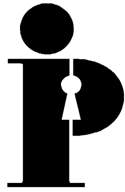

ORDER MO-1812

Appeal MA-030037-1

York Regional Police Services Board

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NATURE OF THE APPEAL:

The requester made a request to the York Regional Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to a polygraph test administered to him on a specific date, and a related interview.

The Police issued a decision to the requester denying access to the records in their entirety, relying on the exemption at section 8(1)(b) (law enforcement).

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

During mediation, the appellant narrowed the scope of his appeal to two records – the score sheet and the polygraph chart. Accordingly, these are the only two records remaining at issue.

Also during mediation, the Police issued a new decision to the requester, claiming the exemption at section 38(a) (discretion to refuse requester's own information) in conjunction with sections 8(1)(a), 8(1)(b), 8(1)(c), 8(1)(f) and 8(2)(a) (law enforcement).

Mediation did not resolve this appeal, and the file was transferred to adjudication. I sent a Notice of Inquiry to the Police, initially, outlining the facts and issues and inviting the Police to make written representations. The Police submitted representations in response. I then sent a Notice of Inquiry to the appellant, together with a copy of the Police's representations. The appellant, in turn, provided representations.

In this appeal I must decide whether the records are exempt under section 38(a) in conjunction with sections 8(1)(a), 8(1)(b), 8(1)(c), 8(1)(f) or 8(2)(a).

RECORDS:

The two records remaining at issue are the score sheet and the polygraph chart.

BRIEF CONCLUSION:

The records are not exempt, and the Police must disclose them.

DISCUSSION:

DO THE RECORDS CONTAIN PERSONAL INFORMATION?

The first issue I must decide is whether the records contain personal information, and if so, whose.

Section 2(1) of the *Act* defines personal information as "recorded information about an identifiable individual," including certain types of information listed in paragraphs (a) through (h). This list is not exhaustive, and information that does not fall within paragraphs (a) through (h) may still qualify as personal information (Order 11).

The Police submit that the records contain the appellant's personal information.

The appellant appears to submit that the records do not contain any personal information.

I have reviewed the records and I find that they both contain the appellant's personal information. The records reflect the results of the polygraph test administered to the appellant in connection with the fire. As such, they are "about" the appellant, even if they do not specifically identify him by name. Both the contents of the records and the surrounding circumstances render the information personal in nature.

I also find that the records do not contain the personal information of any other individuals.

DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(A), IN CONJUNCTION WITH SECTIONS 8(1)(A), 8(1)(B), 8(1)(C), 8(1)(F) OR 8(2)(A), APPLY TO THE RECORDS?

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 disclosure that limit this general right.

Under section 38(a), where a record relates to the requester but section 8 (law enforcement) would apply to the disclosure of personal information in the record, the institution may refuse to disclose that personal information to the requester.

Because section 38(a) is a discretionary exemption, even if the information falls within the scope of this section, the institution must nevertheless consider whether to disclose the information to the requester.

Here, the Police rely on section 38(a) in conjunction with sections 8(1)(a), 8(1)(b), 8(1)(c), 8(1)(f) and 8(2)(a). These sections read:

> 38. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;
>
> 8. (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(2) 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," which appears in sections 8(1)(a), (b) and (c) and section 8(2)(a), is defined in section 2(1) of the *Act* 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).

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context (*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)).

Under sections 8(1)(a), (b), (c) and (f), the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient (Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)).

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se*

fulfillment of the requirements of the exemption (Order PO-2040; *Ontario (Attorney General) v. Fineberg*, above).

Sections 8(1)(a) and 8(1)(b): law enforcement matter/investigation

In order for sections 8(1)(a) or 8(1)(b) to apply, the "law enforcement matter" or "investigation" in question must be specific and ongoing. The exemptions do not apply where the matter or investigation is completed, or where the alleged interference is with "potential" law enforcement matters or investigations (Orders PO-2085, MO-1578).

The Police submit:

> The records at issue form part of an active and ongoing investigation into … arson. …
>
> … the release of information to any individual whether or not the person is a suspect in an investigation, may seriously compromise the outcome of the investigation. If a suspect or involved party to the investigation become aware of the extent of information already in the possession of the police, they could flee the jurisdiction to escape arrest and prosecution. Further, knowledge of the information in the records could tip an involved party as to the direction of the investigation and provide an opportunity to tamper with evidence, which has not yet been uncovered.

The appellant submits, among other things, that the police investigation may be active and ongoing, but it is progressing slowly. He submits that disclosing the records will not interfere with the investigation. He submits that he already knows the results of the polygraph test and simply wishes to "verify" them because they have affected his insurance policy. Finally, the appellant disputes the Police's submission that disclosure will lead to a flight risk. The appellant also makes certain confidential representations that I am not at liberty to disclose in this order.

Based on the evidence before me, I find that there is a specific and ongoing "law enforcement matter" or "investigation" within the meanings of sections 8(1)(a) and (b). It is my understanding that no one has yet been charged in connection with the suspected arson and that the Police are still gathering evidence.

