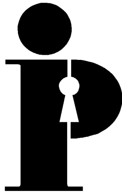

ORDER MO-1283

Appeal MA-990116-1

South Bruce-Grey Police Services Board

NATURE OF THE APPEAL:

The South Bruce-Grey Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for information relating to the requester. The request was in the form of questions and was worded as follows:

> (i) Were the [Police] contacted by [a named individual] or any other resident of [a specified address], on January 4, 1999 or at a later date to investigate a dark van parked outside [the named individual's] home and if so:
>
> > (a) at what time was the complaint received at your office?
> >
> > (b) what officer responded? (name and badge number)
> >
> > (c) was it suggested by [the named individual] or by anyone else that I was the person in the van outside [the named individual's] home?
>
> (ii) Is there an ongoing police investigation involving [the requester] regarding (i) above?
>
> (iii) If there is an ongoing police investigation of myself as mentioned in (i) above then:
>
> > (a) what is the status of this investigation?
> >
> > (b) when will I be contacted regarding this issue?
> >
> > (c) when do you expect closure of this matter?
>
> (iv) Have any officials of [a named school board] requested information regarding this matter?

The Police asked the requester to clarify "the dates of the records and some description of the records" requested.

The requester submitted a clarified request. Part 1 of the clarified request was for access to "all files containing my personal information including, but not limited to, all investigation reports". Part 2 of the clarified request was for any records responsive to the questions in his original letter.

After notifying six individuals whose interests could be affected by disclosure of the records (the affected persons), the Police informed the appellant that it had identified four records or groups of records responsive to Part 1 of the clarified request. The Police granted access to Records 1 and 2 and partial access to Record 3. Access to Record 4 was denied in full. The Police denied access to the information severed from Record 3 pursuant to sections 8(2)(a) (law enforcement report) and 14(1) (invasion of privacy) of the Act. Access was denied to Record 4 pursuant to section 14(1). The Police relied on the

"presumed unjustified invasion of personal privacy" in section 14(3)(b) of the Act in support of the section 14(1) claims.

With respect to Part 2 of the clarified request, the Police refused to confirm or deny the existence of any responsive records pursuant to section 14(5) of the Act.

The requester, now the appellant, appealed the decision of the Police. The appellant also raised the issue of conflict of interest. The Freedom of Information Co-ordinator for the Police is married to the person who has assumed the job of principal at the school where the appellant taught and where some of the incidents which are the subject of his request allegedly took place.

A Notice of Inquiry was sent to the appellant, the Police and the affected persons. Because the Part 1 records as well as any responsive Part 2 records, if they exist, would appear to contain the personal information of the appellant, sections 38(a) and (b) of the Act were added to the scope of the inquiry. Representations were received from all parties.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS

Section 14(5) of the Act reads as follows:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

For ease of discussion, I will state that the requirements of section 14(5) have not been established by the Police. A total of 59 pages of records do exist which are responsive to Part 2 of the appellant's request, specifically "General Occurrence Reports" and "Supplementary Reports", a witness statement and documents provided to the Police stemming from an incident involving the receipt of a threatening letter on January 19, 1999 and the subsequent investigation undertaken by the Police. These records cover the period January through May 1999.

A full discussion of section 14(5) will follow later in this order.

RECORDS:

The remaining Part 1 records consist of the undisclosed portions of an incident summary prepared by the Police (Record 3), and ten pages of witness statements and attached documents concerning an assault investigation involving the appellant. The Part 2 records involve a separate investigation into allegations of criminal harassment by the appellant, as described above.

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, as recorded information about an identifiable individual.
The Part 1 and Part 2 records all relate to investigations conducted by the Police into allegations involving the appellant. As such, I find that all records responsive to both parts of the appellant's request contain his personal information.

Some of the records contain information provided to the Police by the affected persons and other identifiable individuals in the context of the two investigations. I find that these records contain the personal information of these other identifiable individuals, as well as the appellant.

PART 1 RECORDS

The Police claim that section 8(2)(a) applies to Record 3, and that section 14(1) applies to Records 3 and 4. Because I have found that these records contains the personal information of the appellant, the relevant exemption claims are sections 38(a) and (b).

Law Enforcement Report

Under section 38(a), the Police have discretion to deny access to an individual's own personal information in instances where certain exemptions apply. One such exemption is section 8.

Section 8(2)(a) reads as follows:

> A head may refuse to disclose a record,
>
> > 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;

Only a report qualifies under this section. The word "report" is not defined in the Act. For a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information (Order P-200). Generally speaking, results would not include mere observations or recordings of fact (Order M-1048).

The Police submit that:

> [The Police] is of the opinion [Record 3] fits the definition of report in Order M-84 as having been prepared in the course of law enforcement. It contains a summary of the investigation, findings of fact by the investigator, conclusions of the investigation and a recommended conclusion (Order P-467).

