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

ORDER MO-2041

Appeal MA-050295-1

Cobourg Police Services Board

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NATURE OF THE APPEAL:

The Cobourg Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to complaints received about the requester. The Police located a responsive record (now identified as Record 2) and notified another individual whose rights may be affected by the disclosure of the record under section 21 of the *Act*. After hearing from the affected person, the Police initially denied access to the responsive record, claiming the application of the discretionary exemption in section 38(a), taken in conjunction with section 8(2)(c) of the *Act*.

The requester, now the appellant, appealed the decision.

During the mediation stage of the appeal, the Police conducted another search of its record-holdings and located another two-page responsive record, identified as Record 1a and b. In a final decision letter dated November 7, 2005, the Police denied access to all of the responsive records pursuant to the discretionary law enforcement exemption in section 8(2)(a), in conjunction with section 38(a) and the discretionary invasion of privacy exemption at section 38(b) of the *Act*.

Further mediation was not possible and the matter was moved to the adjudication stage of the process. I initially sought and received the representations of the Police. In their representations, the Police determined that certain portions of Record 1b ought to be disclosed to the appellant and provided me with a highlighted copy describing those portions which they were prepared to disclose. As it is unclear to me whether the Police have done so, I will order them to disclose these portions of Record 1b below.

I then provided the appellant with a Notice of Inquiry and a summary of the representations of the Police because of concerns that I had respecting the confidentiality of those submissions. The appellant also provided me with representations in response to the Notice of Inquiry.

RECORDS:

The records at issue consist of a General Occurrence Report dated October 8, 2004 (Record 1a), a second General Occurrence Report dated June 13, 2005 (Record 1b) and an Occurrence Summary dated October 8, 2004 (Record 2).

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. That term is defined in section 2(1) 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,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(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,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The Police argue that the records contain the personal information of the appellant and another identifiable individual (the affected person) as it includes the views and opinions of another individual about the appellant (section 2(1)(g)), the address and telephone number of both the appellant and the affected person (section 2(1)(d)) and the affected person's name along with other personal information relating to this individual (section 2(1)(h)).

The appellant argues that the records contain his personal information and that he ought to be entitled to have access to them.

I have carefully reviewed the contents of the three records remaining at issue and find that Record 1a contains the personal information of the appellant, as it includes his address and telephone number, as contemplated by section 2(1)(d) of the definition of that term. In addition, I find that Records 1b and 2 contain the views of another individual about the appellant and that this constitutes his personal information within the meaning of section 2(1)(g) of the definition. Finally, I conclude that all three of the records contain the appellant's name along with other

personal information relating to him and that this constitutes his personal information under section 2(1)(h) of the definition.

In addition, I find that Records 1a and 2 also contain the address and telephone number of the affected person and that this constitutes the personal information of this individual under section 2(1)(d). Records 1b and 2 also contain the name of the affected person with other personal information relating to this individual, thereby qualifying under the definition of "personal information" in section 2(1)(h).

Having determined that the records contain the personal information of both the appellant and another identifiable individual, I will review whether the undisclosed information qualifies for exemption under section 38(b) of the *Act*.

INVASION OF PRIVACY

General Principles

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

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

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met. Section 14(1) sets out certain exceptions to the general rule against the disclosure of personal information that relates to an individual other than the requester. The only exception which may have some application in the circumstances of this appeal is set out in section 14(1)(f), which states:

> 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.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining

whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Representations of the parties

The Police submit that the presumption in section 14(3)(b) applies to the personal information as it was compiled and forms part of an investigation into a possible violation of law. Section 14(3)(b) states:

> 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;

Accordingly, the Police submit that the disclosure of this personal information would result in a presumed unjustified invasion of personal privacy under section 38(b).

The Police have also indicated that they are prepared to disclose a portion of Record 1b to the appellant. I find that because no mandatory exemptions apply to the information which the Police propose to release to the appellant, I will order that they do so.

