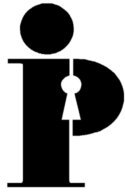

RECONSIDERATION ORDER MO-1868-R

Appeal MA-040061-1

Order MO-1855

Durham Regional Police Service

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BACKGROUND:

This order sets out my decision on the reconsideration of Order PO-1855, issued on October15,2004.

The appellant submitted a request to the Durham Regional Police Service (the Police), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to all driver and witness statements relating to a fatal motor vehicle accident. The requester also asked whether the Police had possession of any other information or documentation about the accident in addition to the various statements.

The request was submitted by a law firm on behalf of the insurer of the driver of one of the vehicles (the driver). For reasons outlined in Order MO-1855, I treated the law firm and the driver as interchangeable for the purposes of the appeal.

The Police identified 11 driver and witness statements as the records responsive to the request, one of which was the videotaped statement of the driver. The Police denied access to all of these records in their entirety, pursuant to the exemptions in section 8(2)(a) (law enforcement) and section 14(1) (invasion of privacy) of the *Act*. The Police relied on the presumptions in sections 14(3)(a) and 14(3)(b) and the factor in section 14(2)(f) in support of the section 14(1) claim. The appellant appealed the Ministry's decision.

During the mediation stage of the appeal, four witnesses consented to disclose their statements. In the case of one of these witnesses, the consent was restricted to the statement itself, and not to her name, address, telephone number and employment information, which was recorded on the back page of the statement.

The Police declined to release the statements for which consent had been obtained on the basis that these records also contain personal information of other individuals, including the person who died in the accident.

After conducting an inquiry and considering representations submitted by the Police and the appellant, I found that the records did not qualify for exemption under section 8(2)(a). I also found that, applying the "absurd result" principle, certain records which satisfied the requirements of the section 14(3)(b) presumption should be disclosed to the appellant. These records are described in Provision 1 of Order MO-1855.

Prior to the compliance date for Order MO-1855, I received a letter from the Police asking me to reconsider my decision, pursuant to section 18.01 of this office's *Code of Procedure*. The Police submit that I misinterpreted the facts in the case, which may have lead to an error in my decision. Specifically, the Police state that throughout Order MO-1855 I incorrectly identify the appellant as the individual who was charged as a result of the accident, when in fact another individual was the person charged. In effect, the Police are suggesting that there was a fundamental defect in the adjudication process leading to Order MO-1855.

I stayed Order MO-1855. After reviewing the Police's letter, I decided it was not necessary for me to hear from the appellant before making my decision on the reconsideration request.

SHOULD THE ORDER BE RECONSIDERED?

The reconsideration procedures for this office are set out in section 18 of the *Code of Procedure*. In particular, sections 18.01 and 18.02 of the *Code* state:

> 18.01 The IPC [Information and Privacy Commissioner] may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

The Police submit that by assuming that the appellant was charged as a result of the accident, my decision on how to treat the various witness statements in this appeal may have been wrong.

I concur.

In considering whose "personal information" was at issue in the appeal, under the definition in section 2(1), I made the following finding:

> As the driver charged under the *Highway Traffic Act* as a result of the accident, I find that all of the records also contain the "personal information" of the appellant.

I then proceeded to deal with the various records under Part II of the *Act*, which governs situations where an appellant is seeking access to his/her own personal information. In deciding how to treat witness statements where the witness had consented to disclosure, I concluded:

> … I find that applying the section 14(3)(b) presumption as the sole basis for denying access to witness statements containing the appellant's personal information under section 38(b) where the witness has consented to disclosure would produce a manifestly absurd result. It would also contradict one of the primary purposes of the *Act*, namely allowing individuals to have access to records containing their own personal information, unless there is a compelling reason not to do so.

It is clear that, with the possible exception of the statement provided by the driver (which I will address below), the other witness statements that do not contain the driver's personal information should have been considered under the privacy exemption in section 14(1) of the *Act*, not section 38(b). This error represents a fundamental defect in the adjudication process and I must reconsider my decision on this basis alone.

Although not raised by the Police, I have also identified another fundamental defect in the adjudication process.

In describing the request in Order MO-1855, I stated:

> The request was submitted by a law firm on behalf of the insurer of the driver of one of the vehicles … The requester provided the Police with a written consent from their insured to disclose the requested records to him. As such, I will treat the requester and the insured as interchangeable and will refer to them both as the "requester" or the "appellant" throughout this order.

In effect, I decided that the appellant law firm could stand in the shoes of the driver for the purposes of the request and appeal, and that the law firm and the driver had the same interests in the various records at issue in the appeal and the application of the *Act*. This finding was wrong.

