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

ORDER MO-1561

Appeal MA-020060-1

Gananoque Police Service

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NATURE OF THE APPEAL:

The Gananoque Police Service Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from an individual for "a copy of an occurrence [report] dated November 28, 2001 pertaining to a call that I had reported to the Gananoque Police Detachment."

The Police identified the responsive record as a one-page occurrence report. The Police notified a third party (the affected person) pursuant to section 21 of the *Act*. After receiving this individual's views, the Police issued a decision letter to the requester that read, in part, as follows:

> Following third party notification a decision has been made to grant you partial access to the records which you requested. Full access is denied to the record pursuant to section 14(1)(a).

The requester (now the appellant) appealed the Police's decision.

During the mediation stage of the appeal, the appellant clarified that she had intended her request to include the handwritten notes made by the police officers who attended in response to her call. The Mediator relayed this information to the Police, who located the handwritten notes and issued a second decision letter relating to them, denying access to these records in full, on the basis that they qualified for exemption under section 38(b) (invasion of privacy), and sections 8(2)(a) and 8(1)(a) (law enforcement). The issue of the possible application of section 38(b) to the occurrence report and section 38(a) to the handwritten notes (discretion to refuse requester's own information) was also identified by the Mediator and added to the scope of the appeal.

As well, during mediation the appellant confirmed that any information in the handwritten notes concerning other unrelated policing activities was not responsive to her request and could be removed from the scope of the appeal.

Further mediation was not possible, and the appeal proceeded to the adjudication stage. I issued a Notice of Inquiry initially to the Police and the affected person identified in the records. The Police responded with representations, but the affected person did not. After reviewing the Police's representations, I decided that it was not necessary to hear from the appellant before issuing my order in this appeal.

RECORDS:

The records remaining at issue in this appeal are:

- the severed portions of a one-page occurrence report; and

- the responsive portions of six pages of handwritten notes from the notebooks of various police officers.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

The section 14(1)/38(b) personal privacy exemptions apply only to information which qualifies as personal information. "Personal information" is defined in section 2(1) of the *Act* to mean, in part, recorded information about an identifiable individual, including the address of the individual (paragraph (d)); the personal opinions or views of the individual except where they relate to another individual (paragraph (e)); the views or opinions of another individual about the individual (paragraph (g)); 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 (paragraph (h)).

The Police claim that all of the records contain the personal information of the affected person, specifically the views and opinions of the appellant about the affected person. The Police also submit that the address of the affected person included in the notebook entries is his personal information.

The records at issue in this appeal all relate to documents produced by the Police in response to a call received from the appellant concerning the actions of the affected person. The appellant has received all of the occurrence report, with the exception of the name and address of the affected person, and other small portions that specifically refer to him or identify him by name. The police officers' notebook entries all relate to the activities of officers who were involved in responding to the appellant's call, and contain information about both the appellant and the affected person.

I find that all of the records contain the personal information of both the appellant and the affected person. The records substantiate that the appellant had contacted the Police regarding a personal matter and contain information "about" the appellant for the purposes of the definition of "personal information". The records also contain the name and address of the affected person, and the views and opinions of the appellant about the affected person's conduct that gave rise to her call to the Police, which is sufficient to constitute the affected person's "personal information" as the term is defined in section 2(1) of the *Act*. One sentence in one of the notebook entries also includes the views of one of the police officers about the affected person.

DISCRETION TO REFUSE ACCESS TO APPELLANT'S OWN PERSONAL INFORMATION/INVASION OF PRIVACY

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the Police must look at the information and weigh the appellant's right of access to her own personal information against the affected person's right to the protection of his privacy. If the Police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the Police the discretion to deny access to the appellant's personal information.

In determining whether the exemption in section 38(b) applies, 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 affected person's personal privacy. Section 14(2) provides some criteria for the Police 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; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. 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 section 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

The Police have identified the presumption in section 14(3)(b) in support of the section 38(b) exemption claim. 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 Police submit that the records were compiled in response to a call from the appellant concerning a possible breach of the *Criminal Code* by the affected person. The contents of the records would appear to substantiate the Police's position in this regard, and I find that the requirements of section 14(3)(b) have been established for the undisclosed portions of the records.

