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

ORDER M-634

Appeal M_9400661

York Regional Police Services Board

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NATURE OF THE APPEAL:

The York Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request sought access to information relating to an investigation which led to alleged sexual assault charges being laid against the requesters. The Police identified numerous records and granted partial access. The requesters appealed the decision to deny access to the remaining records.

The records relate to a police investigation of the appellants who were charged with the sexual assault of their autistic son. The son is now of the age of majority. These charges were subsequently withdrawn and the parties are now involved in civil litigation proceedings. The civil suit is undertaken by the appellants, both on their own behalf and on behalf of the son, against various parties including the Police. During mediation, the request was narrowed to include only those records which relate directly to the investigation.

The Police rely on the following exemptions to deny access to the records:

- solicitor-client privilege - section 12
- invasion of privacy - sections 14(1) and 38(b)

A Notice of Inquiry was provided to the appellants and the Police. In their representations, the Police raised the possible application of section 54(b) of the Act which deals with the right of access by committee. A supplementary Notice of Inquiry inviting representations on this issue was sent to the parties. Additional representations were received from the parties.

A Notice of Inquiry was also provided to individuals referred to in the records and the Ministry of the Attorney General (the Ministry). Representations were received from the Ministry and some of the individuals notified.

In his representations, counsel for the appellants indicated that access has been obtained to an assessment report withheld by the Police. The report, being pages FIO 437-448 in the index provided by the Police, is no longer at issue. The records that remain at issue in this appeal are listed in Appendix "A" to this order.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Police have withheld access to Records 1, 2, 5, 6, 7 and 8 on the basis of section 12 of the Act. Before I begin my discussion, I wish to address several matters raised by the Police in their representations.

In their representations, the Police submit that the confidentiality provision found in section 67(1) of the provincial Freedom of Information and Protection of Privacy Act (the provincial Act) "interfaces" with the confidentiality of the solicitor-client privilege in section 19 in that

same statute. The Police state that similarly, section 12 of the Act "must be examined in conjunction with section 53(1) of the Act". The Ministry has made no similar argument, and makes its representations on the basis that section 12 of the Act applies.

There is nothing in the legislation that provides for sections 19 and 67(1) in the provincial Act to be read together and similarly, nothing in the Act vis-a-vis sections 12 and 53(1). I fail to see the connection between the confidentiality provisions in sections 53(1) of the Act and 67(1) of the provincial Act and the solicitor-client privilege exemptions in these two statutes (sections 12 and 19 respectively). Section 19 of the provincial Act is not one of the confidentiality provisions referred to in section 53 of the Act. The confidentiality provisions in both the Act and the provincial Act clearly refer to confidentiality provisions in legislation other than the Act and the provincial Act. In my view, this appeal falls to be decided under section 12 of the Act.

The Police then submit that it is unfair that the appellants could receive access to a record under the Act when the same record may be properly exempt under the equivalent section of the provincial Act. Section 19 of the provincial Act is worded differently from section 12 of the Act in that the provincial Act refers to "Crown counsel" whereas the Act refers to "counsel employed or retained by an institution". Because the solicitor-client exemption is worded differently and necessitates a different interpretation, the Police suggest that the relevant sections under the provincial and the municipal legislation should be read in tandem.

The provincial and municipal Acts are two separate pieces of legislation. It is worth noting that the provincial Act was not amended to extend coverage to municipal institutions, but rather a separate statute was enacted to bring municipal institutions within the ambit of freedom of information and privacy legislation. While the majority of the sections are in concordance and it is helpful to refer to the Act when interpreting the provincial Act and vice-versa, there are some distinct differences in wording between the two pieces of legislation, as is clearly illustrated by sections 12 and 19 in the present case.

Therefore, in considering the application of section 12 of the Act to the records, I am bound by the wording in the legislation and I interpret it on the basis of a plain reading of the Act.

The Police claim that Records 1, 2, 5, 6, 7 and 8 are exempt from disclosure on the basis of the solicitor-client privilege provided by the discretionary exemption in section 12 of the Act. The Ministry supports the Police's application of the exemption to these records.

Records 1 and 2 are memoranda from a Crown attorney to the investigating police officer. Records 5, 6, 7 and 8 are notes and a report by a Crown attorney. All of the records relate to the police investigation and resulting charges of alleged sexual assault against the appellants.

