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

# ORDER MO-1431

Appeal MA_000091_1

Durham Regional Police Services Board

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## NATURE OF THE APPEAL:

The Durham Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a solicitor representing two named businesses (the appellants). The request was for all information and documentation relating to a letter entitled "Important Notice" which had been issued by the Police to the appellants.

The Police identified certain responsive records, and denied access to them based on various exemptions. The appellants appealed the Police's decision.

Following notification of the appeal, the Police amended the earlier decision by identifying additional exemption claims for the records. The denial of access to the records was based on one or more of the following exemptions contained in the *Act*:

- sections 8(1)(a), (b), (c), (d) and (g) - law enforcement
- section 8(1)(e) - endanger life or safety
- section 8(1)(f) - right to fair trial
- section 8(1)(l) - facilitate commission of unlawful act
- section 14 - invasion of privacy
- sections 38(a) and (b) - discretion to refuse requester's own information

The appellants also appealed the amended decision.

During mediation, the appellants' solicitor emphasized that the request was for "... all information, documentation, memorandum and other materials ..." and that it included:

> any pre-investigation memoranda or correspondence indicating how and why the investigation against the two establishments was initiated and any instructions to or from the investigating officer to or from his superiors.

The Mediator asked the Police to conduct a further search for all information responsive to the request, and referred in particular to the clarification provided by the appellants' solicitor. The Police conducted another search and located a video statement. The Police applied the exemptions in sections 8(1)(a), 14(3)(b), 38(a) and 38(b) of the *Act* to deny access to the video tape. The Police informed the Mediator that no other responsive records existed.

The Police later advised the Mediator that the sections 38(a) and 38(b) exemption claims were being withdrawn. The appellants continued to object to the application of the remaining exemption claims, and also continued to maintain that further responsive records exist.

Mediation was not successful in resolving all of the issues in this appeal, so the matter proceeded to the adjudication stage. I sent a Notice of Inquiry to the Police initially, and received representations in response. In their representations, the Police identified the following:

- the investigation to which the records relate resulted in prosecutions, and substantial disclosure of the records has been made through the criminal process. Accordingly, the

Police withdrew the sections 8(1)(a), (b), (d), (e), (f), (g) and (l) exemption claims for a number of records;

- section 14 applies to the video statement;
- section 8(1)(c) and section 14 apply to all other remaining records; and
- all of the exemptions apply to five records which had not been disclosed in the context of the criminal proceedings (the police intelligence records).

The Police also provided two affidavits identifying the nature of the searches conducted in response to the request.

After submitting its representations, the Police conducted a further search and identified one additional record that "may be responsive". It is a sample precedent form of the "Important Notice" letter, which was adapted for use by the Police.

I sent the appellants a modified Notice of Inquiry, along with the non-confidential portions of the Police's representations. The appellants did not submit representations.

## RECORDS:

The records at issue in this appeal consist of:

- two binders, each relating to one of the two appellants and containing General Incident and Arrest Reports, Supplementary Reports, Will State summaries, "Important Notice", Summonses and a Video Statement Synopsis;
- a video taped statement;
- five police intelligence records; and
- a sample form of the "Important Notice" letter.

## DISCUSSION:

### RESPONSIVENESS OF RECORDS

As identified above, the Police identified one additional potentially responsive record after submitting its representations. The Police provided me with a copy of this record (a sample precedent form of the "Important Notice" letter), but did not identify it for the appellants and did not make a decision regarding access.

The appellants' initial request was for "...all information, documentation, memorandum and other materials ..." relating to a letter entitled "Important Notice" which was issued by the Police to each of the appellants. This request was clarified during mediation to include records regarding how and

why the investigations were initiated. In my view, the initial request alone is broad enough to encompass the sample precedent form letter. I find that this record is "reasonably related" to the request, and therefore responsive (see Orders P-880 and P-1051).

I will include a provision in this order requiring the Police to issue an access decision to the appellants concerning this record.

**PERSONAL INFORMATION:**

The section 14(1) personal privacy exemption only applies to "personal information". The appellants in this case are two named corporations. As such, I find that the records do not contain "personal information" of these corporate bodies.

As far as the five police intelligence records are concerned, given my findings later in this order, it is not necessary for me to make a determination as to whether these records contain personal information.

"Personal information" is defined in section 2(1) of the *Act*, in part, to mean recorded information about an identifiable individual, including the criminal history of the individual [paragraph (b)] the address, telephone number, fingerprints or blood type of the individual [paragraph (d)], and the individual's name where it appears with other personal information relating to the individual [paragraph (h)].

The Police submit that the information contained in the remaining records is personal information, and state that the records:

> ... are replete with personal information of variously, witnesses ... and suspects/ accused, including but not limited to the corporate requesters, which is intermingled and virtually impossible to sever.

The remaining records consist of a video taped statement and two binders of documents relating to the appellants. As noted earlier, these documents include General Incident and Arrest Reports, Supplementary Reports, Will State summaries, "Important Notice" forms, Summonses and a Video Statement Synopsis.

