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

ORDER MO-2065

Appeal MA-050287-1

Halton Regional Police

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NATURE OF THE APPEAL:

The Halton Regional Police Services Board (the Police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)*:

> I am requesting information in reference to [a specified occurrence number]. Also any and all follow-up report[s] pertaining to the same.

The Police located a police occurrence report, a follow-up report and notebook entries relating to the occurrence referred to in the request. The Police granted partial access to the records and denied access to the remaining portions pursuant to the personal privacy and law enforcement exemptions under the *Act*. The Police indicated that some information was withheld from the investigating officer's notebook entries on the basis that it is non-responsive to the request.

In particular, the Police claimed that disclosure of the remaining portions of the records would constitute an unjustified invasion of the personal privacy of another individual or individuals under section 38(b) of the *Act*. They relied on the factors listed at 14(2)(f), 14(2)(g), and 14(2)(i) as well as the presumptions at sections 14(3)(a), 14(3)(b) and 14(3)(h).

The Police also claimed that patrol zone information, 10-codes and/or statistical codes in the records are exempt under sections 8(1)(e) (endanger life or safety) and 8(1)(l) (facilitate commission of unlawful act), in conjunction with section 38(a) of the *Act*. The Police further claimed that the records were exempt pursuant to section 8(2)(a) (law enforcement report), in conjunction with section 38(a) of the *Act*.

The requester (now the appellant) appealed the Police's decision to this office. During mediation, the appellant confirmed that he was pursuing access to the withheld portions of the records, including the portions the Police claim to be non-responsive to the request.

This appeal was not resolved in mediation and was moved to the adjudication stage. At the outset of the adjudication process, the appellant requested that this office contact two individuals for the purpose of giving them an opportunity to consent to the release of their personal information to him. Accordingly, I sent a Notice of Inquiry to the Police and sought their representations. I also contacted the two individuals identified by the appellant to determine whether they consent to the disclosure of the information relating to them. In response, I received the representations of the Police and the written consent to disclose from one of the individuals. I then sent a Notice of Inquiry to the appellant, along with the non-confidential portions of the Police's representations. Although the appellant did not submit representations, he confirmed that he continues to seek access to the withheld portions of the records.

RECORDS:

The records remaining at issue consist of the withheld portion of the occurrence report, follow-up report and the investigating officer's notebook entries.

DISCUSSION:

RESPONSIVENESS OF RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880]. In my view, the appellant's request clearly indicated that he was seeking access only to information relating to a specific occurrence. Accordingly, the scope of the request is clear and the only issue is whether the portions of the record identified as non-responsive by the Police relate to the appellant's request.

The Police submit that:

> Portions of the officer's notebook were removed as non-responsive as they pertain to matters totally unrelated to the above-noted occurrence such as traffic stops and investigations of other occurrences/calls for assistance. These matters are completely separate and distinct from the appellant's occurrence and, therefore, do not "reasonably relate" to the request.

I have carefully examined the portion of the officer's notebook which the Police claimed not to be responsive to the request. I find that these portions of the record are concerned with matters that are not related to the occurrence involving the appellant. Accordingly, I find that this information is not responsive to the appellant's request and is therefore outside the scope of this appeal.

PERSONAL INFORMATION

The Police have claimed that sections 38(a) and (b) apply to the withheld records. In order to evaluate the application of these exemptions, I must first address the question of whether the records sought by the appellant contain "personal information", and if so, to whom the information relates.

The Police submit that the records at issue contain the names, addresses, telephone numbers, dates of birth and statements of the affected individuals provided to the Police during its investigation of the occurrence, thereby qualifying as "personal information" within the definition of that term in section 2(1).

Under section 2(1) of the *Act* "personal information" is defined, in part, as 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 where they relate to another individual,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if 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;

I have carefully reviewed the occurrence report, follow-up report and notebook entries and find that they contain the personal information of the appellant and other individuals, as it includes their names, addresses and telephone numbers, as mentioned in paragraph (d) of the definition. I also find that the records at issue contains personal information which falls within the ambit of paragraphs (e), (g) and (h) of the definition. This is the personal information of the appellant and other individuals.

Having determined that the records contain the personal information of both the appellant and other identifiable individuals, I will review whether the undisclosed information qualifies for exemption under sections 38 (a) or (b) of the *Act*.

