



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

# **ORDER MO-2369**

**Appeal MA07-143-3**

**Hamilton Police Services Board**



Tribunal Services Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9188  
TTY: 416-325-7538  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Hamilton Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...copy of letter from the Ontario Ministry of the Attorney General [the Ministry] to the [Police] concerning [the appellant] and which was presented by [named detective] to [the appellant] and [named individual], from Hamilton, at the meeting around mid-June 2004 in the office of [named detective] at [address of the Police].

The Police located the responsive record and denied access to it pursuant to section 38(a) (refusal to disclose requester's own information), in conjunction with sections 8(1) (law enforcement) and 9(1) (relations with other governments), of the *Act*.

The Ministry also received a request from the same requester under the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*). The Ministry located its own copy of the same record and denied access to it, claiming the application of exemptions under the provincial *Act*. The requester also appealed the Ministry's decision and this office opened Appeal PA07-258 to address the issues extant in that appeal.

The requester, now the appellant, appealed both the decisions of the Ministry and the Police. This appeal only addresses the request made to the Police under the *Act*.

As mediation was not successful in resolving the issues in this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Police, initially. The Police did not provide representations in response. I also sent a letter to the Ministry asking if it relied on its representations made in file PA07-258, concerning the appellant's request to the Ministry for a copy of the same record at issue in this appeal. The Ministry confirmed that it was relying on its representations. I sent a copy of the Ministry's letter referring to its representations in file PA07-258, along with a Notice of Inquiry, to the appellant seeking his representations. I received representations from the appellant in response. Both the Ministry and the appellant provided representations on the applicability of the "public interest override", as set out in section 16 of the *Act*, to the record.

I also sought and received further representations from the appellant on the applicability of the personal privacy exemption in section 38(b) with respect to any personal information of other identifiable individuals that may be contained in the record.

The appellant's provincial appeal was considered by me in Appeal PA07-258 which resulted in the issuance of Order PO-2714, concurrently with the interim order in this file, Order MO-2341-I.

The order provisions in Order MO-2341-I, read as follows:

1. I uphold the Police's decision not to disclose the personal information of identifiable individuals other than the appellant in the record. For ease of reference I have highlighted the portions of the record that should not be disclosed to the appellant on the copy of the record sent to the Ministry with this order.
2. I order the Police to disclose the remainder of the record to the appellant by October 3, 2008 but not before September 26, 2008.
3. In order to verify compliance with provision 2 of this order, I reserve the right to require the Police to provide me with a copy of the record disclosed to the appellant.
4. I order the Police to re-exercise their discretion with respect to the personal information in the record of identifiable individuals other than the appellant and to advise the appellant and this office of the result of this re-exercise of discretion, in writing. If the Police continue to withhold all or part of this remaining information, I also order them to provide the appellant with an explanation of the basis for exercising their discretion to do so and to provide a copy of that explanation to me. The Police are required to send the results of their re-exercise, and their explanation to the appellant, with the copy to this office, no later than September 22, 2008. If the appellant wishes to respond to the Police's re-exercise of discretion, and/or their explanation for exercising their discretion to withhold information, the appellant must do so within 21 days of the date of the Police's correspondence by providing me with written representations.

The order provisions in Order PO-2714, read as follows:

1. I uphold the Ministry's decision not to disclose the personal information of identifiable individuals other than the appellant in the record. For ease of reference I have highlighted the portions of the record that should not be disclosed to the appellant on the copy of the record sent to the Ministry with this order.
2. I order the Ministry to disclose the remainder of the record to the appellant by October 3, 2008 but not before September 26, 2008.
3. In order to verify compliance with provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the appellant.

On September 30, 2008, the Police released a copy of the record to the appellant, less the severances as ordered in Order MO-2341-I. In its decision letter, the Police provided the appellant with an explanation for their re-exercise of discretion to not disclose the personal information of identifiable individuals other than the appellant in the record. The appellant did not provide me with written representations in response to the Police's re-exercise of their discretion.