Having reviewed these records, I find that most of them, including the video taped statement, contain personal information of identifiable individuals gathered by the Police in the context of investigating possible criminal activity by the appellants, including names, addresses, charges laid against certain individuals, statements made by individuals concerning allegations and other information relating to identifiable individuals. This information falls within the scope of paragraphs (b), (d) and/or (h) of the definition of "personal information".

However, this finding does not apply to some of the records, specifically, nine records which document charges against the appellants. The following records contain information about these two businesses but no personal information of identifiable individuals:

from binder 1: three one-page General Incident reports dated July 7, 1999, July 16, 1999 and October 2, 1999; and a copy of the two-page "Important Notice" dated October 20, 1999.

from binder 2: the summons dated August, 1998; and four one-page General Incident reports dated August 15, 1998, April 7, 1999, April 15, 1999 and August 27, 1999

**INVASION OF PRIVACY**

Where a requester seeks the personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only section with potential application in the circumstances of this appeal is section 14(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of privacy. Section 14(2) provides some criteria for the institution to consider in making this determination, and section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure under section 14(3) 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).

Section 14(3)(b) of the *Act* 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 Police submit:

> All of the responsive records were compiled and are identifiable as part of investigation(s) into possible violations of law. These were violations involving adult entertainment by-laws and criminal law in relation to indecent theatrical performance and common bawdy house.

I did not receive any representations from the appellants on this issue.

I accept the position put forward by the Police as it relates to most of the records, which were compiled and are identifiable as part of the investigation into possible by-law and *Criminal Code* violations by the appellants. I find that these records qualify for exemption under section 14(3)(b) of the *Act*.

However, some of the records were created after the investigation was concluded. It has been determined in previous orders that "records which are created following an investigation into a possible violation of law cannot fall within the ambit of the presumption in section 14(3)(b)" [See Order M-1086]. As far as these records are concerned, although they do not fall within the scope of the section 14(3)(b) presumption, I find that all of them contain highly sensitive personal information about the individuals identified in the records, and I am satisfied that their disclosure would constitute an unjustified invasion of personal privacy.

In making my findings on this issue, I acknowledged that a number of these records were disclosed to the appellants through the criminal prosecution process. I referred to this fact in the Notice of Inquiry which was sent to the appellants. However, the appellants chose not to make representations, and I have no evidence before me as to precisely which records or portions of records were disclosed in the criminal proceedings, and which ones were not.

Senior Adjudicator David Goodis faced a situation similar in Order MO-1378, where the issue before him was access to records which may have been previously disclosed to an appellant, and which contained personal information of identifiable individuals. He stated:

> The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.
>
> In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:
>
> > Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the *Act*.
>
> In my view, this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.

I adopt Adjudicator Goodis' reasoning for the purposes of this appeal. Accordingly, regardless of whether or not the records containing information which qualifies for exemption under section 14

were disclosed to the appellants in other proceedings, I find that they nonetheless qualify for exemption under section 14 in the circumstances of this appeal.

I also find that none of the information contained in the records falls within the exceptions listed in section 14(4) of the *Act*, and the appellants have not raised the application of section 16.

Therefore, with the exception of the nine records outlined above that do not contain personal information, and the five police intelligence records, all other records qualify for exemption under section 14(1) of the *Act*.

**LAW ENFORCEMENT**

The Police claim that all 14 remaining records qualify for exemption under section 8(1)(c) of the *Act*, and that the five police intelligence records (but not the other nine records) also qualify under section 8(1)(g).

I have decided to consider the five police intelligence records under section 8(1)(g) and the other nine records under section 8(1)(c).

**Section 8(1)(c)**

Section 8(1)(c) states that:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. This definition states:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b);

The matter to which the records in this appeal relate is the Police investigation of various offences allegedly committed by the appellants. In my view, this matter falls clearly within paragraphs (a) and (b) of the definition of "law enforcement".

The only remaining issue is whether disclosure of the nine records could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement.

Senior Adjudicator Goodis made the following statements in Order PO-1747, which I find are applicable in the context of section 8(1)(c):

> The words "could reasonably be expected to" appear in the preamble of section 14(1) [the equivalent to section 8(1) found in the provincial *Freedom of Information and Protection of Privacy Act*], as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Accordingly, in order to qualify for exemption, the Police must provide detailed and convincing evidence that public awareness of the particular technique or procedure reflected in the records would hinder or compromise its effective utilization. Techniques or procedures already generally known to the public would normally not fall within the scope of this exemption claim. Moreover, where a technique is generally known, it would not be "revealed" by disclosure of a record which identifies this technique (Orders P-170, M-761, P-963 and MO-1337-I).

The Police's representations state that the particular manner in which the investigations led to the eventual prosecution is itself an investigative technique. The representations focus primarily on the police intelligence records, but also apply to the nine records under consideration here. The Police acknowledge that many of the records were disclosed during the criminal prosecution process, but go on to state:

> [The Police] nonetheless continue to claim exemption under section 8(1)(c) in relation to [the remaining records] because there are other investigations ongoing utilizing this technique ... The technique is not widely known to the public, and disclosure of the records would reasonably prejudice the investigative edge associated with it.

