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

ORDER MO-1659

Appeal MA-020193-1

York Regional Police Services Board

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NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), an individual asked the York Regional Police Services Board (the Police) for all records related to three incidents, identified by number.

The Police disclosed much of the individual's own information to her. They denied access to the remaining information on the basis of these exemptions in the *Act*

- section 38(b) (personal privacy) in conjunction with section 14(3)(b)(investigation into possible violation of law)
- section 12 (solicitor-client privilege)

The individual launched an appeal of the decision. During the course of mediation of the appeal, the individual (now the appellant) raised other issues. She asserted that more records than those identified by the Police should exist. She also contended that she had submitted correspondence to the Police because of these incidents and that these letters should have been disclosed to her as well.

The appeal then moved to the adjudication stage. I sought representations from the Police first and then shared them in their entirety with the appellant. The appellant also provided me with detailed representations. I have carefully considered all of these representations.

RECORDS:

There are 109 pages of records at issue in this appeal, consisting of incident reports, police officer notes, crown briefs and related documentation, search results, witness statements and correspondence.

CONCLUSION:

The information the Police withheld from the appellant is exempt under the section 38(b) personal privacy exemption.

In addition, the Police construed the appellant's request too narrowly and, as a result, did not conduct a reasonable search for responsive records.

DISCUSSION:

PERSONAL INFORMATION

The first issue for me to determine is whether the records contain personal information and, if so, to whom that information relates. The term "personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including any identifying number assigned to the individual 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)].

I have examined the records at issue in this appeal. I find that the records contain the personal information of the appellant and of other identifiable individuals, including such things as their

- names
- addresses
- telephone numbers
- personal opinions or views

Hence, the information meets the definition of "personal information" set out in paragraphs (d), (e), and/or (h) of the section 2(1) definition.

UNJUSTIFIED INVASION OF ANOTHER INDIVIDUAL'S PERSONAL PRIVACY

General principles

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 exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met. The 38(b)/14 analysis proceeds as follows:

1. **Does the information fit within section 14(1)(a)-(e)?**

   If so, the information is *not* exempt under section 38(b). If not, proceed to step 2.

2. **Does the information fit within section 14(4)(a)-(c)?**

   If so, the information is *not* exempt under section 38(b). If not, proceed to step 3.

3. **Does the information fit within section 14(3)(a)-(h)?**

If so, the information qualifies for exemption under section 38(b), and the institution must exercise its discretion and decide whether or not to disclose it. If not, proceed to step 4.

4. **Would disclosure of the information constitute an unjustified invasion of another individual's privacy, taking into account any relevant factors listed in section 14(2), and any other relevant unlisted factors?**

If so, the information is exempt under section 38(b), and the institution must exercise its discretion and decide whether or not to disclose it. If not, the information is not exempt under section 38(b).

In this case, the Police have relied on section 38(b) in conjunction with section 14(3)(b) of the *Act* to withhold information.

Police's Representations

> . . . The personal information contained in the records was compiled and is identifiable as part of three separate investigations into possible violations of law.
>
> The first investigation . . . was an assault that was reported to our #4 District. Officers assigned to that district investigated the assault and charges were laid against the "suspect". The second investigation . . . was a domestic dispute, which was investigated as a possible breach of a restraining order where no charges were laid after police had discussions with the Crown Attorney's Office in respect to reasonable expectation of conviction and the third investigation . . . was a threatening report that emerged as a result of the second investigation . . . No charges were laid at the request of the "victim". All three incidents in question, an assault, possible breach of a restraining order and a threat, are all offences under the provisions of the Criminal Code of Canada. It is, therefore, our opinion that the information from all three incidents was compiled in accordance with the provisions of Section 14(3)(b).

Appellant's Representations

The appellant makes detailed representations about this issue. I have summarised her most pertinent arguments.

First, the appellant claims that she already knows much of the personal information the Police is withholding from her because she supplied the Police with the information. That information includes one individual's name, address, employer, phone number and details of their criminal record. She claims to have provided information about another individual as well.

She also claims to have much of the withheld information because it was disclosed to her through the criminal trial process.

In these circumstances, she asserts that it is absurd to withhold from her the information of others that she already knows.

