explicitly mentioned in the July 5 letter, this would include a copy of the complete telephone answering machine tape, and of the telephone documentation originally submitted to [named police officer], which clearly fall under the scope of the request.
- iii.) any other records or information police may have pertaining to my complaints, in addition to those defined by the above.

The IPC adjudicator wrote the Police indicating that before the adjudicator could proceed with adjudication, in view of the new decision issued by the Police, it would be necessary to clarify the issues that remain in dispute. Specifically, the adjudicator stated that it would be necessary to determine the basis for the severances made by the Police to the responsive records, as well as their position with respect to the issues that had been identified in the appellant's letter to the IPC. The adjudicator continued by stating that in view of the above, this office had assigned appeal number MA-010142-2 to this matter to deal with the issues stemming from decision letter #3, which include access to the supplementary occurrence report at issue in Appeal MA-010142-1. In order to deal with this matter as expeditiously as possible, the IPC streamed this appeal to the mediation stage so that a mediator could clarify the outstanding issues with respect to this matter before moving the appeal to adjudication.

I initially sought representations from the Police and they submitted representations. The Police agreed to share the non-confidential portions of their representations with the appellant. I then sought representations from the appellant. The appellant submitted two sets of representations.

RECORDS:

When I initially sent my Notice of Inquiry to the parties, I had described six records as being at issue. However, based upon the representations of the Police, I am now satisfied that portions of

these records have been released to the appellant. Specifically, I understand that the appellant has received certain portions of the detective's notebook and all of the appellant's notes that he gave to the Police. These pages are, therefore, no longer at issue in this appeal.

To assist in organizing the records, I have assigned a page number to each document that remains at issue. These records and the exemptions claimed are described in the following table:

Record Number	Access Provided	Description	Exemptions Claimed
1	Partial access	Occurrence Report #98-027753-0, dated October 16, 1998	38(a)(b), 8(2)(a), 14
2	Denied in full	Supplementary to Report #98-027753-0, dated October 16, 1998	38(a)(b), 8(2)(a), 14
3	Partial access	Supplementary to Report #98-027753-0, dated October 16, 1998	38(a)(b), 8(2)(a), 14
4	Partial access	Supplementary to Report #98-027753-0, dated October 16, 1998	38(a)(b), 8(2)(a), 14
5	Partial access	Supplementary to Report #98-027753-0, dated May 7, 1999	38(a)(b), 8(2)(a), 14
8	Partial access	Supplementary to Report #98-027753-0, dated March 15, 2001	38(a)(b), 8(2)(a), 14
17	Partial access/ Not applicable	Notebook notes of named detective	38(a)(b), 8(2)(a), 14
18	Denied in full/ Not applicable	Notebook notes of named detective	38(a)(b), 8(2)(a), 14
20	Partial access	Notebook notes of named detective	38(a)(b), 8(2)(a), 14
21	Denied in full/ Not applicable	Notebook notes of named detective	38(a)(b), 8(2)(a), 14
22	Partial access	Notebook notes of named detective	38(a)(b), 8(2)(a), 14
23	Partial access	Notebook notes of named detective	38(a)(b), 8(2)(a), 14

DISCUSSION:

PERSONAL INFORMATION

As I have indicated, the Police have relied on section 38(b) in conjunction with section 14 in denying access to the information at issue. In order to assess whether these provisions apply it is, first, necessary to determine whether the records contain personal information and, if so, to whom that personal information relates.

Under section 2(1) of the *Act*, "personal information" is defined as recorded information about an identifiable individual, including any identifying number assigned to 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.

Based on my review of the records, there is no doubt that the records contain the personal information of the appellant, five named affected persons and other identifiable individuals. The information contained in the records reveals the details of a Police investigation into a complaint filed by the appellant. The nature of the complaint is set out, the names and addresses of four of the five affected persons are provided along with the details of interviews conducted with them. For the fifth affected person, details of this person's relationship with the appellant are provided. The records also make brief reference to interviews conducted with the other identified individuals during the course of the investigation.

However, with respect to Record 4, the severed portion of this record contains information regarding specific steps taken and to be taken by the named detective in respect of the investigation. In my view, the severed portion of Record 4 does not contain the personal information of any individual. I will, therefore, address the status of this information under the section 8(2)(a) exemption.