## **RECORD:**

The record in this appeal consists of a two-page letter from the Ministry to the Police. The personal information severed from this letter as a result of Order MO-2341-I is at issue.

## **DISCUSSION:**

### **PRELIMINARY ISSUE**

Prior to receiving a copy of the severed record, the appellant asked for a reconsideration of both the Interim Order MO-2341-I and Order PO-2714 despite not having seen the severed record which was to be disclosed to him pursuant to the order provisions in these decisions. After receipt of the severed record, he did not provide further representations concerning a reconsideration of my decision in both files to sever the personal information of identifiable individuals other than the appellant contained in the record. The appellant and his counsel were contacted by this office after his receipt of the severed record to find out if he still wished to have the orders reconsidered or whether he had any representations to make concerning the Police's re-exercise of discretion, as ordered to do so in Order MO-2341-I. Neither the appellant nor his counsel provided representations in response to the issue of the Police's re-exercise of discretion, which they were entitled to do by reason of Order MO-2341-I. Nor did either the appellant or his counsel provide further representations in support of their reconsideration requests after having received the severed record.

After considering both the representations of the appellant and his counsel which were provided prior to their reviewing the severed record, I will not reconsider my decision in either appeal.

### **RE-EXERCISE OF DISCRETION**

The sole issue to be decided is whether the Police re-exercised their discretion in a proper manner in not disclosing the personal information of identifiable individuals other than the appellant in the record.

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 exemptions from this right.

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 protection of their privacy.

In deciding 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 institution to consider in making this determination.

In Order MO-2341-I I found that the factors in favour of disclosure in sections 14(2)(a), (b) and (d) raised by the appellant had no application to the personal information of the identifiable individuals in the record other than the appellant. Based upon my review of this personal information, I found that the listed factor in section 14(2)(f) (that the personal information is highly sensitive) favouring non-disclosure of this information does apply. To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual [Order PO-2518]. Although this personal information of identifiable individuals other than the appellant may be contained in public court documents, disclosure of this information, along with remaining information in the record, could reasonably be expected to cause significant personal distress to these individuals. Considering that the sole factor which I have found relevant under section 14(2) favoured privacy protection, I found that the disclosure of the personal information of individuals other than the appellant would give rise to an unjustified invasion of their personal privacy.

Accordingly, in Order MO-2341-I I found that that the personal privacy exemption in section 38(b) applied to the personal information of the identifiable individuals other than the appellant in the record. However, in the absence of representations from the Police, I was not satisfied that they exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors in not disclosing the personal information of identifiable individuals other than the appellant in the record. Therefore, I ordered the Police to re-exercise their discretion with respect to this information.

The Police re-exercised their discretion and continued to withhold from the appellant the personal information that I ordered severed from the record. In the decision letter of September 30, 2008 that accompanied the severed record disclosed to the appellant, the Police stated with respect to section 38(b) that:

...a decision has been made to grant partial access to the requested letter. Even though some of the information pertains to you, some of the information has been removed because disclosure would constitute an unjustified invasion of another individual's personal privacy as consent for disclosure was not obtained.

The following [sections of the *Act*] were considered in making this decision:

14(2)(f) the personal information is highly sensitive

14(2)(i) the disclosure may unfairly damage the reputation of any person referred to in the record

### **Analysis/Findings**

The section 38(b) exemption is discretionary, and permits 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 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

I find that in denying access to the undisclosed portions of the record, the Police have re-exercised their discretion under section 38(b) in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. The undisclosed personal information in the record qualifies as sensitive information under section 14(2)(f) relating to the identifiable individuals in the record other than the appellant. Disclosure may unfairly damage the reputation of these individuals and also would thereby constitute an unjustified invasion of their personal privacy.

Accordingly, I find that the Police's re-exercise of their discretion was proper.

**ORDER:**

I uphold the Police's re-exercise of their discretion to withhold the personal information of identifiable individuals in the record which I had found to be exempt under section 38(b) in Order MO-2341-I and I dismiss this appeal.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_  
November 27, 2008