Regarding the section 14(3)(b) presumption specifically, the appellant claims that it can not be used to withhold information from her as the Police have admitted that, in the case of two of the incidents where no charges were laid, an "investigation file" does not exist. As such, 14(3)(b) cannot be claimed where no charges were laid. She also questions how the Police can claim a presumption based on the conduct of an investigation where the Police also claim there is no "investigation file".

More generally, the appellant asserts that the Police received some of the information they are withholding from her prior to the commencement of any investigation. Therefore, this information is not part of the investigation and so cannot be excluded under section 14(3)(b). She makes the same argument for information she believes the Police received after they laid charges. She also argues that the information related to one individual was provided at the time of arrest. In her view, documents generated at, and after, the time of arrest are after the completion of the investigation. Therefore, section 14(3)(b) cannot be applied.

Finally, the appellant argues that much of the information that the Police have withheld from her is information she provided to the Police or information provided to other parties. The result is that she already knows the information. She concludes, therefore, that it is absurd to withhold this information from her.

Sections 14(1) and (4)

Clearly none of these provisions apply. Therefore, I will proceed to consider the application of the presumption claimed by the Police, section 14(3)(b).

Section 14(3)(b) presumption

Section 14(3)(b) reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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;

According to Order MO-1568, if a record contains personal information and that information was compiled during the course of an investigation and is identifiable as such, the presumption at 14(3)(b) continues to apply, whether or not the investigation is complete (see also Orders M-701, MO-1256, MO-1431).

Furthermore, "compiled" does not mean the same thing as "originally created for". It means collected or gathered. Therefore, the section 14(3)(b) presumption will apply as long as the personal information was collected or gathered together as part of an investigation (See Orders PO-2066, P-666, P-1168) into possible violations of law.

I have examined the records at issue. I find that section 14(3)(b) applies to some of the records. Those records are: Records 1, 2, 3, 4, 5, 6, 7, 10, 11, 32, and all the records identified between 78 and 107. I find that these records were gathered for the investigations into an assault, a possible breach of a restraining order and a threat. All of these matters are offences under the *Criminal Code*.

The section 14(3)(b) presumption does not, however, apply to the remainder of the records, Records 12 to 29. While the Police applied these sections, it is clear to me upon examination of the records themselves that they were not compiled for the purpose of investigation. All of these records were prepared after the investigation into one of the incidents and are associated with the subsequent laying of charges and the criminal prosecution of the matter. Previous orders have found that records that 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 Orders M-1086, MO-1431, MO-1224]

To conclude, section 14(3)(b) applies to Records 1, 2, 3, 4, 5, 6, 7, 10, 11, 32, and all the records identified between 78 and 107 and, therefore, they qualify for exemption under section 38(b).

Section 14(3)(b) does not apply to Records 12 to 29.

Section 14(2) factors

While Records 12-29 do not fall within the scope of the section 14(3)(b) presumption, I find that they contain personal information of other individuals that is highly sensitive (as provided for in section 14(2)(f) of the *Act*). In addition, I am not persuaded that any factors favouring disclosure under section 14(2) apply. Therefore, I conclude that disclosure of the information relating to individuals other than the appellant in Records 12-29 would constitute an unjustified invasion of personal privacy. [See Order 1431]

Absurd result

Finally, to deal with the appellant's last argument, numerous orders of this office have recognised the applicability of the principle of *absurd result* where the institution has claimed the section 38(b) personal privacy exemption. Adjudicators have found that it is absurd to withhold personal information in certain circumstances and where the appellant has been able to clearly demonstrate that they know the information because:

- They already have a copy of the record at issue. [Orders PO-1679, MO-1621]
- They were present while another individual provided the information – for example to the Police. [Order P-1414]

- The information is essentially the same as that which had been provided to the appellant through the disclosure of other records or provided to the appellant by other institutions. [Order PO-1757]
- The appellant actually supplied the information to the institution. [Order M-444]

I find that the appellant has failed to provide sufficient detailed evidence to show that the information should be disclosed to her.

While the appellant may know a lot of the information withheld from her, her knowledge alone does not prove that the personal information of others appears in each of the records because she provided it.