INVASION OF PRIVACY

Introduction

Section 36(1) of the *Act* gives individuals a right of access to their own personal information. Section 38 provides certain exceptions to the section 36(1) right of access. Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant and of other individuals, the Police have the discretion to deny the appellant access to that information if disclosure of the information would constitute an unjustified invasion of another individual's personal privacy.

Sections 14(2) and (3) provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for consideration in making this determination. Section 14(3) lists types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

In *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, the Divisional Court 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).

I will first consider the application of the presumption in section 14(3)(b).

Section 14(3)(b)

Introduction

Section 14(3)(b) reads:

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;

Representations

The Police make substantial representations in support of the section 38(b)/14 exemption. And, as stated above, the Police rely specifically on the criteria in sections 14(2)(e), (f), (g) and (i) and the presumptions in sections 14(3)(b) and (g) to deny access to the information denied. Due to the nature of the records and the operation of the section 14(3)(b) exemption, I will first examine the applicability of the section 14(3)(b) exemption to the circumstances of this appeal.

The Police make the following representations regarding section 14(3)(b):

The Police [...] has relied on s[ection] 14(3) to deny access in that all information sought was compiled and is identifiable as part of an investigation into a possible violation of the law.

“Compile” means to collect, gather or assemble together. The term is intended to be applied comprehensively to all data, information and records gathered together by a police officer or agent in the conduct of a law enforcement investigation. [Order P-666]

The records sought relate to this police report, which was compiled and is identifiable as part of the above-referenced police investigation, which is for the purpose of determining whether there was a violation of the *Criminal Code of Canada* or other relevant legislation. Therefore, th[e] Police [...] relied upon s[ection] 14(3)(b) and s[ection] 38(b) of the *Act*.

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The records at issue were compiled and are identifiable as part of an investigation into a possible violation of law. In this case the violation of law was Harassment. The investigation was conducted and the report submitted.

In order P-223, Assistant Commissioner Tom Wright states[:] “this subsection does not specify whether the “investigation into a possible violation of law” must be one which examines the activities of the individuals who are subject to investigation or is more properly referable to those of the individuals interviewed in the course of such investigations. It is my opinion that the subsection may be interpreted in either way.”

The record at issue is Hamilton Police Service Harassing Phone Calls Report. This record was prepared in the course of law enforcement and investigation by this Police Service, which is responsible for enforcing and regulating compliance with the Criminal Code of Canada as well as Provincial and Municipal Legislation; its powers governed by Bill 107 of the Police Services Act. As such, s[ection] 14(3)(b) and s[ection] 38(b) are applicable. [Order PO-1715]

The presumption in s[ection] 14(3)(b) only requires that there be an investigation into a possible violation of law. Thus there is a presumption raised that disclosure of the record at issue would be an unjustified invasion pursuant to s[ection] 14(3)(b).

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Balancing all considerations, the Police [...] submits that the presumption in s[ection] 14(3)(b) has more weight than any factors contained in s[ection] 14(2), which may favour disclosure.

The appellant made extensive representations in response to those submitted by the Police in respect of sections 14(2) and 14(3).

With respect to section 14(3)(b) specifically, the appellant states that the records to which he is seeking access were not compiled or identifiable as part of an investigation into his harassment complaint or his complaint made against the Police. He views these records as:

[...] no more than reports of two interviews conducted with [the appellant], documenting [his] harassment complaint, together with a few off-hand and wholly unsupported comments regarding the validity of the information and, finally, in the May 11, 1999 supplementary, a recommendation to refer the matter to the COAST unit, whose mandate is to deal with mental health concerns. [The named detective’s] later statements [...] regarding the existence of any investigation prior to his own, were equivocal at best.

The appellant states further:

There is, therefore, nothing in this information to indicate that it was either compiled or is identifiable as part of an investigation, as the exemption in section 14(3)(b) requires, unless the mere reporting of a complaint is, in and of itself, an

“investigation,” which is not in conformity with the ordinary, commonsense meaning of the word.

Although [the named detective] may later have reviewed this material, in the context of his much later investigation, the information obviously was not compiled as a part of that investigation, which did not begin until December, 2000.

