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

ORDER MO-1651

Appeal MA-020299-2

Belleville Police Service

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NATURE OF THE APPEAL:

The Belleville Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a letter sent by a named Crown Attorney to the Police. The Police located the requested record and denied access to it, claiming the application of the following exemptions contained in the *Act*:

- law enforcement – section 8(2)(c);
- relations with other governments – section 9(1)(d); and
- invasion of privacy – section 38(b), with reference to the presumption in section 14(3)(b) (compiled as part of a law enforcement investigation), and the considerations listed under sections 14(2)(f) (highly sensitive information), 14(2)(h) (supplied in confidence) and 14(2)(i) (disclosure may unfairly damage a person's reputation).

The requester, now the appellant, appealed the decision of the Police to deny access to the record. Mediation of the appeal was not successful and the matter was moved to the adjudication stage of the appeal process.

As the record may contain the personal information of the requester, I decided to add the possible application of section 38(a) (discretion to deny access to requester's own information), in conjunction with the exemptions in sections 8(2)(c) and 9(1)(d) as an issue in the appeal.

I initially sought representations from the Police and two individuals whose interests may be affected by the disclosure of the record (affected persons #1 and 2), as they bear the onus of establishing the application of the exemptions claimed for the record. The Police and one of the affected persons (affected person #2) submitted representations. Affected person #2 consented to the disclosure of his personal information in the record. Affected person #1, the named Crown Attorney, did not respond. I then provided the appellant with a Notice of Inquiry and attached a copy of the representations of the Police. The appellant provided submissions, which were shared with the Police and affected person #1. I then received reply representations only from the Police.

RECORDS:

The sole record at issue in this appeal is a two-page memorandum dated July 30, 2002.

DISCUSSION:

PERSONAL INFORMATION

The section 38 personal privacy exemption applies only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*. Personal information means recorded information about an identifiable individual, including the telephone number of the individual [paragraph (d)], the views or opinions of another individual about the individual [paragraph (g)] 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)].

I have reviewed the record and make the following findings:

- only the second last paragraph of page 2 of the record contains the personal information of the author of the memorandum (affected person #1), including her telephone number [paragraph (d)] and information relating to her activities during the month of August 2002 [paragraph (h)]

- the remaining portions of the record contain the personal information of the appellant and affected person #2 consisting of the views or opinions of another individual (affected person #1) about these individuals [paragraph (g)]

INVASION OF PRIVACY

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the Police determine that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Police have the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The Police must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the Police determine that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives them the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, 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 of the individual to whom the information relates. Section 14(2) provides some criteria for the Police to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not 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].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling

public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption (see Order PO-1764).

If none of the presumptions in section 14(3) applies, the Police must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The Police have relied on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act* and the factors listed under section 14(2)(f), (h) and (i) of the *Act*. These provisions state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (h) the information was supplied by the individual to whom it relates in confidence;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (b) 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;

Section 14(3)(b)

In support of their contention that the information in the record is subject to the presumption in section 14(3)(b), the Police submit that:

> The information contained in the memorandum from the Crown Attorney was, at the time, directly related to an "ongoing" investigation, not only surrounding a Criminal Charge also the potential for a charge of Misconduct under the *Police Services Act*. In addition, the potential for civil litigation is still outstanding as a person was unlawfully arrested and not properly before the courts.

In my view, the presumption in section 14(3)(b) has no application to the record at issue. At the time the record was created, the Police *investigation* into a possible violation of law had been concluded and the contemplated charge was not proceeded with by the Crown. The investigation

had, accordingly, been completed at the time the record was prepared by affected person #1. Accordingly, I find that the record was not compiled and did not form part of the law enforcement investigation, as is required under section 14(3)(b).

Considerations under Sections 14(2)(f), (h) and (i)

The Police submit that the information contained in the record is "highly sensitive" within the meaning of section 14(2)(f) as it contains the author's "unsubstantiated opinion regarding the competencies of at least two members of the Belleville Police Service."

The Police also indicate that the record was received from affected person #1 "in confidence", who received assurances from the Police that it would "not be disclosed". Accordingly, the Police argue that the factor listed in section 14(2)(h) is relevant in determining whether the disclosure of the record would result in an unjustified invasion of personal privacy.

The Police also submit that section 14(2)(i) is applicable to the record, although they do not provide any basis for this contention.

The appellant indicates that he does not intend to initiate any legal action against affected person #1 should the record be disclosed to him. He also expresses concerns that negative comments "could be reflected in my employment record" as a result of this memorandum being received by the Police.

As stated above, I did not receive any submissions from affected person #1 despite providing her with an opportunity to do so at both the initial representations and reply stages. This individual's views on the disclosure of the personal information in the record would have been very helpful.

Findings

The record contains the personal information of the affected parties and the appellant. Under section 38(b), where none of the presumptions under section 14(3) are found to apply, I am required to undertake a balancing exercise being mindful of the listed considerations contained in section 14(2), as well as any unlisted factors, to determine whether disclosure would result in an unjustified invasion of personal privacy.

