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

ORDER MO-1945

Appeal MA-050039-2

York Regional Police Services Board

Tribunal Services 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 York Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the videotape of an interview the requester participated in with an identified police officer on a specific date. The interview related to the requester's complaints about another individual (the accused), against whom charges were laid by the Police.

The Police responded to the request by denying access to the record on the basis of the exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 8(1)(a) and (b) (law enforcement) and section 8(1)(f) (right to fair trial). The Police identified that the charges relating to the matter remained before the courts.

The requester, now the appellant, appealed the decision of the Police.

Mediation did not resolve the issues in this appeal, and it was transferred to the adjudication stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the Police, initially. In addition, because the record may contain the personal information of identifiable individuals other than the requester, I invited representations on the possible application of section 38(b) (invasion of privacy). The Police provided representations in response to the Notice. I then sent the Notice of Inquiry to the appellant, along with a copy of the Police's representations, and received representations in response.

RECORDS:

The record at issue is a videotape of the appellant's interview.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual, including information relating to the individual's age (section 2(1)(a)), employment history (section 2(1)(b)), address and telephone numbers (section 2(1)(d)), the personal opinions or views of that individual except where they relate to another individual (section 2(1)(e)), the views or opinions of another individual about the individual (section 2(1)(g)) or 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 (section 2(1)(h)).

The Police submit that the record contains the types of personal information set out in sections 2(1)(a), (b), (d), (e) and (h). The Police state:

> The record consists of a video statement taken during the investigation of a … complaint, of the victim, now the appellant. The statement clearly identifies verbally and visually who the appellant is as well as verbally identifies the accused.

The Police then identify how the information in the record relates to the various parts of the definition of "personal information" in section 2(1) of the *Act*.

The appellant also takes the position that the record contains his personal information.

The record at issue is a videotaped interview of the appellant, and contains information relating to incidents involving the appellant and the accused. I find that the record contains the appellant's personal information as defined in section 2(1)(a), (b), (d), (e) and (h) of the *Act*. I find that the record also contains the personal information of the accused because it contains his name, the views or opinions of another individual about him (section 2(1)(g)) and other personal information relating to him (section 2(1)(h)). In addition, portions of the record also mention other individuals by name, and contain the personal information of these individuals within the meaning of section 2(1)(h).

DOES THE DISCRETIONARY EXEMPTION AT SECTION 38(a), IN CONJUNCTION WITH SECTIONS 8(1)(a), (b) AND/OR (f) APPLY TO THE RECORD?

General principles

Section 36(1) 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. Because section 38(a) is a discretionary exemption, even if the information falls within the scope of section 8, 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), (b) and (f), which read:

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

The term "law enforcement," which appears in sections 8(1)(a) and (b), 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.)].

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", 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*].

I will begin by reviewing the possible application of section 8(1)(a).

Section 8(1)(a) – law enforcement matter

Representations

The Police submit that the disclosure of the record could reasonably be expected to interfere with a law enforcement matter. The Police state:

> A [criminal complaint] was made to the … Police wherein the investigation of this complaint led to the Police obtaining video statements of all of the victims identified by the investigation. [This] led to the [Police] arresting and charging an individual under the criminal code of Canada with multiple charges …. This matter is to be heard in the Newmarket Provincial Court on [a specified date]. It

> is the view of the [Police] that premature disclosure of the records may interfere with the preparation of this matter for trial. During the course of dealing with the request, the investigating officer was contacted and questioned as to releasing a copy of the victim's statement prior to the trial. The officer's opinion was that release of the statement would jeopardize his case. The record is a video statement that will be used as evidence …. The appellant indicated to the Police that he required his statement in order to commence a civil action against the accused and therefore the statement could be viewed by persons outside of the criminal process and which could raise questions as to the validity of the evidence. The appellant will most likely be requested to testify at the criminal proceedings and if he has received legal advice regarding his statement from an outside legal advisor rather than the crown attorney, then his testimony might be questioned.

Later in their representations the Police also state:

> The record at issue is the video statement of the victim describing the events that lead up to the accused being charged. The statement is considered part of the evidence that is to be heard at trial. By disclosing this statement prior to the criminal trial it may lead persons to have preconceived ideas about the accused and therefore not allowing him an impartial adjudication.

With respect to the argument that the appellant is simply seeking his own personal information, the Police also identify that, once the criminal process has been completed, the Police will provide the appellant with a copy of the record.

The appellant takes the position that that Police have not provided sufficient evidence to support a finding that section 8(1)(a) applies to the record. The appellant refers to the requirements set out above, which state that the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm", and that evidence amounting to speculation of possible harm is not sufficient. The appellant states:

> With regard to section 8(1)(a) … the arguments put forward by the Police are speculative and unconvincing. They suggest that if the appellant is provided with the statement, and then testifies at the criminal trial, his testimony could be questioned for its veracity, but do not explain why. The Police also argue that the release of the video statement to the appellant could raise questions as to the validity of the evidence. Neither of these points is substantiated with solid examples or reasons behind the statements.

The appellant also refers to Orders M-918 and M-1134, which were referred to by the Police, and states that these orders can be distinguished from the current situation, as they dealt with the disclosure of records to third parties, rather than disclosure to the individual who made the statement.

In addition, the appellant refers to previous orders of this office in which decisions granting access to a requester's own statements were upheld. In particular, the appellant refers to Orders M-646, M-838 and MO-1314 as instances where it was held that access to an individual's own statement would not result in the possible harms referred to by the institution.