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It may be objected that “except to the extent that disclosure is necessary to continue the investigation” assumes that the investigation is still open, or that this determination should be, properly, made by the Police only. I submit that this may be so only in the case of the proper and lawful performance by the Police of their duties and responsibilities. The Legislature surely did not intend the provisions of the *Act* concerning law enforcement to serve as a shield and screen for improper conduct by the Police. [...] It appears that the Police are using their monopoly on information to cover up police misconduct and/or negligence and/or incompetence. I therefore submit that the determination that the disclosure of the information to me is necessary in order to continue the investigation would be entirely consistent and in accord with the meaning of the *Act* and the intentions of the Legislature.

Findings

Based on my review of the records and the parties’ representations, I am satisfied that the Police compiled all of the information in the records as part of an investigation into a possible violation of law, an offence of harassment under the *Criminal Code*. In my view, the records at issue concern a Police investigation into a complaint of harassment. While the appellant may wish to gain access to this information to pursue a complaint of Police wrongdoing, this does not negate the application of the section 14(3)(b) presumption. I am satisfied that section 14(3) applies to all of the records at issue with the exception of Record 4.

Regarding severance, in my view the Police have provided the appellant with as much of his information as is reasonably possible in the circumstances without disclosing exempt information relating to the affected persons. Therefore, I find that section 38(b) exemption applies to the information withheld by the Police in all of the records except Record 4.

Exercise of Discretion

The Police make the following representations regarding their exercise of discretion under section 38(b) of the *Act*:

Th[e] Police understands that s[ection] 38(b) of the *Act* introduces a balancing principle. We looked at the information and weighed the appellant’s right of access to his own information against an affected individual’s right to the

protection of their privacy. The degree of disclosure that took place was founded on the individual merits of this case. This police service disclosed a portion of the records that it believed it could without releasing information subject to exemption. It was felt that we had identified a real potential for harm if certain information was released. Whether or not further harm occurs should not be the issue, rather the fact that we have identified that harm and it is believed that it could occur should suffice to rebut the argument for the release of this information. It could also be argued that this release of information could serve to aggravate an already delicate situation. The disclosure of the record definitely constitutes an unjustified invasion of the affected individuals' personal privacy.

The appellant submits in response:

In the Police's comments under this heading regarding the "balancing principle" introduced by section 38(b), they make cryptic remarks regarding "a real potential for harm if certain information was released," and "we have identified that harm and it is believed that it could occur," and that "this release of information could serve to aggravate an already delicate situation."

No such "harm" is identified in the non-confidential representations I received. [...] I note only, therefore, that it is not sufficient to state that there is a "potential for harm," or that "it is believed that [a harm] could occur." For this consideration to be relevant, evidence must be supplied of its relevance (Order M-321). That is, it must be shown that there is a reasonable expectation of "harm" occurring if the information is disclosed. A vague or hypothetical "harm," or someone's belief that a "harm" could occur, would not be a relevant consideration.

After careful consideration of the materials before me and, in particular, the nature of the Police investigation and the records, I am satisfied that the Police properly exercised their discretion by providing the appellant with partial access to the records. Therefore, I uphold the decision of the Police respecting all of the records at issue with the exception of Record 4.

LAW ENFORCEMENT

Introduction

In addition to section 38(b) of the *Act*, another exemption to the general right of access is found in section 38(a) of the *Act*, under which the institution has the discretion to deny an individual access to his or her own personal information in instances where the exemptions in sections 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information [emphasis added].

In this case, the Police have relied on section 8(2)(a) in relation to the records at issue, in exercising their discretion under section 38(a). However, I have found that the section 38(b)/14 exemption applies to all of the records at issue with the exception of Record 4, which does not

contain the personal information of any individual. Therefore, I will consider whether the section 8(2)(a) exemption applies to exempt the severed portion of Record 4 from disclosure.

I have described the severed portion of Record 4 above. It contains information regarding steps taken on a specific date by the named detective in response to the appellant's allegations of harassment and the steps to be taken by this detective in respect of this investigation.

Section 8(2)(a): Report prepared in the course of law enforcement

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;

In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

(See Order 200 and Order P-324)

The word "report" is not defined in the *Act*. However, previous orders have found that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

The Police provided representations on the application of section 8(2)(a) to the records at issue. However, their representations are general in nature and do not specifically address the severed information in Record 4.

