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

ORDER MO-2114

Appeal MA-060192-1

York Regional Police Services Board

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NATURE OF THE APPEAL:

The requester submitted 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 access to a copy of a videotaped statement made by his former wife and a transcript of that statement.

The Police located responsive records and issued a decision denying access to them under the mandatory invasion of privacy exemption at section 14(1), with specific reference to the presumption at section 14(3)(b) (information compiled as part of a law enforcement investigation) of the *Act*.

The requester (now the appellant) appealed this decision.

During mediation, the Police clarified that they did not have a transcript of the videotaped statement, but did have notes that the officer who took the statement made while it was being taped. The appellant accepted these notes as a responsive record, and asked that they be included as part of the request and appeal. Following discussions with the mediator, the Police also added section 38(b) (discretion to refuse requester's own information) as an exemption claim in the appeal because the appellant's personal information appears to be contained in the records at issue. No further mediation was possible, and the file was forwarded to adjudication.

In his request and through mediation, the appellant's representative, who is currently representing the appellant in a civil matter, maintained that the videotape had been disclosed to the appellant's criminal lawyer as part of the Crown's disclosure after the appellant was charged with uttering death threats against his former wife. Since the appellant has viewed the videotape, his representative does not believe that its disclosure would constitute an unjustified invasion of personal privacy of the former wife. This raises the possible application of the absurd result principle.

I decided to seek representations from the Police, initially. In the circumstances under which this request for information was made, I decided not to notify the former wife as an affected person, initially. Representations were received from the Police and they were shared with the appellant, in their entirety. The appellant was also invited to make representations, which he did. After reviewing these representations, I decided that it was not necessary to notify the former wife to elicit her views regarding disclosure of the records.

RECORDS:

The records at issue comprise a Videotape of an interview with the appellant's former wife relating to an incident that occurred between her and the appellant and the interviewing officer's notes made at the time of the interview.

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 if 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 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 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].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Police submit that the records contain personal information about the appellant and his former wife, as well as two other identified individuals. In particular, the videotaped statement contains references to these individuals by name, as well as the video image of the former wife and her personal opinions.

Findings

I find that the records contain the personal information of the appellant and other identifiable individuals. The personal information of the appellant and the other identifiable individuals in the records includes their names along with other personal information about them (paragraph (h) of the definition of that term in section 2(1)). I find further that the appellant's personal information is so intertwined with that of the other individuals identified in the record that it is not severable.

INVASION OF PRIVACY

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 exceptions to this general right of access.

Section 38(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

In this case, I have determined that the records contain the personal information of the appellant and other individuals.

Under section 38(b) of the *Act*, where a record contains the 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. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

In determining whether the exemption in section 38(b) applies, 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 head to consider in making a determination as to 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(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. 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)

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

In addition, if any of the exceptions to the section 14(1) exemption at paragraphs (a) through (e) applies, disclosure would not be an unjustified invasion of privacy under section 38(b).

In this case, the Police have decided to deny access to the records on the basis that they are exempt under section 38(b), in conjunction with the presumption at section 14(3)(b).

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.

Representations of the Parties

The Police submit that:

> The [Police] received a complaint of harassment [a *Criminal Code* offence] which was investigated by officers of the [Police]. Part of this investigation consisted of the victim of the harassment making a video statement. Based on this video statement and other evidence, criminal charges of uttering death threats were laid against an individual (the appellant) in connection with the investigation. It is, therefore, our opinion that the information from this investigation was compiled in accordance with the provisions of Section 14(3)(b).

The appellant acknowledges that he was charged with the offence of uttering a death threat against his former wife. The appellant indicates further that the charge was later withdrawn by the Crown and provides his assessment of the basis for the Crown's withdrawal.

Findings

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;

I find that the personal information in all of the records was compiled and is identifiable as part of an investigation into a possible violation of law pursuant to the *Criminal Code*. The fact that criminal proceedings were withdrawn thereafter has no bearing on the issue, since section 14(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849).

As a result of my finding that the presumption in section 14(3)(b) applies to the personal information at issue, I conclude that its disclosure is presumed to constitute an unjustified invasion of the personal privacy of the identifiable individuals in the records. Therefore, subject to my discussion below of Absurd Result and Exercise of Discretion, I conclude that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellant and that this information qualifies for exemption under section 38(b).

Absurd result

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]

However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

Representations of the Parties

The Police acknowledge that the videotape was provided to the appellant's criminal lawyer as part of the Crown's disclosure after the appellant was charged with uttering death threats and that he has viewed the videotape. However, the Police submit that the purpose of disclosure of information of the Crown's case in criminal matters is so that an individual or his lawyer may use the materials solely for the purpose of making full answer and defence to the charges identified in the disclosure materials. The Police note that the criminal process has been completed for this matter and referred to previous IPC orders, which have held that even though certain personal information may have been available during the criminal court disclosure process, that availability does not continue once the criminal process is completed.