Findings

I have carefully reviewed the record, as well as the representations of the parties, to determine whether the disclosure of the record could reasonably be expected to interfere with a law enforcement matter, and therefore whether the exemption in section 8(1)(a) applies.

The use of the word "interfere" contemplates that the particular law enforcement matter is still ongoing [see Orders M-258, M-302, M-420 and M-433]. The purpose of the exemption contained in section 8(1)(a) is to provide an institution with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter. The institution bears the onus of providing evidence to substantiate that, first, a law enforcement matter is ongoing, and second that disclosure of the records could reasonably be expected to interfere with the matter [Order M-1067].

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. In this case, the appellant agrees that the criminal case and the preceding investigations constitute a "law enforcement matter" for the purpose of section 8(1)(a), and also that the matter is an ongoing one. I concur, and am satisfied that the criminal proceeding currently underway is an ongoing "law enforcement" matter within the meaning of the legislation.

I must now determine whether the disclosure of the record could reasonably be expected to interfere with the law enforcement matter, as contemplated by section 8(1)(a).

The representations of the appellant focus on the lack of detail and certainty in the Police's representations. The appellant describes the Police's representations as "speculative" and "unconvincing", in contrast to the requirement that such representations be "detailed and convincing".

In this appeal, I am satisfied that the Police have provided sufficient evidence to establish that the disclosure of the record could reasonably be expected to interfere with the identified law enforcement matter. I am aware that the Police's representations must be "detailed and convincing", and that the law enforcement exemption must be approached in a "sensitive manner", recognizing "the difficulty of predicting future events in a law enforcement context".

In this appeal the record requested is a videotape of the appellant's interview with a police officer. In it, the appellant describes in detail certain highly sensitive and disturbing events, and

the Police identify that the interview led to the accused being charged. The Police specifically state that the interview statement is considered part of the evidence for the purpose of the upcoming trial of the accused.

The Police also identify that, in determining how to respond to this request, they contacted the investigating officer and that it was his opinion that the release of the statement would jeopardize the case. Furthermore, the Police identify concerns that the statement could be viewed by persons who are outside of the criminal process. In my view, having regard to the nature of the record and the fact that the record relates directly to an ongoing law enforcement matter, I am satisfied that the disclosure of the record could reasonably be expected to interfere with that matter.

I make this finding based on the Police's representations, and taking into account the nature of the record itself. Unlike other appeals, where requests were made for other types of information (for example – photographs of the requester, or amounts spent on the transportations of witnesses), the information in the record in this appeal contains specific details of the observations and recollections of the appellant, including discussions with the officer and personal perspectives and observations. In my view, the premature disclosure of this record, particularly if it was to be disclosed to individuals who may in some way be involved in the law enforcement matter and the trial itself, could reasonably be expected to interfere with the identified law enforcement matter.

On this basis, I am satisfied that the exemption in section 38(a), in conjunction with section 8(1)(a), applies to the record. Having found that section 38(a) applies to the record, I must now consider whether the Police have properly exercised their discretion in deciding to deny access to the record.

Section 38(a)

The section 38(a) exemption is discretionary, and permits the Police to disclose information, despite the fact that they could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

The Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The Police identified the factors they considered in exercising their discretion to apply section 38(a). They state that they consider the statement to be the personal information of the appellant, and that:

> The statement forms part of the investigation that is to be presented in a criminal court of law …. Disclosure of the record could clearly jeopardize the outcome of the trial if this statement is released prior to trial.

The Police also submit that the appellant has advised them that he requires this record in order to commence a civil action; however, the Police take the position that the criminal trial takes priority over the civil matter. Finally, the Police confirm that once the criminal process has been completed, the Police will provide the appellant with a copy of the record.

The appellant argues that the Police's representations are not clear about how the release could jeopardize the outcome of the trial. Furthermore, the appellant takes issue with Police's position that he should wait until completion of the criminal matter.

Upon review of all of the circumstances surrounding this appeal, including Police's representations on the manner in which they exercised their discretion and their decision that the record will be provided with a copy of the record once the criminal process has been completed, I am satisfied that the Police have not erred in the exercise of their discretion not to disclose the record withheld under section 38(a).

Absurd Result

Prior orders have found that, in certain circumstances, non-disclosure of personal information which was originally provided to the institution by a requester, or personal information of other individuals which would clearly have been known to a requester, would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. In these orders, it has been found that a denial of access in these circumstances would constitute, according to the rules of statutory interpretation, an "absurd" result. Accordingly, disclosure has been ordered where an absurd result is found.

This principle is often applied in circumstances where the only exemption claim is that the disclosure of the information would constitute an unjustified invasion of the personal privacy of another individual under section 38(b). On occasion, this principle has also been applied to support access to a requester's own information which might otherwise be exempt from disclosure under section 38(a) of the *Act*: see, for example, Order MO-1314.

In the circumstances of this appeal, I find that the principle of "absurd result" is not applicable because, in my view, there is a compelling reason for non-disclosure of the record at this time. Although the information in the record was provided by the appellant, I have found that disclosure of the record could reasonably be expected to interfere with a law enforcement matter

and the prosecution of the accused. I find, therefore, that the "absurd result" principle does not support the appellant's request for access to the record at this time.

Accordingly, I am satisfied that the exemption under section 38(a) applies to the record.

In view of my findings, it is unnecessary to consider the applicability of section 38(b) of the *Act*.

ORDER:

I uphold the decision of the Police.

Original signed by: July 20, 2005
Frank DeVries
Adjudicator