The position of this office with respect to the relationship between the Police and a Crown attorney is clearly set out in Order M-52. In that order, Commissioner Tom Wright determined that the relationship between the Police and a Crown attorney is not that of solicitor and client as the Police are not the clients of the Crown attorney. The Ministry's representations do not include any evidence on this point. The Police concede that there is no solicitor-client relationship between the Police and a Crown attorney. I agree.

Section 12 consists of two branches, which provide the Police with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Police have not indicated which branch of the section 12 exemption they are relying on. I will therefore examine the application of both Branches 1 and 2 to the records. I will first consider the application of Branch 2.

With respect to Branch 2, two criteria must be satisfied in order for a record to qualify for exemption:

1. the record must have been prepared by or for counsel employed or retained by an institution; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

The records were prepared by the Crown attorney, an employee of the provincial government who is not "employed or retained" by the Police (Order M-52). Neither the Police nor the Ministry have provided any specific argument on this issue. I find that Branch 2 does not apply to Records 1, 2, 5, 6, 7 and 8.

The purpose of the common law solicitor-client privilege (which is the basis for Branch 1 of the section 12 exemption) is to protect the confidentiality of solicitor-client relationships. In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Police must provide evidence that the records satisfy either of the following tests:

1. (a) there is a written or oral communication, **and**
   (b) the communication must be of a confidential nature, **and**
   (c) the communication must be between a client (or his agent) and a legal advisor, **and**
   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

In my view, both parts 1 and 2 of the Branch 1 test (the common law solicitor-client privilege) requires that there be a solicitor-client relationship between the lawyer and the institution.

As indicated, the relationship between the Police and a Crown attorney is not that of solicitor and client as the Police are not the clients of the Crown attorney. Indeed, in their representations, the Police acknowledge that the common law privilege cannot apply to the records. In my view, Branch 1 (the common law solicitor-client privilege) cannot apply to the records at issue as there is no solicitor-client relationship between the Police and the Crown attorney.

In my view, this finding is sufficient to dispose of the section 12 exemption claim in its entirety. However, as the Ministry has submitted representations regarding part 2 of the common law solicitor-client privilege, I will address them.

The second part of Branch 1 applies to communication where there is litigation ongoing or contemplated, and includes records relating to the lawyer's preparation for litigation. The Ministry submits that the records at issue were created or obtained for the lawyer's brief for existing or contemplated litigation, namely a criminal prosecution.

The Ministry notes in its representations that the prosecution was withdrawn in January 1994. The Ministry acknowledges that there is authority that indicates that litigation privilege lapses upon completion of the litigation for which the documents were prepared (see, for example, Meany v. Busby (1977), 15 O.R. (2d) 71). However, the Ministry argues that the documents nonetheless remain privileged as they are not the type of documents to which the rule applies.

I agree with the Ministry that not all documents in counsel's brief lose their privilege once the litigation is terminated. The general rule appears to be that direct communications between a solicitor and client are forever privileged (see Manes and Silver, Solicitor-Client Privilege in Canadian Law, pp.210-212). Inquiry Officer John Higgins considered a similar issue in Order P-667 where he stated:

> In my view, based on the principles quoted above from Manes and Silver and Boulianne v. Flynn, it is also clear that such collected documents, which are not direct solicitor-client communications, do not maintain their privileged status at common law once the litigation is completed, and therefore in those circumstances, they would no longer qualify for exemption under Branch 1.

I agree with Inquiry Officer Higgins' conclusions. In this case, as noted, there is no solicitor-client relationship between the Police and a Crown attorney and it cannot be said that the records are direct communications between a solicitor and a client. Therefore, in my view, these records are not the type of records which remain forever privileged.

The Ministry also argues that since there is an existing malicious prosecution action arising from the withdrawn prosecution, the privilege extends to that proceeding. The Ministry notes that this proceeding has been dismissed but that the decision is under appeal. The Ministry refers to page 210 of Manes and Silver. There, the authors state:

> [W]here the privileged communications were originally obtained for both the original litigation and any subsequent litigation involving the same subject matter, privilege is maintained in the subsequent litigation.

In my view, the records at issue in this appeal do not fall within the principle that privilege may be extended to a subsequent proceeding. Although the records may be relevant to the subject matter of the subsequent litigation, they were not obtained for that purpose. And further, I am unable to conclude that the subsequent litigation was contemplated at the time the records were prepared.