Although the law firm obtained a written consent from the driver, permitting the Police to provide the appellant with records containing the driver's personal information, this consent is not sufficient to allow the request to be considered as one made by the driver for his own personal information. The proper characterization of the relationship between parties in this type of circumstance has been addressed in past orders of this office, including Order MO-1244, where Adjudicator Holly Big Canoe stated:

> The appellant submits that, because the driver of the vehicle has authorized him to access her personal information, that his request should be considered as one made by her for access to her own personal information. I disagree. The terms of the authorization signed by the driver do not specify that the appellant is making the request on her behalf, only that she will not consider such disclosure an unjustified invasion of her personal privacy. Therefore, I will take the authorization as evidence that the driver has consented to the disclosure of her personal information to the appellant, not as authorization for him to make a request on her behalf.

In my view, a similar approach should be taken in this case. Although the form signed by the driver is titled "Authorization for Release of Information", it is in effect nothing more than a consent to disclose personal information. It does not provide the law firm with authority to make a request under the *Act* on behalf of the driver; it simply permits the Police to disclose any information about the driver gathered in the accident to the law firm without raising privacy concerns. While this consent has an impact on how the driver's personal information is treated in the context of this appeal, the request should be considered under Part I of the *Act*, not Part II. In other words, the section 38(b) exemption has no relevance in the circumstances of this appeal,

and my reliance on it in making findings in Order MO-1855 is wrong and represents a fundamental defect in the adjudication process.

For these reasons, I have decided to reconsider Order MO-1855.

RECORDS:

As outlined in Order MO-1855, the records consist of 11 witness and driver statements. Three statements are recorded on videotape and eight on paper.

DISCUSSION:

LAW ENFORCEMENT

Section 8(2)(a)

The Police claim that the various witness statements fall within the scope of section 8(2)(a), which reads:

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

The term "law enforcement" is used in several parts of section 8, including section 8(2)(a), and is defined in section 2(1) as follows:

> "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)

There is no dispute that the Police are "an agency which has the function of enforcing and regulating compliance with a law", and that the records at issue here were "prepared in the course of a "law enforcement investigation", specifically the motor vehicle accident involving the appellant and others.

The only issue in dispute is whether the records qualify as "reports" for the purpose of section 8(2)(a).

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I]. The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

The Police point out that the various witness statements were obtained by police officers while discharging their duties under the *Police Services Act*, specifically the investigation of a fatal motor vehicle collision. In the view of the Police, "the report was clearly prepared in the course of law enforcement by an agency that has the function of enforcing and regulating compliance with the law".

The appellant has a different view. He submits that the various witness statements are not "reports" because they "are neither formal statements or accounts of the results of the collation and consideration of information, and are only mere observations or recordings of fact with respect to the aforementioned accident".

Applying a long line of previous orders involving witnesses statements similar in nature to the ones at issue in this appeal, I find that the appellant's interpretation is correct and that the records at issue here do not qualify as "reports" for the purposes of section 8(2)(a) of the *Act* [Orders M-720, M-855, MO-1197, MO-1201]. The statements reflect factual accounts made by various witnesses to the accident in question. They have not been collated by the various police officers into any sort of comprehensive document reflecting a consideration of the information gathered from the witnesses, and are clearly the type of record routinely found to fall outside the definition of "report".

Accordingly, I find that the records do not qualify for exemption under section 8(2)(a) of the *Act*.

PERSONAL INFORMATION/INVASION OF PRIVACY

In order to determine whether any of the records qualify for exemption under section 14(1) of the *Act*, I must first decide whether the record contains "personal information" and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (c) any identifying number, symbol or other particular assigned to the individual,

> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if 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;

The parties are in agreement, and I concur, that the individual records contain the "personal information" of the various witnesses who provided their statements to the Police, including the driver. In addition, I find that all of the records contain the "personal information" of the individual who died in the accident. Finally, I find that a number of the records also contain the views and opinions of the witnesses about other individuals involved in the accident, including various drivers, thereby falling within the scope of paragraph (g) of the definition.

None of the records contain the "personal information" of the appellant.

Section 14(1)(a)

Section 14(1) requires an institution to deny access to personal information of someone other than a requester unless one of the exceptions listed in this section are present. One such exception is section 14(1)(a), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

As noted earlier, the driver signed a consent authorizing the Police to disclose personal information about him to the appellant.

During mediation, eight of the individuals who had provided the witness or driver statements (the affected parties) were notified in an attempt to seek consent to the disclosure of their statements. No contact information could be found for the other three witnesses. Three of the eight notified affected parties provided consent to disclose their entire statements, and one other individual consented to disclosure of the content of her statement, but not her name, address, telephone number and employment information that was recorded on the back page of the statement.