It would appear that The Police did not bring any charges against the affected person as a consequence of the investigation. However, previous orders of this office have established that the absence of charges does not negate the application of section 14(3)(b) (see, for example, Orders PO-1715 and MO-1451).

The Police also identify the factor in section 14(2)(i) in support of the decision that disclosure of the affected person's personal information would constitute an unjustified invasion of his privacy. This section reads:

> 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,
>
> > the disclosure may unfairly damage the reputation of any person referred to in the record.

The Police indicate that the appellant has filed a complaint against the affected person, who is a police officer, under the *Police Services Act*. The Police rely on this, as well as the fact that the affected person has not been convicted of any criminal offences, as the basis for the relevance of section 14(2)(i). In my view, the fact that the affected person was not charged as a result of the appellant's call to the Police does not necessarily lead to the conclusion that disclosure of information about him to the person who made the call would damage the affected person's reputation, or that any such damage would be "unfair" in this context. Similarly, the *Police Services Act* establishes a complaint process that has its own procedures and is available to members of the public, including the appellant in this case, who object to the propriety of actions taken by individual police officers. The call made by the appellant in the circumstances of this appeal concerned actions taken by the affected person in a personal rather than a professional capacity, and I find that any steps taken under the *Police Services Act* have little, if any, bearing on my consideration of section 14 in the context of this appeal.

In summary, I find that the requirements of the section 14(3)(b) presumption are present with respect to the records at issue in this appeal, and that no factors favouring disclosure in sections 14(2) are relevant in the circumstances.

DISCRETION TO REFUSE ACCESS TO APPELLANT'S OWN PERSONAL INFORMATION /LAW ENFORCEMENT

Under section 38(a) of the *Act*, an institution has the discretion to deny an individual access to his or her own personal information in instances where the exemption in section 8 applies.

The Police rely on sections 8(1)(a) and 8(2)(a) in support of the section 38(a) exemption claim.

Section 8(1)(a)

In order for a record to meet the requirements of 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 includes "policing", which I find was clearly the type of activity undertaken by the Police in the context of creating the records at issue in this appeal.

The purpose of the exemption contained in section 8(1)(a) is to provide an institution with the discretion to refuse access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an **ongoing** law enforcement matter. The institution bears the onus of providing evidence to substantiate first, that a law enforcement matter is ongoing and second, that disclosure of the records could reasonably be expected to interfere with the matter (See Orders P-324, P-403 and M-1067).

The Police maintain that the law enforcement matter that gave rise to the creation of the records is ongoing. They base this position on two grounds:

- the fact that the affected person, although not charged as a result of the incident reported by the appellant, may offend again, and he may be the subject of ongoing monitoring; and

- the fact that the appellant has filed a complaint against the affected person under the *Police Services Act*.

I do not accept the Police's position. The records at issue in this appeal were created approximately 18 months ago. No subsequent records relating to the investigation have been identified by the Police as responsive to the appellant's request and, in my view, it is clear that the investigation was completed some time ago. The Police have stated that no charges were laid as a result of the investigation. If the affected person should be monitored in future, it would be in respect of another, independent investigation, and I find that the law enforcement matter that gave rise to the records at issue in this appeal is not ongoing, as required by section 8(1)(a).

As far as any complaint under the *Police Services Act* is concerned, in my view, it is not accurate to characterize this type of complaint as an ongoing law enforcement matter arising from the appellant's call to the Police. Based on the contents of the records, it is clear that the appellant contacted the Police regarding the actions of the affected person in a personal rather than a professional capacity, and I find that any connection between this call and any complaint she may have made under the *Police Services Act* is too remote to bring the records within the scope of section 8(1)(a).

