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

# ORDER M-1104

## Appeal M-9700326

## Port Hope Police Services Board

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## NATURE OF THE APPEAL:

The appellant submitted a request to the Port Hope Police Services Board (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to records related to an alleged assault against the appellant. Specifically, the appellant requested investigation reports, correspondence to and from the Crown Attorney, occurrence reports (if different from the investigation reports), and the investigating officer's notes (if different from the investigation reports). The Police located a general occurrence report and three supplementary reports and provided partial access to them. Access was denied to portions of each of these records based on the following exemptions under the Act:

- endanger life or safety - section 8(1)(e);
- law enforcement - section 8(2)(c);
- solicitor-client privilege - section 12;
- invasion of privacy - section 14(1).

The appellant appealed the denial of access. The appellant also indicated that he believes that more records exist.

During mediation, the Police located a memorandum from a Crown Attorney and extracts from the investigating officer's notebook. At this time, the Police issued a second decision and denied access to parts of these records based on sections 8(1)(c) (law enforcement), 8(2)(c), 12 and 14(1) of the Act. The Police also located two pages of another officer's notes which were released to the appellant with the investigating officer's notes. The Police subsequently located an additional three pages of notes from another officer's note book. The Police indicated that these notes would be treated the same as the investigating officer's notes and were released to the appellant with severances made under the same exemptions referred to above. The Police denied access to any correspondence **to** the Crown Attorney stating that it did not exist in their records.

During mediation, the appellant stated that he no longer sought access to the names, addresses, ages, gender and birth dates found in the occurrence report and supplementary reports and in the investigating officer's notes. The appellant also stated that any technical or procedural codes found in the investigating officer's notes were not at issue. The appellant agreed that any information severed from the investigating officer's notes that was not responsive to his access request is not at issue. Therefore, as this was the only information removed from the officers' notes, these records are no longer at issue.

As a result of the above, the Police state that they are no longer relying on sections 8(1)(e) and 8(2)(c) of the Act.

As the records at issue may contain the personal information of the appellant, sections 38(a) (discretion to refuse requester's own information) and 38(b) (invasion of privacy) of the Act were raised as issues in the Notice which was sent to the parties. The appellant also maintains that correspondence to the Crown Attorney relating to himself should exist.

## RECORDS:

The records remaining at issue consist of a two-page memorandum from the Crown Attorney to the investigating officer (Record 1), and portions of pages FOI-06 and FOI-07 which relate to the information received by the investigating officer from the Crown Attorney in Record 1 (Record 2). In fact, the information withheld from Record 2 is an exact reproduction of the information contained in the memorandum (Record 1).

## 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 records and find that they contain the personal information of the appellant and other identifiable individuals, including the alleged assailant. Specifically, the contents of the records pertain most directly to the alleged assailant. The appellant has indicated that he is not interested in obtaining the names of any individual referred to in the record. However, in my view, even with the names removed the identity of the alleged assailant, in particular, would be identifiable from the remaining portions of the records, and this information continues to qualify as his personal information.

### INVASION OF PRIVACY

Where a record contains the personal information of both the appellant and another individual, section 38(b) allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Sections 14(2) and (3) 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 head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 14 exemption.

The appellant submits that the disclosure of the information in the two records would not be an unjustified invasion of another's privacy, since the disclosure is desirable for the purpose of subjecting the institution to public scrutiny, the personal information is relevant to a fair determination of rights affecting the appellant,

the individual to whom the information relates (for example, the Crown Attorney) will not be exposed unfairly to pecuniary or other harm, the personal information is not highly sensitive, inaccurate or unreliable, was not supplied in confidence, will not unfairly damage the reputation of the person referred to in the record, and access to the personal information may promote public health and safety. These are all factors under section 14(2) of the Act. As well, the appellant submits that disclosure of the information is necessary to prosecute a private charge (i.e. the exception to section 14(3)).

Section 14(3)(b) states that:

> A disclosure of personal privacy is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > 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.

The Police indicate that the information contained in the two records was compiled and is identifiable as part of an investigation into a possible violation of law (i.e. an alleged assault). The Police continue that the information in the memorandum pertains to whether or not charges should be laid against the alleged assailant and is, therefore, directly related to the investigation.

With respect to the appellant's position that disclosure of the information is necessary to prosecute the violation through a private charge, he provides a brief history of the matter. In this regard, the appellant alleges that he was assaulted in October 1996 by staff of the Cobourg Jail while he was an inmate of the Cobourg Jail awaiting first Court appearance. He now seeks an order of compensation under the Compensation for Victims of Crime Act.

The appellant states that, in order to be successful before the Criminal Injuries Compensation Board, he needs to prove on a balance of probabilities that a crime occurred. While a conviction is not necessary, the onus is on the applicant to prove that he was injured as a result of a commission of a crime if entitlement is to be granted under that Act that he did not contribute to his injuries, and that he co-operated fully with the police and subsequent court proceedings.

The appellant indicated that he had attempted to have the Police lay charges against the alleged assailant. Although the Police performed the investigation and prepared the file for the Crown's review, the Crown Attorney recommended that charges not be laid. The appellant indicates that he was told that there was no reasonable probability of conviction.