Furthermore, while I can see that she has copies of some of the withheld records, I do not know how the appellant obtained those copies. There is insufficient evidence before me to satisfy me that the information was disclosed directly to her by the Police, the Crown Attorney, or any other institution. The fact that some of these records might have been disclosed to other parties in the context of other proceedings does not entitle the appellant to copies of these same records in the context of this request and appeal. As stated clearly in Order MO-1568, it does not follow that the personal information of which the appellant has knowledge through other means and also contained in the records compiled in the context of a criminal investigation would necessarily fall outside the protection of the section 14(1) mandatory exemption claim:

> In the context of this appeal, I find that the names of the accused and his employer that are contained in Record 1, as well as the other types of information about the accused referred to by the appellant (i.e., age, years of employment, etc.), were compiled in the context of a criminal investigation involving this individual. As such, the information is properly characterized as "personal" rather than "professional" in nature, and must be considered in the same manner as other personal information compiled by the Police in this context.

Overall, I am not satisfied on the evidence that the circumstances of this appeal warrant the disclosure of this information to the appellant.

Severance

In the circumstances, I am satisfied that the Police have done a reasonable job under section 4(2) of the *Act* in severing exempt information from the records and providing the appellant with information that is solely her own.

Exercise of discretion

As indicated, section 38(b) is a discretionary exemption. Therefore, once it is determined that a record qualifies for exemption under this section, the Police must exercise their discretion in deciding whether or not to disclose it.

Taking into consideration the representations of Police and the fact that they have disclosed much information to the appellant, I am not persuaded that the Police erred in the exercise of their discretion in these requests.

Conclusion

All of the information the Police withheld from the appellant qualifies for exemption under section 38(b). In addition, the Police did not err in exercising discretion under section 38(b).

SOLICITOR-CLIENT PRIVILEGE

The Police have also relied on the section 12 solicitor-client privilege exemption to withhold access to all or parts of Records 12, 13, 14, 23, 24 and 27.

As I have already found that section 14 applies to the personal information of others contained in those records, I need not make a finding on the application of section 12.

RESPONSIVENESS OF RECORDS/REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, 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.

Previous orders of the Commissioner have established that in order to be responsive, a record must be "reasonably related" to the request.

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
>
> [Order P-880, P-1051]

It follows that a reasonable search, therefore, will be one that seeks to identify all records that are reasonably related to the request.

The appellant asserts that she made the following statements to Police, all of which are responsive and none of which has been disclosed to her:

- written statements dated August 1, 2001, August 29, 2001, September 2, 2001, September 10, 2001, September 13, 2001, October 4, 2001 and November 15, 2001

The Police assert that the appellant's statements to the Police are actually letters of complaint and as such did not form part of the investigations conducted into the incidents enumerated nor are they incorporated into the related investigation files.

In the circumstances, I find that the Police failed to conduct a reasonable search for responsive records because their interpretation of the appellant's requests was too narrow.

The Police submit that:

> …The request was very straight forward and stated that the appellant was seeking all records related to the investigation of three incidents by [the Police]…This office then conducted a search for this information…

What follows is a detailed description of the efforts the Police made to locate records responsive to this request. The problem is that the Police erred in their definition of the scope of the request. The appellant did not ask for "all records related to the *investigation* of three incidents". The appellant's requests, articulated identically for each incident, were for

> Any notes, memo book entries, documents, transcripts, audio recordings, video recordings and *all other records related to incident number*… (emphasis added)

In my view, these requests are not limited to records related only to the investigations of the three incidents. Therefore, the correspondence that the appellant refers to, which she wrote to Police in relation to the incidents in question, is responsive to her requests.

ORDER:

1 I uphold the Police's decision that the records are exempt from disclosure.

2. I find the search conducted by the Police for responsive records was not reasonable.

3. I order the Police to conduct a further search for responsive records in accordance with my findings above.

4. I order the Police to provide the appellant with information about the results of this further search in accordance with the requirements of sections 12, 21 and 22 of the *Act* using the date of this order as the date of the request.

Original Signed By: June 4, 2003
Rosemary Muzzi
Adjudicator