Section 8(2)(a)

In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the Police must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

(See Order 200 and Order P-324)

Based on the contents of the records and the role played by the various police officers in the context of the creation of the records, I find that the second and third requirements of section 8(2)(a) are present: the records were prepared in the course of a law enforcement investigation into the possible breach of the *Criminal Code* by the affected person, and the Police are an agency that has the function of enforcing compliance with that law.

However, I find that the first requirement of the test for exemption under section 8(2)(a) has not been established. The word "report" is not defined in the *Act*. However, previous orders have found that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

Many previous orders of this office have determined that occurrence reports and police officers' notebook entries do not constitute "reports" for the purposes of section 8(2)(a) (see, for example, Orders M-1109, PO-1845 and PO-1959). I make the same finding in this appeal. The occurrence report, most of which has already been disclosed, consists of a formal recording of the facts and observations of police officers in relation to actions stemming from the appellant's call to the Police concerning the activities of the affected person. Similarly, the notebook entries of the police officers are factual statements of their involvement in the investigation, and cannot accurately be described as "reports" for the purposes of section 8(2)(a).

Accordingly, I find that none of the records qualify for exemption under either section 8(1)(a) or section 8(2)(a) and, therefore, the section 38(a) exemption has no application in the circumstances of this appeal.

ABSURD RESULT

In Order M-444, former Adjudicator John Higgins stated:

> Turning to the presumption in section 14(3)(b), the evidence shows that the undisclosed information was compiled and is identifiable as part of an investigation into a possible violation of law (namely, a murder investigation) and for that reason, it might be expected that the presumption in section 14(3)(b) would apply.
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> However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.
>
> It is possible that, in some cases, the circumstances would dictate that this presumption should apply to information which was supplied by the requester to a government organization. However, in my view, this is not such a case. Accordingly, for the reasons enumerated above, I find that the presumption in section 14(3)(b) does not apply. In the absence of any factors favouring non-disclosure, I find that the exemption in section 38(b) does not apply to the information at issue in the records.

Several subsequent orders have supported this position and include similar findings (see, for example, Orders M-613, M-847, M-1077 and P-1263). All of these orders have found that non-disclosure of personal information which was originally provided to the institution by an appellant, or personal information of other individuals which would clearly have been known to a 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. They determined that applying the presumption to deny access to the information which the appellant provided to the institution would, according to the rules of statutory interpretation, lead to an "absurd" result.

In my view, the reasoning in these past orders is applicable to the personal information of the affected person at issue in this appeal. The only information in the occurrence report that has not already been disclosed to the appellant is the name and address of the affected person, which she herself provided to the Police, and small portions of the narrative text that make reference to information that the appellant provided to the Police in the context of her call and subsequent meeting. As far as the notebook entries are concerned, with the exception of one sentence that contains the views of one of the investigation police officers about the affected person, all other portions of these records are factual descriptions of the steps taken by the Police in response to receiving the appellant's call, primarily the details of a meeting involving the police officers, the affected person and the appellant. With the exception of the one sentence, which I find qualifies for exemption under section 38(b) of the *Act*, I find that applying the section 38(b) exemption (based on the presumption in 14(3)(b)) to deny access to information that was either provided to the Police by the appellant in the first place, or gathered by the Police in her presence, would lead to an "absurd" result.

Therefore, I find that section 38(b) does not apply to the undisclosed portions of the occurrence report and all portions of the notebook entries, with the exception of the sentence referred to above, and these records should be disclosed to the appellant. I would have reached the same conclusion had I found that any of the records satisfied the requirements of section 38(a), for the same reasons.

ORDER:

1 I uphold the decision of the Police to deny access to one sentence in one of the police officer's notebooks. I have attached a copy of this record to the order provided to the Police with the portion that should **not** be disclosed highlighted.

2. I order the Police to disclose all other records to the appellant by **September 12, 2002,** but not before **September 6, 2002**.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Police to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2.

Original signed by: August 8, 2002
Tom Mitchinson
Assistant Commissioner