LAW ENFORCEMENT/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 36(1) of the *Act* gives individuals a general right of access to their personal information held by a government body. Section 38 provides a number of exceptions to this general right of access, including section 38(a), which reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (a) if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information; [emphasis added]

In this appeal, the Police rely on section 38(a) in conjunction with sections 8(1)(e) and 8(1)(l) to deny the appellant access to patrol-zone information, 10 codes and/or statistical codes contained in the record. Sections 8(1)(e) and 8(1)(l) state:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

The Police also rely on section 38(a) in conjunction with section 8(2)(a) to deny access to the remaining portions of the record. Section 8(2)(a) states:

> (2) A head may refuse to disclose a record,
>
> > (a) 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;

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (a) policing,

> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply to a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]. Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Previous orders of this office have determined that a police investigation into a possible violation of the *Criminal Code* qualifies as a "law enforcement" matter for the purposes of section 2(1) of the *Act*. Accordingly, I find that the record at issue in this appeal relates to "law enforcement", as defined in section 2(1).

Section 8(1)(e) and 8(1)(l)

The Police state that sections 8(1)(e) and 8(1)(l) was used to remove the patrol-zone information, 10 codes and/or statistical codes from the records. The representations of the Police state:

> The effectiveness of these codes would be severely limited if they were disclosed. If individuals intent on engaging in criminal activity are aware of the procedures represented by the codes, they could then be used to counter the actions of the police in response to a variety of emergency situations. This could result in the risk of harm to either police officers or members of the public involved in a police situation (refer Orders M-393, M-757 and PO-1777).

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]. In this appeal, the "detailed and convincing" standard applies in respect of section 8(1)(l).

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

This office has issued many orders regarding the release of Police codes and has consistently found that section 8(1)(l) applies to 10 codes (for example, see Orders M-93, M-757, MO-1715

and PO-1665) as well as other coded information such as 900 codes (see Order MO-2014). These orders adopted the reasoning stated in Order PO-1665 by Adjudicator Laurel Cropley:

> In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

I have carefully reviewed the records and find that some of the withheld information consists of numerical codes identifying the nature of call and patrol-zone, in addition to identifying the investigating officer's unit, division, district, bureau, pistol serial number, aerosol spray number and handcuff serial number.

Given the difficulty of predicting future events in the law enforcement context and the nature of the information at issue, I find that the Police have provided "detailed and convincing" evidence to establish a "reasonable expectation of harm" with respect to the patrol-zone information, 10 codes and /or statistical codes. In making my decision, I have taken into account previous Orders from this office and concur with them. I therefore find that some of the withheld information qualifies for the exemption under section 38(a) in conjunction with section 8(1)(l) of the *Act*.

As I have found that section 8(1)(l) applies to all the information for which the Police claimed sections 8(1)(e) and (l), namely the patrol-zone information, 10 codes and/or statistical codes, it is not necessary for me to consider the applicability of section 8(1)(e). However, I must go on to determine whether the balance of the exempted portions of the record qualify for exemption under section 38(a) in conjunction with section 8(2)(a) of the *Act*.

Section 8(2)(a)

The Police submit that the occurrence report, follow-up report and notebook entries are law enforcement reports and thus are exempt from disclosure. The Police's representations state:

> The records consist of the facts in the case and the way the officer conducted and concluded his investigation at the time. He prepared the reports concluding that, in his opinion, this was a civil matter and no further police action was required. The officer investigated the incident and documented his findings in the reports. The reports clearly go beyond a mere reporting of the facts as they contain a formal statement and account of the results of the collation and consideration of information leading to the reasoning behind the officer's conclusion that no criminal offence had occurred.

This part of the law enforcement exemption permits an institution to refuse to disclose a record if it 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 Police 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. (Order 200 and Order P-324)

There is no dispute in the present appeal that the Police is an agency charged with enforcing and regulating compliance with the law and that the record was prepared in the course of the investigation of a complaint. Accordingly, the key determination in evaluating the application of section 8(2)(a) in the circumstances of this appeal is whether the record constitutes a "report" as contemplated by the provision. I note that previous orders of this office have held that the word "report" means "a formal statement or account of the results of the collation and consideration of information" and that, generally, results would not include mere observations or recordings of fact (Orders P-200, MO-1238, MO-1337-I). Further, it has been held by this office that the title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

Having reviewed the record, I do not agree with the Police's claim that the occurrence report, follow-up report and notebook entries of the investigating officer go beyond a "mere reporting of the facts". The investigating officer's notebook entries record the information he gathered from the appellant and other individuals during his investigation. I also compared the notebook entries with the occurrence and follow-up reports prepared by the investigating officer and conclude that these reports consist of no more than a general overview of the officer's notebook entries.

The fact that the investigating officer noted in the course of his investigation that the complaint appeared to be a civil matter does not amount to a "formal statement or account of the results of the collation and consideration of information". Similarly, the investigating officer's summarization of his observations does not constitute a report by itself.