As noted earlier, the Police declined to release the statements for which consent had been obtained on the basis that they also contain the personal information of other individuals, including the person who died in the accident.

It might appear at first blush that these consents would be sufficient to justify their disclosure to the appellant. However, I have determined that, in addition to the witnesses, all of the statements include the "personal information" of the individual who died in the accident, and some contain personal information of other individuals involved in the accident. For obvious reasons, consent from the deceased individual is not an option in these circumstances, and the other involved individuals have not consented. For these reasons, the exception in section 14(1)(a) cannot apply.

Section 14(1)(f)

Introduction

The other exception with potential application in this case is section 14(1)(f), which reads as follows:

> 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), (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 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 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [See Order PO-1764]

Section 14(3)

In their initial decision letter to the appellant, the Police identified the presumptions in sections 14(3)(a) and (b) as applicable to the records at issue in this appeal. The Police withdrew the

section 14(3)(a) presumption in their representations, leaving section 14(3)(b) as the only potentially applicable presumption.

Section 14(3)(b) 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 witness statements were clearly prepared or compiled by members of this police service in relation to an investigation into a possible violation of law, specifically the *Criminal Code* of Canada and the *Highway Traffic Act*. At the completion of the investigation a determination was made to charge one individual involved in the collision.

The Police also refer to previous orders where similar information was found to qualify under the section 14(3)(b) presumption.

The appellant takes the position that the Police have failed to discharge the burden of proving that the witness statements fall within the scope of the section 14(3)(b) presumption and, in the alternative:

> … the appellant states that the Police have concluded any investigation into a possible violation of law arising out of the aforementioned motor vehicle accident, and as such, any disclosure of personal information contained in the witness statements would not constitute an unjustified invasion of personal privacy under section 14(3)(b).

I disagree with the appellant's position. The records themselves establish that they were compiled by the Police and are identifiable as part of its investigation into a possible violation of law, specifically the *Criminal Code* and the *Highway Traffic Act*. One of the drivers was charged as a result of this law enforcement investigation. It is also clear, based on a long line of orders issued by this office, that the fact that an investigation has been completed and charges laid does not negate the application of the section 14(3)(b) presumption, as long as it has been established that the records themselves were compiled during the course of the investigation [Orders P-223, P-237, P-1225, MO-1181, MO-1443, MO-1817].

Accordingly, I find that, subject to my discussion of the "absurd result" principle below, the requirements of the section 14(3)(b) presumption have been established.

Section 14(2)

The Police identified the factor in section 14(2)(f) in their decision letter as a relevant consideration in favour of privacy protection. This section reads:

> A head in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all relevant circumstances, including whether,
>
> > the personal information is highly sensitive

I included section 14(2)(f) in my Notice of Inquiry, but the Police did not address its application in their representations.

The appellant points out in his representations that the Police "have failed to discharge the burden of proof in demonstrating that the information contained in the witness statements is highly sensitive and reasonably expected to cause excessive personal distress to the witness who provided the statement".

I concur with the appellant. Clearly, the consents provided by the various witnesses to disclose their statements to the appellant are inconsistent with any claim that they contain highly sensitive information, at least as far as those four witnesses are concerned. Having reviewed the content of the other statements, I find that they also do not contain information that could reasonably be expected to cause "excessive personal distress to the subject individual", the standard established by this office for the application of section 14(2)(f) [Orders M-1053, P-1681, PO-1736]. The statements are factual observations provided by various witnesses to a car accident. None of the witnesses was injured in the accident, and the only ones who would appear to have a personal relationship to the individual who was killed in the incident have consented to disclose their statements.

Although none of the remaining witnesses provided consent, neither did any of them provide representations in response to the Notice indicating an objection to the disclosure of their personal information. Although the absence of a response cannot be equated with consent, in my view, failure to provide representations is a relevant consideration in assessing whether the "highly sensitive" factor in section 14(2)(f) is present.

Finally, I also find that the various statements do not contain "highly sensitive" information concerning the deceased individual. None of the statements, including those where consents have been provided, contain information describing the deceased person or any similar information that might reasonably be expected to cause excessive personal distress to the victim's surviving family members.

Accordingly, I find that the factor in section 14(2)(f) is not a relevant consideration in the circumstances of this appeal.

Based on the representations provided by the Police and my review of the records, I also find that no other factors favouring privacy protection, either listed in section 14(2) or otherwise, are relevant considerations in this case.

Therefore, the presumption in section 14(3)(b) is the only basis for a conclusion that the various witness statements qualify for exemption under section 14(1) in this appeal.

