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

ORDER MO-1855

Appeal MA-040061-1

Durham Regional Police Service

Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Durham Regional Police Service (the Police) received a request 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 who had been charged as a result of the accident. 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.

The Police identified 11 driver and witness statements as the records responsive to the request and denied access to them in their entirety, pursuant to 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 41(1) claim. In their decision letter, the Police also stated that the requester did not provide information to meet the requirements of section 54(a).

The requester, now the appellant, appealed the Police's decision.

During mediation, the Police confirmed that aside from the 11 statements, no additional responsive records were located, with the exception of an incident report that the appellant already had. The appellant advised that he was satisfied with this response.

With the consent of the Police, the Mediator provided the appellant with further information about the nature of the responsive records, specifically that three of the statements are recorded on videotape and that the remaining eight statements are recorded on the standard paper witness statement forms. The Police advised that they did not have the resources to edit the videotapes.

Also during mediation, the appellant confirmed that section 54(a) is not at issue in this appeal.

The Mediator notified eight of the individuals who had provided the witness or driver statements (the affected parties), in an attempt to seek consent to the disclosure of the records. No contact information could be found for the other three witnesses. Four of the eight notified affected parties provided consent to the disclosure of their personal information. One of those individuals agreed to disclose the content of her statement, but objected to the release of 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 the statements also contain the personal information of other individuals, including the person who died in the accident.

Further mediation efforts were not successful and the appeal was transferred to me for adjudication.

Because it appears that all of the records might contain the appellant's personal information, I added sections 38(a) and 38(b) (right of access to one's own personal information) as possible issues in this appeal.

I began my inquiry by sending a Notice to Inquiry to the Police, the four previously notified affected parties who did not consent to the disclosure of their statements, and the one affected party who agreed to disclose the statement itself but not the specified information on the back page. Only the Police responded with representations. I then sent the Notice to the appellant, together with a copy of the Police's representations. The appellant in turn submitted representations.

RECORDS:

The records consist of 11 witness and driver statements. Three statements are recorded on videotape and eight on paper.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to 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 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;

The parties are in agreement, and I concur, that the individual records contain the "personal information" of the witnesses who provided their statements to the Police.

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.

Finally, I find that all of the records contain the "personal information" of the individual who died in the accident; and a number also contain the views and opinions of the witnesses about other individuals involved in the accident, including other drivers, thereby falling within the scope of paragraph (g) of the definition.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

Introduction

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(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, **8,** 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

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 in which the appellant was charged by the Police.

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 satisfy the requirements of section 8(2)(a) and therefore do not qualify for exemption under section 38(a) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

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 access

As noted earlier, four witnesses who provided statements to the Police gave the Mediator written consent to disclose their statements to the appellant.

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 witness and the appellant, all of the witness 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 38(b)

Introduction

The other exception with potential application in this case is section 38(b). Under this section, 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.

Section 14(1)(f) and sections 14(2) through (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met. Under section 14(1)(f):

> 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 potential applicable 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;

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 on 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 law, specifically the *Criminal Code* and the *Highway Traffic Act*. The appellant 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, nor do any of them have a personal relationship to the individual who was killed in the incident. 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 38(b) in this appeal.

ABSURD RESULT

This office has applied the "absurd result" principle in situations where the basis for a 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).

One of the records at issue in this appeal is the videotaped statement provided by the appellant to the Police. This is precisely the same type of record that was at issue in Order M-444 and, for the same reasons outlined by Senior Adjudicator Higgins, I find that applying the section 14(3)(b) presumption to a record of this nature would lead to an absurd result, and that the appellant's statement does not qualify for exemption under section 38(b) of the *Act* for that reason.

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 containing 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 where, as here, the records contain the requester's own personal information.

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. With the exception of the appellant's own statement, which I have addressed separately, the Police obtained the information in the other witness statements from individuals other than the appellant. These records contain personal information about the witnesses who gave the statements as well as others involved in the accident, including the appellant. That being said, 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 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.

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 38(b).

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 38(b). I find that the appellant's statement, the statements of the three affected parties who have consented to disclose their statements, and the portions of the statement of the third 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 appellant's videotape statement, the two other videotape statements of witnesses who consented to disclosure, 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 **November 5, 2004**. I have 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: October 15, 2004
Tom Mitchinson
Assistant Commissioner