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

ORDER MO-1973

Appeal MA-050057-1

Halton Regional Police Services Board

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NATURE OF THE APPEAL:

A request was submitted to the Halton Regional Police Service (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information regarding a specific occurrence:

1. … the e-mail which [named Staff Sergeant] sent you and [named Inspector] on this matter, and the repl(ies) which were provided in relation to same, and

2. All notes (handwritten, typed, audio-taped or store electronically) which [named Staff Sergeant], [named Constable] and any other HRPS member's notes made on this matter, but not limited to notes made on or about September 9, 10, and 19, 2004.

The Police located and granted partial access to the responsive records. Records were withheld in full or in part pursuant to section 38(a) of the Act in conjunction with sections 8(1)(e), 8(1)(l), and 7(1) of the Act.

The requester, now the appellant, appealed the Police's decision.

During the course of mediation, the appellant clarified that he was not seeking access to the information withheld from the investigating officer's notebook entries. Sections 8(1)(e) and 8(1)(l) of the *Act* are therefore not at issue in this appeal because they were only claimed for this information.

However, the appellant advised that he wanted to pursue access to the e-mail correspondence that was withheld. In response, the Police advised the mediator that they are maintaining their reliance on sections 38(a) and 7(1) of the *Act* to deny access to the e-mail correspondence. Accordingly, sections 38(a) and 7(1) of the *Act* remain at issue in this appeal.

As no further issues could be resolved, the file has proceeded to the adjudication stage.

I sought and received the representations of the Police. I sent a Notice of Inquiry to the appellant, who did not submit representations.

The appellant alleged a reasonable apprehension of bias and asked me to remove myself as the adjudicator in this matter. In my view, the appellant's allegations are unfounded and I reject his request for me to remove myself.

RECORDS:

The records at issue in this appeal consist of five pages of e-mail correspondence.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) and states, in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (g) the views or opinions of another individual about the individual,

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of "about" the individual

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.)].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Do the records contain personal information and if so, to whom do they relate?

The Police submit that "[t]he recorded information that has been withheld from disclosure contains the personal information of the appellant".

I have reviewed the five pages of e-mail correspondence. The e-mails are exchanges between the Police's staff; the appellant is named and is the subject of the e-mails. The e-mails concern the appellant's request for information under the *Act*. Accordingly, I find that these records contain the personal information of the appellant. The e-mails also contain the names of several Police officers and other Police employees. The information about the officers and the other Police employees appears in those individuals' employment capacity. Their involvement or presence does not reveal anything of a personal nature. Such information is normally considered to be information about employees in their professional capacity, and not considered personal information [Order MO-1288]. I find that it is not personal information.

In summary, I find that the records at issue contain the personal information of the appellant.

PERSONAL PRIVACY

General Principles

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

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, **7**, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

In this case, the institution relies on section 38(a) in conjunction with section 7(1).

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084,

upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd Doc. C42073 (Sept. 26, 2005) (C.A.) See also Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner) Docs. C42061 and C42071 (Sept. 26, 2005) (C.A.)].

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)* (cited above)].

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above].

A number of previous orders have considered the purpose of section 7(1). As noted above, in Order 24 the purpose was described as allowing "…persons in the public service [to] advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure". In their representations the Police refer to Order 94, in which the purpose of allowing for the "free-flow of advice and recommendations" is reiterated. There are numerous other orders from this office which adopt the same approach and apply the same reasoning, as I also do for the purposes of this appeal.

The Police go on to state "[t]his institution believes it is extremely important that members of the Halton Regional Police Service be allowed to communicate freely with each other and consult freely with each other about matters of importance or 'course of action to be taken' in their course of employment." The Police refer to Order P-363 and quote former Assistant Commissioner Tom Mitchinson:

> … [it] is a fact that staff would not feel free and open to express their minds in writing on specific issues if they were aware that their advice or recommendations were subject to possible public scrutiny. Such 'chilling effect' is precisely the rationale behind the exemption…

I agree with former Assistant Commissioner Mitchinson. However, I do not agree with the Police that either this office's jurisprudence or the former Assistance Commissioner's findings support the application of section 7(1) to the records in this appeal. The records are, as previously described, e-mail exchanges between the Police's staff, concerning the appellant's request for information under the *Act*. In my view, rather than setting out a recommended course of action to be accepted or rejected by its recipient during the deliberative or policy-making process, the records contain information which could be considered as a caution, or as a supervisor's direction to staff on how to conduct an investigation. Such information has previously been found *not* exempt under section 7(1).

Adjudicator Frank DeVries dealt with a similar situation in Order MO 1714, where he concluded:

> I find that Record 1 does not qualify for exemption under section 7 of the *Act*. As identified by the Township, this record is a direction given to staff regarding a particular action. Similar to the situation in Order P-363, the record in this appeal does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; rather, it directs staff to take a particular action. This does not constitute "advice or recommendations" for the purpose of section 7 of the *Act*.

I find that the records at issue in this appeal also do not set out a suggested course of action to be accepted or rejected by the recipient. For this reason, they do not qualify for exemption under section 7(1) of the *Act*, and are not exempt under section 38(a). I will order them to be disclosed.

ORDER:

1. I order the Police to disclose the records to the appellant by sending him a copy on or before **October 20, 2005.**

2. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: September 29, 2005
Beverley Caddigan
Adjudicator