In my view, the record includes information which qualifies as "highly sensitive" within the meaning of section 14(2)(f). The record contains the author's opinions regarding the actions and motivations of the appellant and affected person #2 and uses very strong language in doing so. I find that this is a significant factor weighing against the disclosure of the record.

However, I also find that the Police have not provided sufficient evidence to substantiate their contention that the record was submitted with an expectation that it would be treated confidentially, within the meaning of section 14(2)(h). Neither the record itself nor the representations provided by the Police explicitly indicate that the author of the memorandum had a reasonably-held expectation that it would be treated confidentially. On the contrary, the contents of the memorandum give every indication that its author expected the Police to

acknowledge her complaint and take specific action against the officers named therein. Therefore, I find that section 14(2)(h) is a not a relevant factor favouring the non-disclosure of the record.

The Police have not provided any submissions on the application of section 14(2)(i) and I have not heard from affected person #1 on this point. Therefore, I am unable to give any weight whatsoever to this factor.

The appellant relies on the fact that affected person #2 has consented to the disclosure of his personal information to the appellant. He also emphasizes his right of access to information relating to himself under section 4(1)(a). The appellant also takes the position that he ought to be entitled to information relating to himself, particularly since it may have an adverse effect on his employment situation. I find these to be significant considerations favouring the disclosure of the information contained in the record relating only to the appellant or to affected person #2.

I note that one of the purposes of the *Act*, set out in section 1(b), is to provide individuals with a right of access to personal information about themselves, while protecting the privacy of others. Balancing the appellant's right of access to information about himself against affected person #1's right of privacy, I find that the disclosure of the personal information contained in the record which relates only to affected person #1 would result in an unjustified invasion of the personal privacy of this individual. However, I conclude that the exercise of the appellant's right of access to information about himself and affected person #2, who has consented to its disclosure, would not result in an unjustified invasion of the personal privacy of affected person #1.

I conclude my discussion of the invasion of privacy exemption by indicating that only the final portions of the record which contain only the personal information of affected person #1 qualify for exemption under section 38(b). The remainder of the record does not qualify for exemption under this section. I have provided the Police's Freedom of Information and Protection of Privacy Co-ordinator with a highlighted copy of the record in which I have indicated those portions of the record which are exempt from disclosure under section 38(b). I will now consider the application of the other exemptions claimed by the Police to apply to the record.

LAW ENFORCEMENT

The Police also rely on the discretionary exemption in section 8(2)(c), taken in conjunction with section 38(a) of the *Act* to deny access to the record. Section 8(2)(c) states:

> A head may refuse to disclose a record,
>
> > that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

Section 8 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based

on reason. An institution relying on the section 8 exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 42 of the *Act*. [Order P-188]

The requirement in Order 188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the institution seeks to avoid by applying the exemption. [Order P-948]

In support of its contention that the record is exempt from disclosure under section 8(2)(c), the Police simply state that "disclosure could and would potentially expose the author (in this case the Crown Attorney) to civil liability."

In my view, the Police have not provided me with the kind of "sufficient evidence to substantiate the reasonableness of the expected harm" which is required under section 8(2)(c). The Police have not demonstrated a logical connection between the disclosure of the record and the potential harm which it seeks to avoid. I find, therefore, that sections 8(2)(c) and 38(a) have no application to the record at issue.

RELATIONS WITH OTHER GOVERNMENTS

The Police also rely on the discretionary exemption in section 9(1)(d), taken in conjunction with section 38(a) of the *Act*, to support its position that the record ought not to be disclosed. The relevant portions of section 9(1) state:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c);

In support of this contention, the Police state:

> The memo in question was issued and endorsed by the Crown Attorney of the County of Hastings, an agent of the Ministry of the Attorney General. Section 9(2) consent was sought and refused.
>
> The decision not to disclose considered several factors, including but not limited to, the potential for civil litigation by the officer or officers, the potential for action of false arrest by the person arrested and detained, and the potential for misconduct at the time based on the communication of the Crown Attorney.

It is not disputed that the record was received by the Police from affected person #1, who is a Crown Attorney employed by the Ministry of the Attorney General, an agency of the Government of Ontario. In my discussion of the consideration in section 14(2)(h) above, I found that I was not provided with sufficient evidence to demonstrate that the record was received by the Police from the Crown Attorney in confidence. I reach the same conclusion with respect to the requirements of section 9(1) and find that this section does not apply to exempt the record from disclosure as I have not been provided with sufficient evidence to reach a finding that it was provided in confidence to the Police. As a result, I find that sections 9(1) and 38(a) have no application to the record at issue.

ORDER:

1. I order the Police to disclose to the appellant those portions of the record which are **not** highlighted on the copy of the record which I have provided to the Freedom of Information and Protection of Privacy Co-ordinator. The Police are ordered to provide the appellant with a copy of those portions of the record which are **not** highlighted by **July 2, 2003** but not before **June 27, 2003.**

2. I uphold the decision of the Police to deny access to those portions of the record which are highlighted on the copy of the record provided to the Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the Police to provide me with a copy of the record which is disclosed to the appellant.

Original signed by: May 27, 2003
Donald Hale
Adjudicator