Following the reasoning in Order 200, I am not persuaded that Record 4 qualifies as a "report". At best, this record makes general reference to actions taken and to be taken with respect to an investigation. I am not satisfied that this record meets the standard of a formal statement or account of the results of the collation and consideration of information. Accordingly, part one of the three part test has not been met and I find that the section 8(2)(a) exemption does not apply.

REASONABLENESS OF SEARCH

The appellant believes that more records should exist in addition to those identified, given that the scope of his request includes all records that he submitted to the Police in support of his harassment complaint and police complaints. The Police's position is that the scope of the appellant's request is limited to records that were produced by the Police, excluding those that he received as a result of a previous request.

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Police have 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 I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records being sought and the Police indicates that further records do not exist, it is my responsibility to ensure that the Police have conducted a reasonable search to identify any records that 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 its obligations under the *Act*, the Police must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Police's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The Police submitted representations on this issue that outline the steps it took in conducting its search for records responsive to the appellant's request. The Police states that searches were conducted at three stages: the request and mediation stages and after receiving my Notice of Inquiry. For each of the three searches the Police has outlined how it conducted each search through the "Records Branch", what it searched and who was involved in each search.

The appellant submitted voluminous representations under this issue. Many of the appellant's comments address issues that fall outside the scope of this issue, including concerns regarding the handling of other appeals with this office, the way in which this appeal was managed by the mediator during mediation, the accuracy of the Reports of Mediator issued with respect to this appeal and discrepancies between the manner in which the Police has described the records in its representations. The appellant's submissions that address the reasonable search issue focus principally on the scope of his request. The appellant takes the position that the Police improperly interpreted his request as being restricted to records that contain only his personal information.

Based upon my review of the parties' representations and the records themselves, I am satisfied that the Police has taken all reasonable steps to locate records responsive to the appellant's request. As well, in my view the Police has properly interpreted the scope of the appellant's

request. I am satisfied that the Police has taken a reasonably broad view of the appellant's request and has taken reasonable steps to identify all records responsive to this request.

PUBLIC INTEREST OVERRIDE

Introduction

The appellant has raised the application of the section 16 public interest override as a basis for allowing access to the severed records denied under the section 38(b)/14 exemption.

Under section 16 of the *Act*, an exemption from disclosure under section 14 (among others) does not apply where a "compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption." For section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

"Compelling" is defined as "arousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act's* central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [See Order P-1398]

Section 14 and Public Interest

It is important to note that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption. (See Order PO-1705)

Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. It is important to note that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that "[a]s the personal information subject to the request becomes more sensitive in nature ... the effect of the proposed exemption is to tip the scale in favour of non-disclosure". (See Order MO-1254)

Representations

The appellant makes extensive representations regarding the application of the public interest override. The central theme in the appellant's submissions appears to be that he needs the information denied under section 38(b)/14 to expose the Police as having conducted an inadequate investigation of his harassment complaint and as being guilty of police misconduct. The appellant feels strongly that due to the "powers wielded by the Police [...] and their mandate to protect the security, freedom and property of citizens [...] any police misconduct [is] a particularly public concern."

The Police state:

[...T]here is no evidence of compelling public interest to invoke the application of s[ection] 16 to oust the presumptions in s[ection] 14(3) nor the principles as enunciated in John Doe. The primary purpose of this request seems to be to satisfy the appellant that a proper investigation was conducted. Such a purpose does not constitute a "compelling public interest". [Order P0-1715]

Findings

This appeal arises out of the appellant's wish for access to records that document matters relating to a private complaint of harassment filed by and, subsequently, investigated by the Police. The appellant has not demonstrated a relationship between disclosure of the severed portions of *these particular* records and the advancement of the public interest he identifies, in this case exposing the Police for what he considers to have been an inadequate investigation and police misconduct. Therefore, the appellant has not established a "compelling public interest" as required by section 16, and this section does not apply.

ORDER:

1. I uphold the Police's decision to withhold portions of Records 1, 3, 5, 8, 17, 20, 22 and 23, and Records 2, 18 and 21 in their entirety.
2. I order the Police to disclose Record 4 in its entirety to the appellant no later than **January 20, 2003**, but no earlier than **January 15, 2003**.
3. In order to verify compliance with the terms of provision 2, I reserve the right to require the Police to provide me with a copy of the material it discloses to the appellant.

Original signed by: _____

Bernard Morrow
Adjudicator

December 11, 2002 _____