ABSURD RESULT

This office has applied the "absurd result" principle in situations where the basis for finding that information qualifies for exemption under section 14(1) would be absurd and inconsistent with the purpose of the exemption.

Senior Adjudicator John Higgins first applied the absurd result principle in Order M-444, where he 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.
>
> 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. The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]

- the requester was present when the information was provided to the institution [Orders P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

In Order MO-1323, Adjudicator Laurel Cropley elaborated on the rationale for the application of the absurd result principle as follows:

> As noted above, 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 (section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the *Act* in recognition of these competing interests.
>
> In most cases, the "absurd result" has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial *Act*). The reasoning in Order M-444 has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the *Act* and section 14(2)(a) of the provincial *Act*) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288).
>
> In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

To date, this office has not applied the absurd result principle to a situation where an individual has consented to disclose his or her witness statement which may contain personal information of individuals other than the witness and the requester. Having carefully considered the various interests at play in this type of situation, I have concluded that the principle should be extended to this type of situation.

Order M-444 and other subsequent similar orders have made it clear that if an individual makes a formal request for access under the *Act* to his or her statement made as a witness to a police investigation, that statement will be provided to the requester, regardless of the fact that it contains personal information of other individuals. These orders are saying, in effect, that denying a requester access to information that originated with that same person cannot be justified on the basis that some parts of the statement may relate to other individuals as well.

This office has applied the absurd result principle to that set of circumstances, and institutions routinely disclose statements of this nature in response to requests under both the provincial and municipal statutes. This practice reflects a clear balancing of interests in favour of disclosing information that might otherwise be caught by a presumption in section 14(3)(b), on the basis of what Adjudicator Cropley described as a "higher" right of access to one's own personal information.

What I am talking about in the current appeal is extending the principle one step further. In my view, if a witness consents to disclose his or her statement to a requester, barring exceptional circumstances, that alone should be sufficient to trigger the absurd result principle. While I acknowledge that this situation differs from the case where the information in the statement originates with a requester, in my view, it is a difference without a meaningful distinction. From a practical perspective, in many cases a consenting witness would have a copy of his or her statement and could simply pass it on to a requester. If no copy is in the possession of a witness, that individual could make a request under the *Act* for the record, which would be granted, and then simply provide it to the requester, without somehow raising any concerns regarding the privacy protection provisions in Part II of the *Act*. I can see no useful purpose in creating hurdles to a right of access that are not rooted in a legitimate concern for privacy protection. In my view, barring exceptional circumstances that are clearly not present here, I do not accept that the Legislature could have intended to cloak all witness statements with the highest degree of privacy protection inherent in a section 14(3) non-rebuttable presumption in circumstances where the author of the statement has expressed a clear intention to share the content of the statement with a requester.

Accordingly, I find that applying the section 14(3)(b) presumption as the sole basis for denying access to witness statements where the witness has consented to disclosure would produce a manifestly absurd result.

Different considerations apply in circumstances where consent has not been obtained. The rationale for applying the absurd result principle is not present in these circumstances, and the presumption in section 14(3)(b) as it applies to witness statements where no consent is present is sufficient to establish the requirements of section 14(1).

Therefore, I find that the requirements of section 14(3)(b) have been established for all records where the witness has not provided consent, as well as the portions of the statement of the one consenting affecting party not covered by the terms of the consent. These records qualify for exemption under section 14(1).

I further find that the statements of the driver, as well as the statements of three affected parties who consented to disclose their statements during the mediation stage of this appeal, and the portions of the statement of the fourth consenting party covered by the terms of the consent do not qualify for exemption, based on the application of the absurd result principle, and should be disclosed to the appellant.

As noted earlier, the Police indicated that they do not have the resources to edit videotapes. However, in light of my findings in this order the three videotape records must be disclosed to the appellant in their entirety, thereby removing any concerns regarding editing.

ORDER:

1. I order the Police to disclose the videotape statements of the driver, the two other videotape statements of witnesses who consented to disclosure during mediation, the entire written statement of the one affected party who consented to disclosure, and the portions of the written statement of the second affected party covered by the terms of the consent. Disclosure must be made to the appellant by **December 3, 2004**. At the time I issued Order MO-1855, I provided the Police with a copy of the written statement that should be disclosed in its entirety, as well as a highlighted version of the other written statement that identifies the portions that are not covered by the terms of the consent and should **not** be disclosed.

2. I uphold the Police's decision to deny access to the six remaining written statements and the portions of the one partially disclosable statement not covered by Provision 1.

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

Original Signed by: November 19, 2004
Tom Mitchinson
Assistant Commissioner