The nine records all concern specific charges laid against the appellants, and consist of single-page General Incident reports, a Notice and a summons. None of these records themselves describe a specific investigative technique, nor would their disclosure reveal any such technique. Although different considerations might conceivably be relevant in the context of the five police intelligence records, as far as the nine other records are concerned, I find that the general arguments put forward relating to the possible application of the section 8(1)(c) exemption to these records is not the sort of "detailed and convincing evidence" necessary to establish the exemption claim.

Therefore, I find that the nine records do not qualify for exemption under section 8(1)(c) of the *Act*.

**Section 8(1)(g)**

Section 8(1)(g) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

The purpose of section 8(1)(g) is to provide the institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information. Previous orders have defined intelligence information as:

> information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence (Orders M-202 and P-650).

The Police state that the type of information contained in the five Police intelligence records is gathered and used by the Police, and that its disclosure would reveal law enforcement intelligence information or would interfere with the ability to gather this type of information. The Police provide evidence and arguments in support of this position, including specifics which relate to the particular investigations involving the appellants.

I have considered the representations of the Police and am satisfied that disclosure of the information contained in the five Police intelligence records could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information.

Therefore, I find that the five Police intelligence records qualify for exemption under section 8(1)(g) of the *Act*.

Because of this finding, it is not necessary for me to consider the application of any other exemptions claimed by the Police for these five records.

**REASONABLENESS OF SEARCH**

The appellants maintain that additional responsive records exist.

In appeals involving a claim that further responsive records exist, the issue to be decided is whether the Police have conducted a reasonable search for the records as required by section 17 of the *Act*.

If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Police will be upheld. If I am not satisfied, further searches may be ordered.

Where an appellant provides sufficient detail about the records which he/she is seeking and the Police indicate that further records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any responsive records. The *Act* does not require the Police to prove with absolute certainty that further 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 it has made a **reasonable** effort to identify and locate all responsive records.

The representations provided by the Police outline the various searches conducted in response to the request. Two affidavits accompanied the Police's representations, both of which support the Police's position that all reasonable efforts were made to identify responsive records. One affidavit outlines steps taken to identify responsive police intelligence records and the other affidavit relates to all other responsive records.
The Police state:

> A full and complete search of [Police] records was completed in order to respond to this request. Details of the search and response process may be found in the affidavit of [the Freedom of Information Co-ordinator].
>
> The records responsive to the request were comprised of reports related to prior investigations and prosecutions of the respective requester businesses for both criminal and adult entertainment by-law purposes (including the video taped statement), as well as [police intelligence files].
>
> The "IMPORTANT NOTICE" letters at issue in this request were an exercise of investigative discretion by a police officer in the due execution of his duties at law. As such, much of what informed their creation and conveyance to the requesters was a belief to a standard of articulable cause, in the mind of the police officer who sent them in a certain state of affairs relative to activities ongoing at their businesses. Such a belief, as distinct from the reports and other information supportive of it, does not comprise a "record" under the *Act*. See the affidavit of [a named police officer], attached, for a detailed explanation of this process.

As I interpret these statements, the Police are submitting that the police officer investigating the matter decided, based on his experience, his investigation, and a number of other factors which are not recorded, to send the "Important Notice" records.

It is clear that the Police did not conduct an adequate search for all responsive records at the time of their initial response to the request. A number of additional searches were undertaken during the course of this appeal, and more responsive records were identified along the way. Based on my review of the representations and the contents of the two supporting affidavits, I am satisfied that the Police have now undertaken a reasonable search for all responsive records. The Police have provided me with detailed descriptions of the nature of the searches conducted, the dates of these searches, the identities of the employees who conducted the searches, and the results of the search

activities. I find that the conclusion that no other responsive records exists, reached by the Police after undertaking these various search activities, is reasonable in the circumstances.

## ORDER:

1. I order the Police to provide the appellants with an access decision for the record identified as the sample precedent form of the "Important Notice" letter, which was adapted for use by the Police, pursuant to section 19 of the *Act*, treating the date of this order as the date of the request.

2. I order the Police to disclose the following nine records to the appellants by **June 18, 2001**:

   from binder 1:
   (1) a one-page General Incident report dated July 7, 1999;
   (2) a one-page General Incident report dated July 16, 1999;
   (3) a one-page General Incident report dated October 2, 1999;
   (4) a copy of the two-page "Important Notice" dated October 20, 1999.

   from binder 2:
   (5) the Summons dated August, 1998;
   (6) a one-page General Incident report dated August 15, 1998;
   (7) a one-page General Incident report April 7, 1999;
   (8) a one page General incident report dated April 15, 1999;
   (9) a one-page General Incident report dated August 27, 1999.

3. I uphold the decision of the Police to deny access to all other records.

4. I find that the Police have made reasonable efforts to locate records responsive to the request, and I dismiss this aspect of the appeal.

5. I reserve the right to require the Police to provide me with a copy of the decision letter referred to in provision 1 of this order, and the material disclosed to the appellants in accordance with Provision 2 of this order, only upon request.

Original signed by: May 29, 2001
Tom Mitchinson
Assistant Commissioner