I do not accept the position put forward by the Police. Record 3, much of which has already been disclosed to the appellant by the Police, consists primarily of factual information provided by various individuals involved in the assault investigation, together with observations by the investigating police officer.

In my view, the record is properly characterized as a collection and recitation of "observations and recordings of fact", with no formal statement or account of the results of the collation and consideration of information. For these reasons, I find that Record 3 does not qualify as a "report". Therefore, the record does not qualify for exemption regardless of the fact that it was prepared during the course of a criminal law enforcement investigation by an agency which has the function of enforcing and regulating compliance with the law.

Accordingly, the requirements of section 8(2)(a) have not been established, and I find that Record 3 does not qualify for exemption under section 38(a) of the Act.

Invasion of Privacy

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals, and the Police determine that the disclosure of the information would constitute an unjustified invasion of the other individuals' personal privacy, the Police have discretion to deny the appellant access to that information.

In this situation, 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. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) states that despite section 14(3), a disclosure does not constitute an unjustified invasion of personal privacy if the information falls within one of three categories set out in that section. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The Police have cited the presumption of an unjustified invasion of privacy at 14(3)(b). This section reads

> A disclosure of personal information 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 appellant's representations do not deal specifically with the assault investigation.

The Police state that the personal information was collected in the course of investigating an assault complaint involving the appellant.

I find that the personal information contained in Records 3 and 4 clearly was compiled and is identifiable as part of an investigation into a possible violation of law; in this case the Criminal Code. Therefore, the section 14(3)(b) presumption of an unjustified invasion of personal privacy applies. The fact that no criminal

proceedings resulted from this investigation does not negate the applicability of section 14(3)(b) [see Orders M-198, P-237, MO-1192 and MO-1256].

None of the personal information contained in Records 3 and 4 falls under section 14(4), and the appellant has not raised the possible application of section 16 of the Act.
Accordingly, I find that the severed portions of Record 3 and Record 4 in its entirety qualify for exemption under section 38(b) of the Act.

PART 2 RECORDS

A requester in a section 14(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(5), an institution is denying the requester the right to know whether a record exists, even if it does not. This section gives institutions a significant discretionary power which should be exercised only in rare cases [Order P-339].

An institution relying on this section must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. It must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy [Orders P-339 and P-808 (upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)]

Therefore, before the Police are permitted to claim section 14(5), they must provide sufficient evidence to establish that:

1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[Order MO-1179]

As stated earlier, the relevant exemption claim for the Part 2 records is section 38(b), not section 14. This raises the question of whether section 14(5) can be claimed by the Police with respect to records which contain the appellant's own personal information.

Former Adjudicator John Higgins faced a similar issue in Order M-615, where he found:

> Section 37(2) provides that certain sections from Part I of the Act (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the requester's own personal information). Section 14(5) is not

> one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information.
>
> However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the Act.
>
> Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

I agree with this reasoning, and adopt it for the purposes of considering the Part 2 records in this appeal.

Requirement One

The Part 2 records all relate to the investigation undertaken by the Police regarding allegations of intimidation and criminal harassment by the appellant. These records were all clearly compiled and are identifiable as part of an investigation into a possible violation of law, specifically the Criminal Code. For the same reasons outlined above regarding the Part 1 records, I find that disclosure of the Part 2 records would constitute a presumed unjustified invasion of privacy under section 14(3)(b).

The appellant submits that disclosure of the records is relevant to a fair determination of his rights pursuant to section 14(2)(d) of the Act. He argues:

> I have made a request for personal information so as to establish whether or not there was a police investigation into allegations of stalking. My employer has been notified of this police investigation ... and yet when I try to establish this report with this police they will not confirm or deny the existence of the report.

John Doe has stated that a section 14(2) factor, such as 14(2)(d) raised by the appellant, cannot outweigh a section 14(3) presumption.

Therefore, I find that Requirement One has been established.

Requirement Two

To satisfy the second requirement, the Police must demonstrate that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Police submit that they:

> ... did not confirm or deny the existence of such records due to the ongoing investigation and the concern of what the release of this information would have on an already volatile situation.

In my view, this concern relates to the possible application of section 8(3) of the Act, not to section 14(5). Section 8(3) has not been claimed by the Police in this appeal.
The Police also add that the appellant has never been interviewed regarding this matter.

Throughout this appeal, the appellant has focussed on records relating to an incident that took place on January 4, 1999 outside the home of one of the affected persons. His request makes specific and detailed reference to this incident. However, the records identified by the Police in response to Part 2 of the request all stem from a subsequent incident regarding a threatening letter. This incident took place on January 19, 1999. Having reviewed the records, in my view, these two incidents are part of the same ongoing investigation involving the appellant, and have been treated as such by the Police. Both incidents occurred within a short period of each other, and the facts of both incidents are referred to in the Part 2 records.