I am not persuaded, however, that disclosing the records could reasonably be expected to interfere with the law enforcement matter or investigation. The Police have not provided the "detailed and convincing" evidence required to demonstrate that the harms they allege are not merely speculative. The records at issue relate to the appellant's own polygraph test. The appellant already knows the results of the test and he is now seeking access to the actual scores and chart that form the basis for those results. The evidence before me does not support the Police's submission that disclosure may cause parties to flee the jurisdiction or tamper with evidence.

I therefore find that the records do not qualify for exemption under sections 8(1)(a) or 8(1)(b).

Section 8(1)(c): investigative techniques and procedures

In order to qualify as an "investigative technique or procedure" under section 8(1)(c), the institution must show that disclosing the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The section 8(1)(c) exemption normally will not apply where the technique or procedure is generally known to the public (Orders P-170, P-1487). In addition, the techniques or procedures must be "investigative." The exemption will not apply to "enforcement" techniques or procedures (Orders PO-2034, P-1340).

The Police submit:

> The officer, who is a certified polygraph technician, who conducted the polygraph examination, was also contacted in order to clarify the effect of disclosing the records at issue. He advised that if the score sheet and polygraph chart were released, these records could be taken to an outside agency and analysed by them. Due to the fact that the appellant was the subject of the polygraph examination, he is well aware of the questions that were asked during the test and he could provide those questions to the outside agency. The validity of the results of the test conducted by the police could be compromised. The officer is a trained polygraph technician. The procedures used in conducting the examination have been designed especially for police use by police officers. The test questions are considered part of the procedure.
>
> Polygraph examinations are an established procedure used by police agencies in order to rule out suspects during the course of investigations and in order to establish the creditability of persons giving evidence. The techniques or procedures have been designed and established by police officers. All police personnel qualified to conduct these types of examinations have had specialized training. These procedures are not available to the public.
>
> … the records at issue could reasonably be expected to reveal such techniques or procedures if they were taken to an outside agency that [has] the knowledge to analyse the information. Disclosure of the technique or procedure to the public would hinder or compromise the effective utilization of it.
>
> … release of the records at issue would compromise the practices used by police in order to conduct polygraph examinations that are used as an aid in police investigations.

The appellant submits, among other things, that the investigative techniques used in polygraph testing "may not be well known to the general public but they are available to anyone who takes the time to look."

I find that the records do not qualify for exemption under section 8(1)(c). While polygraph testing may itself qualify as an investigative technique or procedure, in my view disclosing the two records at issue could not reasonably be expected to hinder or compromise the effective utilization of such testing. I have not been provided with sufficient evidence to conclude that disclosing the records could reasonably be expected to compromise the Police's ability to administer the polygraph test effectively in the future. Beyond making the assertions, the Police have not sufficiently explained how disclosing the records could compromise the "validity of the results," or how an analysis by an outside agency could impair the test. For example, the Police do not explain what, specifically, the records reveal about the polygraph technique or procedure.

Section 8(1)(f): right to a fair trial

In order for a record to qualify for exemption under section 8(1)(f), the institution must show that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. The exemption is not available as a protection against remote and speculative dangers (Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)).

The Police submit:

> It is not possible, prior to the conclusion of an investigation, to determine the importance of any piece of information. Premature disclosure of any of the information in the records could reasonably be expected to have a direct effect on the investigation, the ultimate laying of charges and the eventual prosecution of the accused.

The appellant submits that "[t]he fairness that is a concern at this point is the fairness of the scoring and results of the polygraph."

I do not accept the Police's submission that section 8(1)(f) applies to the information at issue. Again, the appellant is seeking access to information about his own polygraph test and he already knows the results of that test. The Police's representations are generalized and they fail to explain exactly how disclosing the records could reasonably be expected to deprive the appellant or anyone else of the right to a fair trial or impartial adjudication.
I therefore find that the records do not qualify for exemption under section 8(1)(f).

Section 8(2)(a): law enforcement report

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

The Police submit, among other things, that "[a]lthough the appellant has narrowed the scope of his appeal to two records, the score sheet and the polygraph chart, they are still part of the report created by the polygraph technician."

The appellant submits that section 8(2)(a) does not apply to the records.

The records at issue consist of a score sheet and a polygraph chart. Both records simply record the results of the appellant's polygraph test; they do not represent any "collation" or "consideration" of those results. I find that neither of these records qualifies for exemption under section 8(2)(a) because neither is a "report" within the meaning of that section.

Conclusion

The records do not qualify for exemption under section 38(a) in conjunction with sections 8(1)(a), 8(1)(b), 8(1)(c), 8(1)(f) or 8(2)(a).

ORDER:

1. I order the Police to disclose the records to the appellant by **August 6, 2004**.

2. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Police to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: ______________ July 15, 2004

Shirley Senoff
Adjudicator