The appellant states that he then went to a Justice of the Peace in order to lay a private complaint. Apparently, after speaking to the Crown, the Justice of the Peace refused to lay a private complaint. The appellant asserts that he wishes to try to persuade the Justice of the Peace to lay a private charge, and that to do so he needs to have the requested information.

The Concise Oxford Dictionary, 8th Edition, defines "prosecute" as "institute proceedings against (a person)".

I am not persuaded, based on the facts as outlined above, that the appellant is in a position to "prosecute" the alleged assailant privately as this option has already been refused by the Justice of the Peace. Further, in my view, the pursuit of a claim under the Compensation for Victims of Crime Act does not relate to a "prosecution against a person" in the requisite sense. Moreover, the appellant indicates that he has already "instituted" proceedings through his compensation claim. Finally, I am not persuaded that, if I were mistaken and the appellant is still in a position to institute proceedings against the alleged assailant in a private prosecution, the appellant would be unable to initiate proceedings without the information at issue. Accordingly, for all of these reasons, I find that the exception to the presumption in section 14(3)(b) is not applicable in the circumstances.

After reviewing the records at issue, I find that disclosure of the information withheld from Records 1 and 2 would constitute a presumed unjustified invasion of privacy under section 14(3)(b) as this information was clearly compiled and is identifiable as part of an investigation into a possible violation of law.

Even if I were to find that any of the factors referred to by the appellant applied in the circumstances of this appeal, the Ontario Court's (General Division) decision in the case of John Doe et al. v. Ontario (Information and Privacy Commissioner) held that the factors in section 14(2) cannot be used to rebut the presumption in section 14(3).

I find that neither section 14(4) nor section 16 are applicable to the information at issue. Therefore, I find that the withheld information in Records 1 and 2 is properly exempt under section 38(b) of the Act.

**REASONABLENESS OF SEARCH**

In cases where a requester provides sufficient details about the records which he or she is seeking and the Police indicate that records do not exist, it is my responsibility to insure that the Police have made a reasonable search to identify any records that are responsive to the request. The Act does not require the Police to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Police must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate responsive records.

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.

In his representations, the appellant indicates that the partial records which he has received clearly show that other records exist. Specifically, he points out that:

> FOI 12 - refers to letters being placed in the appellant's file at the police station, but these were not released;

FOI 16 - refers to a supplementary report being prepared by a police constable (which is assumed to be a reference to FOI 04);

FOI 18 - refers to a supplementary report being completed by a police constable following a telephone call to an individual at the jail, but no corresponding report was released;

FOI 19 - refers to the jail sending at least 3 staff reports to the police constable but these were not released;

FOI 20 - refers to an e-mail between two constables in which one constable asked for all statements that he had obtained, but neither the e-mail nor the statements were released;

FOI 34 - refers to a police constable sending the file to the Crown's office, but no correspondence to the Crown was released;

FOI 38 - refers to a supplementary report being prepared by another constable (presumably FOI 01) and an e-mail being left for a different constable, but no e-mail was released.

The Police indicate that searches for correspondence with the Crown were conducted by the investigating officer in this incident. The Police submit that since this was his investigation, he would be aware of the correspondence in question and therefore would know or have a reasonably good idea as to where it would be stored. He would also be aware of other officers involved in this incident.

The Police indicate that, during mediation, the investigating officer conducted an additional two searches through his files for the original memorandum from the Police to the Crown. However, he was unable to locate the record. He surmises that any correspondence must have been a hand-written note rather than a formal request letter to the Crown Attorney.

I am satisfied that the search conducted for a memorandum to the Crown Attorney was reasonable in the circumstances of this appeal.

I recognize that the Police were not made aware of the types of records that the appellant believes should exist. However, where the records themselves indicate that more records should exist, in my view a reasonable search would have revealed this to "an experienced" person in access matters. The Police indicate that the Freedom of Information and Privacy Co-ordinator did not attend at the Cobourg Police Service to personally conduct his review of the records, but rather relied on employees at that office to conduct the search. The representations of the Police only address the memorandum to the Crown Attorney and police officers' notebooks (which are no longer at issue). They do not identify where or how searches for other records were conducted. Accordingly, I am not satisfied that the search which was conducted was reasonable.

## ORDER:

1. I uphold the decision of the Police regarding access to the requested records.

2. The search for a memorandum to the Crown Attorney from the Police was reasonable and this portion of the appeal is dismissed.

3. I order the Police to conduct a further search for the records which the appellant has identified above (except under point FOI 34) and to advise the appellant of the results of the search no later than **June 4, 1997**.

4. If, as a result of this further search, the Police identify any further records responsive to the request, I order the Police to provide a decision letter to the appellant regarding access to these records in accordance with sections 19 and 22 of the Act, considering the date of this order as the date of the request and without recourse to a time extension.

5. In order to verify compliance with this order, I order the Police to provide me with a copy of the letter referred to in Provision 3 and a copy of the decision referred to in Provision 4 (if applicable) no later than **June 11, 1997**. These copies should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: May 20, 1998
Laurel Cropley
Adjudicator
(formerly Inquiry Officer)