The appellant is aware that an investigation in respect of the January 1999 incidents took place. He has provided me with a copy of a letter from his then-employer which makes reference to an ongoing Police investigation into these matters. The appellant also advises me that he has recently received information from the Ontario Provincial Police confirming his involvement in "an investigation into a threatening/intimidating letter". In addition, simply confirming that records associated with such an investigation exist would not in and of itself convey personal information of other identifiable individuals. No individual, other than the appellant, is identified by the simple acknowledgement of the investigation, nor is any information contained in the records either confirmed or conveyed through this acknowledgement. In my view, any personal privacy interests that do exist are appropriately and adequately addressed through the application of the sections 14(1) and 38(b) exemption claims.

Therefore, I find that Requirement Two has not been established, and the Part 2 records do not qualify under section 14(5) of the Act.

However, for the reasons outlined in my discussion of Requirement One, I find that these records satisfy the requirements of section 14(3)(b) and qualify for exemption under section 38(b) of the Act.

CONFLICT OF INTEREST

The Police's response to the appellant's request was signed by the Freedom of Information and Privacy Co-ordinator of the Police (the Co-ordinator). The appellant claims that the Co-ordinator is in a conflict of interest position because he is married to the current principal of the school where the appellant taught and where some of the incidents which are the subject of the request took place.

In the Notice of Inquiry the parties were asked to provide representations in response to the following questions:

1. Would a well informed bystander reasonably perceive bias on the part of the decision-maker?

2. Would the decision-maker have a closed mind, in that no representations could have been made, which could have resulted in the decision-maker making a different decision?

3. Would the decision-maker have a pecuniary interest in or relation to the records?

4. Would the decision-maker have any other kind of personal or special interest in the records?

If any of the above questions are answered in the affirmative, please respond to the following:

5. Would it have been possible for someone other than the decision-maker to have made the decision?

6. Would the answer to any of questions 1-4, posed in regard to the alternate decision-maker(s), have been "yes"?

7. Would the requester and any third parties/affected persons, with the full knowledge of the relevant facts and having had the opportunity to object, waived their rights to object to the decision-maker's participation?

The appellant states that the Co-ordinator's wife is also a friend of the principal who held the position at the time of the incidents, and submits:

> I do not believe that the decision maker was capable of making any other decision, other than the one that he has made simply to protect the interests of [his wife and the current principal].

The appellant also states that had he been given the opportunity at the time he made the request, he would have objected to the Co-ordinator's participation in the decision-making process.

In addressing this issue, the Co-ordinator states that he has removed himself from involvement in this inquiry to avoid any further perceived conflict, since his wife has now assumed her role as principal at the school. The representations provided by the Police were made by a different individual, who states that he reviewed the original decisions made by the Co-ordinator and concurs with them.

The Co-ordinator also submits that:

> The decision made by the institution was without bias. My wife was a Principal in [a different City] at the time of these decisions and had no authority or contact with the

appellant. My decision was to a large part, based on third party requests for non-disclosure.

I do not have a closed mind in these decisions.

I do not have a pecuniary or special interest in these records.

I do not have any other personal or special interest in these records.

I am not persuaded that any conflict of interest exists in this case, either real or reasonably perceived. It is clear that the Co-ordinator has no pecuniary or other special interest in the records. Neither the Co-ordinator nor his wife had any role in the incidents involving the appellant, and any suggestion of bias based on a friendship that may exist between the Co-ordinator's wife and the other principal is too remote to form the basis of a conflict of any kind. In my view, a well informed bystander could not reasonably perceive bias on the part of the Co-ordinator, and there is nothing before me to suggest that the Co-ordinator approached the decision making process with a closed mind.

For these reasons, I find that the Co-ordinator was not in a conflict of interest position in responding to the appellant's request. In addition, by removing himself from any further involvement in this appeal once his wife became principal, the Co-ordinator has addressed the possible perception of any conflict during the latter stages of this inquiry.

ORDER:

1. I uphold the decision of the Police to deny access to the remaining portions of Record 3 and Record 4 responsive to Part 1 of the request.

2. I do not uphold the Police's decision to refuse to confirm or deny the existence of the Part 2 records.

3. I find that all records responsive to Part 2 of the request qualify for exemption under section 38(b) of the Act.

4. In this order, I have confirmed the existence of records responsive to Part 2 of the appellant's request. I have released this order to the Police and the affected persons in advance of the appellant in order to provide the Police and/or the affected persons with an opportunity to examine this order and determine whether to apply for judicial review with respect to the issue of the existence of the records.

5. If I have not been served with a Notice of Application for Judicial Review with respect to the issue of the existence of the records by **March 24, 2000**, I will release this order to the appellant by **March 29, 2000**.

6. In accordance with the requirements of section 54(4) of the Act, I will give the appellant notice of the issuance of this order by a separate letter, concurrent with the issuance of the order to the Police and the affected persons.

Original signed by: ______________________ March 9, 2000

Tom Mitchinson
Assistant Commissioner