I find, therefore, that the records are not reports within the meaning of section 8(2)(a) of the *Act* and the records are therefore not exempt under section 38(a) in conjunction with this section.

Summary of Findings Relating to the Law Enforcement Exemption

I have found that the patrol-zone information, 10 codes and statistical codes contained in the record satisfy the requirements for exemption under section 8(1)(l) and, for that reason, they are exempt under section 38(a) of the *Act*. As a result, I will go on to consider whether the Police

properly exercised its discretion after I determine whether the personal privacy provisions of the *Act* apply to other portions of the records.

PERSONAL PRIVACY/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to privacy.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met.

If the information fits within any of paragraphs (a) to (f) of section 14(1), disclosure is not an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3rd) 767*].

Section 14(1)(a)

In this case, it appears that section 14(1)(a) could apply. This section applies "upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access." For section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request [see Order PO-1723].

As previously stated, I received the written consent of one of the identifiable individuals whose personal information is contained in the records. This individual confirmed in writing that she consents to the release of her personal information to the appellant.

I am satisfied that this individual's written consent meets the requirements of section 14(1)(a) of the *Act*. Accordingly, the personal information that relates to her is not exempt under section 38(b) and I order the Police to disclose to the appellant the portions of the records which contain

the personal information of this individual. I will enclose a copy of the consent with this order for reference by the Police.

Section 14(2) and (3)

In this case, the Police raised the application of the following considerations and presumptions on the question of whether disclosure would be an unjustified invasion of personal property:

> (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;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (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,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (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;
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The Police's representations submit that disclosure of portions of the record containing the personal information of other individuals would constitute an unjustified invasion of personal privacy. The Police provided confidential and non-confidential representations in this regard. The non-confidential portions of the Police's representations regarding the application of section 14(3)(b) and (h) state:

> … since the personal information relates to records compiled as part of an investigation into the possible violation of law, the disclosure of the personal information of the affected persons is presumed to be an invasion of their personal privacy pursuant to section 14(3)(b) of the Act.

> …
>
> The race and marital status of some of the affected persons is documented in the occurrence report and, as per the definition in the Act, this constitutes their personal information.
>
> Therefore, disclosure of this information is presumed to be an unjustified invasion of personal privacy pursuant to section 14(3)(h) of the Act.

In determining whether the undisclosed personal information is exempt under section 38(b), I have reviewed the records themselves and the complete representations of the Police. I note that the records were created as a result of a complaint made against the appellant and the Police conducted an investigation into whether the conduct of the appellant warranted the laying of charges under the *Criminal Code*. The investigating officer recorded information received from other individuals and concluded that the matter did not warrant the laying of criminal charges.

Previous orders have determined that even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

In my view, it is clear that the personal information in the records, which relates to the appellant and other identifiable individuals, was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code*. Therefore, I find that section 14(3)(b) of the *Act* applies to the personal information at issue (other than the personal information of the affected party who consented to disclosure) and that disclosure of this information is presumed to constitute an unjustified invasion of personal privacy of individuals other than the appellant.

As stated above, once a presumed unjustified invasion of personal privacy under section 14(3) is established, it can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe*, cited above]. Having reviewed the records and the representations provided to me, I find that sections 14(4) and 16 do not apply. Accordingly, I find that the remaining portions of the records (other than the personal information of the affected party who consented to disclosure) are exempt under section 38(b). It is not necessary for me to consider the factors favouring non-disclosure at section 14(2)(g) and (i) cited by the Police.

EXERCISE OF DISCRETION

The section 38(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose

- it takes into account irrelevant considerations

- it fails to take into account relevant considerations

In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The representations of the Police maintain that they considered relevant factors in their exercise of discretion. The Police state that they weighed the appellant's right to know against the right to privacy of the other individuals whose personal information appears in the records.

In my view, the Police considered relevant factors in their exercise of discretion and did not consider irrelevant ones. I note that the withheld information contains only patrol-zone information, 10 codes and/or statistical codes, withheld under the law enforcement exemption, and the personal information of other identifiable individuals relating to the investigation of a complaint. Accordingly, I find that the exercise of discretion by the Police was proper.

ORDER:

1. I order the Police to disclose to the appellant those portions of the record containing the personal information of the affected person who consented to the release of her information. For the sake of clarity, I have highlighted the portions of the record the Police are to disclose to the appellant. I order the Police to disclose these portions of the record by **July 31, 2006**.

2. I uphold the decision of the Police not to disclose the remaining portions of the record.

Original signed by: June 29, 2006
Brian Beamish
Assistant Commissioner