In short, whatever privilege may have arisen under the second part of Branch 1 of the litigation privilege ceased to exist upon the completion of the prosecution.

I find that the requirements for exemption under Branches 1 or 2 have not been met and section 12 of the Act does not apply to the records.

The Police have not claimed any other discretionary exemptions apply to the records; however, some of the records appear to contain personal information and I will, therefore, include them in my discussion of the application of sections 14(1) and 38(b) of the Act.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean 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.

I have carefully reviewed all the records. Records 1 and 2 are memoranda from a Crown attorney to the investigating police officer. Record 3 is a covering letter from the psychologist and Record 4 is a letter from a staff member to the psychologist. Record 5 is a note to file by a Crown attorney. Record 6 is a Crown attorney's pre-trial conference report and Record 7 contains notes of a Crown attorney. Record 8 is a memo to file by a Crown attorney. All of the records relate to the investigation of charges laid against the appellants. On that basis, I find that the information in all the records relates to the appellants and constitutes their personal information.

I find also that Records 1, 2, 3, 4, 5 and 8 contain information that also relates to the son and other identifiable individuals. In particular, Record 3 contains the home address and telephone number of an individual retained in a professional capacity while Records 2 and 5 contain names and other information of identifiable individuals. Record 1 contains references to names of employees and other individuals retained in their professional capacity, listed as potential witnesses for the prosecution. Though this information pertains to the individuals in their capacity as professionals or employees, the individuals are identified as potential witnesses for the prosecution and on that basis, I consider this information to constitute the personal information of these individuals in the circumstances of this case.

Therefore, the information in the records qualifies as the personal information of these individuals under section 2(1) of the Act.

In summary, I find that Records 1, 2, 3, 4, 5 and 8 contain the personal information of the appellants, the son and other identifiable individuals. I find that Records 6 and 7 contain the personal information solely of the appellants.

As indicated, the Police have not claimed any other discretionary exemption for Records 6 and 7 and no mandatory exemption applies. Records 6 and 7 should therefore be disclosed to the appellants.
One of the individuals referred to in Record 1 and notified by this office has provided her consent to disclosure of her personal information to the appellants. No other discretionary exemptions have been claimed by the Police for this information. I will therefore order it to be disclosed to the appellants in the order provisions below.

I will now consider the remaining records, i.e. Records 1, 2, 3, 4, 5 and 8, all of which contain the personal information of the appellants, the son and other individuals.

The appellants are the parents of an individual who is developmentally handicapped and has been diagnosed as having a non-verbal form of autism. Counsel for the appellants affirms that his clients are the natural parents of the son and details the various capacities in which the appellants are responsible for the care and well-being of the son. Counsel states that while the appellants have not applied for official committee status, they are the "de facto legal guardians or committees" of the son.

On this basis, I must determine whether the appellants are entitled to exercise their son's right of access to his personal information under section 54(b) of the Act.

EXERCISE OF RIGHTS OF INDIVIDUAL BY COMMITTEE

Section 36(1) of the Act gives every individual a general right of access to his or her own personal information held by a government institution. Under section 54 of the Act, these access rights may, in certain defined circumstances, be exercised on behalf of the individual by another party. In the present case, the appellants have indicated that they wish to obtain access to the personal information relating to their son for the civil suit which they have launched both personally and on behalf of their son.

At the time the request was made and the appeal was filed, section 54(b) read as follows:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if a committee has been appointed for the individual or if the Public Trustee has become the individual's committee, by the committee.

The legislation is clear in that the son's right of access to his personal information may only be exercised by a committee appointed for him. There is no evidence before me to show that the appellant(s) have been appointed committees for the son. On the contrary, counsel for the appellants has stated that the appellant(s) are not the committee for the son. Consequently, I find that section 54(b) does not apply in the circumstances of this appeal.

Accordingly, the appellants' request for information relating to their son (which is information that also relates to them) is in their personal capacity and is subject to examination pursuant to the provisions of Part III of the Act.

INVASION OF PRIVACY

Where a record contains the personal information of both a requester and other individuals, section 38(b) requires the Police to weigh the requester's right to his or her own personal information against the privacy rights of other individuals. This is an exception to the general right of access provided under section 36(1). If 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.

