



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

ORDER M-851

Appeal M_9600210

Durham Regional Police Services Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Durham Regional Police Services Board (the Police) received a request for a copy of the videotape(s) taken by the Police while a polygraph test was being administered to the requester.

The Police located two videotapes recorded during the requester's polygraph test and denied access to them, claiming the application of the following exemptions contained in the Act:

- invasion of privacy - sections 14(1) and 38(b)
- discretion to refuse requester's own information - section 38(a)

The requester (now the appellant) appealed the decision to deny access to the tape. A Notice of Inquiry was sent by this office to the Police and the appellant. Representations were received from both parties.

The record at issue in this appeal consists of two videotapes containing the polygraph interviews of the appellant which were conducted on two separate occasions. The videotapes contain the discussions between the polygraph examiner and the appellant leading up to and following the polygraph test, as well as the polygraph test itself.

DISCUSSION:

PERSONAL INFORMATION

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

I have reviewed the videotapes which form the record at issue in this appeal. They record the discussions between the polygraph examiner and the appellant concerning an on-going police investigation into an allegation of sexual assault made against the appellant. In their representations, both the appellant and the Police acknowledge that the record contains the personal information of both the appellant and the other individuals who are referred to during the course of the interviews. I concur, and find that the record contains the personal information of the appellant and other identifiable individuals.

INVASION OF PRIVACY

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. 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 a requester and another individual, 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. In this situation, the requester is not required to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his or her own personal information, the only situation under section 38(b) in which he or she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained 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 considerations that are relevant in the circumstances of the case.

The Police state that the disclosure of the information contained in the record would be a presumed unjustified invasion of personal privacy under sections 14(3)(b) of the Act. In addition, the Police submit that the factors listed in sections 14(2)(f), (g) and (i) are relevant with respect to this information. These sections provide:

- (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 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,
 - (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;

As previously noted, the record consists of videotapes which recorded two interviews of the appellant conducted by the Police. The personal information recorded on the videotapes was provided entirely to the Police by the appellant himself. The Police have made detailed representations and contend that information which is recorded in a manner which identifies it as being part of a law enforcement is perceived by the public as being factual. The Police further submit that the disclosure of this information could have a serious impact upon the other individuals about whom the information relates.

In Order M-713, Inquiry Officer Anita Fineberg addressed a situation where a requester sought access to a record which contained the transcript of a 911 call made to the Police by the requester herself. Inquiry Officer Fineberg made the following comments regarding the situation where a request is made for a record which contains information which was provided to an institution by the person requesting it:

Past orders of the Commissioner's office have found that non-disclosure of information which was originally provided to the Police by the requester would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (Orders M-384, M_444, M-613 and M-646). In this case, as in those previous orders, applying the presumption to deny access to the information which the appellant herself provided to the Police would, according to the rules of statutory interpretation, lead to an "absurd" result.

In Orders M-384 and M-444, it was held that the disclosure of personal information in a police officer's notebook, which relates to someone other than the requester, but which the requester had provided to the officer, would not be an unjustified invasion of privacy.

I agree with this conclusion and adopt it for the purposes of this appeal. On this basis, I find that the presumption in section 14(3)(b) does not apply to the information provided to the Police by the appellant. Having considered the factors listed in section 14(2) and all of the circumstances of this appeal, I find that the disclosure of this information would not constitute an unjustified invasion of personal privacy, and section 38(b) does not apply.

DISCRETION TO DENY REQUESTER'S OWN INFORMATION

As previously indicated, section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Section 38(a) of the Act gives the Police the discretion to deny access to a record containing a requester's own personal information where certain listed exemptions would otherwise apply. Specifically, section 38(a) of the Act provides:

A head may refuse to disclose to the individual to whom the information relates, personal information,

if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

While the Police have raised section 38(a) in their decision letter and have again referred to that section in their representations, they do not specify which of the listed exemptions they are relying upon. In his representations, the appellant adopts the assumption that the Police are relying upon section 8(2)(a) of the Act in raising section 38(a) and accordingly contend that, based on the findings in Order M-793, section 8(2)(a) does not apply to the record at issue in this case. As the Police have not specified which of the listed sections they are relying upon, and as they have not raised arguments in relation to the possible application of any of the sections set out in section 38(a), I find that the consideration of that section is not properly before me.

Accordingly, I find that the record does not qualify for exemption under section 38(a). As no other mandatory exemptions apply to the record, it should be disclosed to the appellant.

ORDER:

1. I order the Police to disclose the information contained in the videotapes to the appellant by sending him a copy of the videotapes by **November 28, 1996** but not before **November 25, 1996**. I note that in his request letter, the appellant undertakes to cover the costs of copying the videotapes and I assume that the appellant still intends to do so.
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 record which is disclosed to the appellant in accordance with Provision 1.

Original signed by: _____

Donald Hale
Inquiry Officer

October 24, 1996