The appellant argues that because no criminal offence was found to have occurred as a result of the Police investigation, the presumption in section 14(3)(b) cannot apply. He goes on to submit that the considerations listed in sections 14(2)(d), (e), (g) and (i) apply to the personal information in the records. These provisions state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (g) the personal information is unlikely to be accurate or reliable;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The appellant argues that all of the information contained in the records is already within his knowledge because it either relates to his former wife and daughter or was disclosed to him in the context of another proceeding under the *Police Act*. As a result, he submits that he ought to receive the information in the records as to deny access to it would lead to an absurd result. He states that because he has been cleared of any criminal wrong-doing in the matters described in the records, it would be absurd not to disclose the information to him.

Findings with respect to section 38(b)

In determining whether the personal information which remains undisclosed is exempt under section 38(b), I have reviewed the records themselves and the representations of the parties. I find that the records were created as a result of certain complaints made by the affected person about the actions of the appellant. The Police conducted an investigation into whether the conduct of the appellant warranted the laying of charges under the *Criminal Code*. The investigating officers recorded information received from the affected person, including the personal information of the appellant.

In my view, it is clear that the personal information in the record, which relates to the appellant and the affected person, was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code*. Therefore, I find that section 14(3)(b) of the *Act* applies to the personal information at issue. Previous orders have determined that even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242]. In the present case, there was clearly a law enforcement investigation into the allegations of criminal wrongdoing on the part of the appellant.

Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe*, cited above]. The factors listed in section 14(2), taken singly or in combination, and relied upon by the appellant are not sufficient to overcome the operation of the presumption in section 14(3)(b). In addition, I have considered the application of the exceptions contained in section 14(4) of the *Act* and find that the personal information at issue does not fall within the ambit of this section.

As noted above, the appellant indicates that by withholding the remaining portions of the record, an absurd result would occur since the information relates to an investigation that is completed and did not result in the laying of any charges.

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would

be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323]. 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]
- the requester was present when the information was provided to the institution [Orders M-444, P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

In the present appeal, the information was not provided to the Police by the appellant, he was not present when it was recorded and it is not clearly within his knowledge. Regardless of the fact that no charges against him resulted from the allegations made, the information was compiled and formed part of a law enforcement investigation in a *possible* violation of law. Accordingly, I find that the absurd result principle has no application in the circumstances of this case.

In summary, I conclude that section 14(3)(b) applies to the personal information at issue, which means that disclosure of this information is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) and the "public interest" override at section 16 are not applicable in the circumstances of this appeal. Therefore, I find that the personal information at issue is exempt under section 38(b).

EXERCISE OF DISCRETION

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

In addition, 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 either 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 submit that this office should uphold their exercise of discretion, identifying the factors taken into account in exercising discretion not to disclose all of the record to the appellant. The Police state:

> We therefore determined that the privacy rights of the other individuals outweighed the access right of the appellant to this information.
>
> After careful consideration of the contents of the records at issue, to protect the process and to safeguard the rights and privacy of all parties involved we exercised our discretion to deny access to the requester.

The appellant's representations, which he asked that I not disclose to the Police, address whether the Police properly exercised their discretion under section 38(b). While I am unable to refer directly to those submissions, they address whether the Police made decisions relating to the disclosure of these records based on the identity of the requester and not for the proper reasons.

In my view, the Police considered the relevant factors in their exercise of discretion and did not consider irrelevant ones. I also note that the Police severed and disclosed all personal information in the records that pertains exclusively to the appellant and withheld the personal information that relates primarily to the other individual who did not provide his or her consent to its disclosure. In addition, I note that the records contain personal information relating to what is clearly very sensitive information. I do not agree with the appellant's contention that a stranger to this situation would have been entitled to access the personal information that was not disclosed to the appellant. Because of the sensitive nature of the information, the privacy protection provisions in sections 14(1) or 38(b) of the *Act* would apply regardless of the identity of the requester. Accordingly, I find that the exercise of discretion by the Police was proper.

Because of the manner in which I have addressed the application of section 38(b) to the undisclosed information contained in the records, it is not necessary for me to consider whether they are also exempt under sections 38(a), 8(2)(a) or 8(2)(c).

ORDER:

1. I order the Police to disclose to the appellant those portions of Record 1b which they indicated that they are prepared to disclose in the copy of the record that was provided to me with its representations. I order the Police to disclose these portions of Record 1b by **May 5, 2006.**

2. I uphold the decision of the Police not to disclose the remaining portions of the records.

Original Signed By: April 11, 2006
Donald Hale
Adjudicator