Sections 14(2), (3) and (4) provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. In John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767, the Divisional Court ruled that where one of the presumptions in section 21(3) applies to the personal information in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 16 of the Act applies to the personal information.

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

The Police submit that the presumption against disclosure contained in section 14(3)(a) applies to the information contained in all the records. The presumption in this section applies to personal information which relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

The appellants submit that the information pertains to them and to their family and, therefore, disclosure of this information would not constitute an unjustified invasion of personal privacy. The appellants also submit that the personal information is relevant to a fair determination of their rights (section 14(2)(d)).

In order for section 14(2)(d) to apply, the appellants must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

Counsel for the appellants explains that his clients have commenced civil proceedings against the Police, the Ministry and other parties. Counsel states that the information is necessary to determine whether there were unnecessary delays in the prosecution of his clients and in the subsequent withdrawal of charges.

I have reviewed the information in the records together with the representations of the parties and I make the following findings:

1. I find that Record 4 in its entirety and portions of Records 1, 2, 3, 5 and 8 contain personal information which relates to a medical, psychiatric or psychological diagnosis, condition, treatment or evaluation of an identifiable individual and, therefore, is exempt from disclosure under the presumption contained in section 14(3)(a) of the Act.

2. I find that neither section 14(4) nor section 16 applies to rebut the presumption in section 14(3)(a). As I have indicated previously, the factors under section 14(2), including section 14(2)(d) as raised by the appellants, cannot rebut the presumption in 14(3)(a) that I have found applies to Record 4 and parts of Records 1, 2, 3, 5 and 8. Accordingly, the exemption in section 38(b) applies to this information. I have highlighted these portions on the copy of the records provided to the Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portions should not be disclosed.

3. I have previously found that portions of Records 1, 2, 3 and 5 contain personal information including the address and telephone number of individuals other than the appellants. This information does not fall within any of the presumptions in section 14(3). The appellants have not provided any representations to show that this information is necessary to ensure a fair determination of their rights with respect to the civil action. The appellants have not raised any other considerations which would weigh in favour of disclosing this information.

   In considering the factors listed in section 14(2) together with all circumstances relevant to this case, I find that the personal information in the records is highly sensitive. Therefore, section 14(2)(f) which weighs in favour of protecting the privacy of individuals identified in the records, is a relevant consideration. I find no factors that weigh in favour of disclosure. I find that, in weighing the privacy rights of the individuals to whom this information relates, against the right of access of the appellants, the disclosure of this information would be an unjustified invasion of personal privacy under section 14(1). I find, therefore, that section 38(b) applies to exempt this information from disclosure.

I have highlighted these portions on the copy of the records provided to the Freedom of Information and Privacy Co-ordinator. The highlighted portions of the records should not be disclosed.

4. In summary, I find that Record 4 and the highlighted portions of Records 1, 2, 3, 5 and 8 are properly exempt under section 38(b) of the Act.

ORDER:

1. I uphold the decision of the Police to deny access to Record 4 and the highlighted portions of Records 1, 2, 3, 5 and 8 on the copy of these records which have been provided to the Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I order the Police to disclose Records 6 and 7 in their entirety and the non-highlighted portions of Records 1, 2, 3, 5 and 8 to the appellants within thirty-five (35) days of the date of this order.

3. 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 appellants pursuant to Provision 2.

Original signed by: October 30, 1995
Mumtaz Jiwan
Inquiry Officer

APPENDIX A

INDEX OF RECORDS AT ISSUE
Appeal Number M-9400661

RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED
1 (pp. 430-434)	Memo to detective from Crown attorney, June 28, 1993	12
2 (p. 435)	Memo to detective from Crown attorney, July 12, 1993	12
3 (p. 436)	Letter of psychologist re: assessment, December 30, 1993	14(3)(a), 38(b)
4 (pp. 449-452)	Letter from staff member of York Region Roman Catholic Separate School Board to psychologist, December 16, 1993	14(3)(a), 38(b)
5 (pp. 464-465)	Note to file by Crown attorney, April 20, 1993	12
6 (p. 512)	Crown attorney's office - Pre-trial conference report	12
7 (pp. 589-590)	Notes of Crown attorney	12
8 (p. 591)	Memo to file by Crown attorney, January 17, 1994	12