The Police submit that, although the appellant may have had the opportunity to view the video statement during his criminal process, this does not give him the right to obtain a permanent copy of the tape. The Police submit further that the records at issue contain the personal information of a third party and note that they were created as part of a harassment investigation that resulted in criminal charges of uttering death threats. The Police take the position that disclosure of the personal information of the victim to the accused would be a continuation of the harassment that the victim originally felt. Even though the appellant had previously viewed the video statement of the victim during the disclosure process, the Police submit that it would not be absurd to withhold the information due to the nature of the complaint.

The appellant takes issue with the Police characterizing disclosure of the requested records as a continuation of the harassment the former wife would experience. He submits that he has requested the documents as they are directly relevant in order to pursue a civil proceeding. He argues that if I were to accept the position of the Police, it would be akin to saying that any civil action against a party arising out of a criminal prosecution would be harassment.

The appellant argues further that refusal to disclose the videotape leads to an absurd result as he has already seen it and notes that if the matter had gone to trial, the videotape would have been entered into evidence and become part of the public record. He believes that it is illogical to suggest that the documents do not have a protection for one purpose but do have a protection for another purpose.

The appellant concludes:

> Further, there is no basis whatsoever to support the position of the [Police] that releasing the videotape and the police officer's notes would result in further harassment of the complainant. Given that the Crown Attorney found no merit in the complaint of the complainant to the police, it would be another absurd result to suggest that she still needs some form of protection of privacy when it was the complainant who started this process with her unsubstantiated allegation and hence made this a public issue.

Findings

The appellant acknowledged that the videotape was provided to his criminal lawyer who could not thereafter provide it to him because of an undertaking not to do so given by the lawyer to the Crown Attorney. In my view, the fact of this undertaking underscores the comments made by the Police regarding the limited purpose of disclosure in criminal matters. Moreover, the allegations made by the former wife pertain to her perceptions of the appellant's behaviour that were sufficiently serious to lead her to complain to the Police. The fact that charges were not pursued is not relevant to this issue. In my view, the appellant has misconstrued the position of the Police with respect to continued harassment arising from disclosure of the records in that the continued harassment is not necessarily linked to the civil litigation, but rather from the mere fact of disclosure.

With respect to the information that the appellant may already be aware of, that information is also about identifiable individuals other than the appellant. In Order MO-1524-1, I made the following comments regarding a similar situation, which I find to be equally applicable to the case before me:

> The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.

I also adopt the findings of Adjudicator Frank DeVries in Order PO-2440, where he stated:

> I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, the unusual circumstances of this appeal, and the nature of the allegations brought against the

> police officer and others…I find that, in these circumstances, there is particular sensitivity inherent in the personal information contained in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act* identified by Senior Adjudicator Goodis in Order MO-1378 (namely, the protection of privacy of individuals, and the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

The Records contain the personal information of identifiable individuals other than the appellant relating to a dispute between the appellant and his former wife. It is apparent from the appellant's representations that their relationship continues to be acrimonious. I find in these circumstances that the sensitivity of the personal information, particularly that of the former wife, constitutes a compelling reason for not applying the "absurd result" principle. Disclosure of this personal information would be inconsistent with the purpose of the exemption, which must include the protection of the personal privacy of individuals in the law enforcement context.

Therefore, I find that the absurd result principle is inapplicable in this case and that it would not be absurd to withhold the information found to be exempt under section 38(b).

In arriving at this decision, I have taken into consideration section 51(1) of the *Act*, which provides:

> This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.

This section of the *Act* has been considered in a number of previous orders (see, for example: Orders P-609, M-852, MO-1109, MO-1192 and MO-1449). In Order MO-1109, former Assistant Commissioner Tom Mitchinson commented on this section as follows:

> Accordingly, the rights of the parties to information available under the rules for litigation are not affected by any exemptions from disclosure to be found under the *Act*. Section 51(1) does not confer a right of access to information under the *Act* (Order M-852), nor does it operate as an exemption from disclosure under the *Act* (Order P-609).
>
> Former Commissioner Sidney B. Linden held in Order 48 that the *Act* operates independently of the rules for court disclosure:
>
> > This section [section 64(1) of the provincial *Freedom of Information and Protection of Privacy Act*, which is identical in wording to section 51(1) of the *Act*] makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does

> not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair ...

With respect to the obligations of an institution under the *Act*, the former Assistant Commissioner stated:

> The obligations of an institution in responding to a request under the *Act* operate independently of any disclosure obligations in the context of litigation. When an institution receives a request under the *Act* for access to records which are in its custody or control, it must respond in accordance with its statutory obligations. The fact that an institution or a requester may be involved in litigation does not remove or reduce these obligations.
>
> The Police are an institution under the *Act*, and have both custody and control of records such as occurrence reports. Therefore, they are required to process requests and determine whether access should be granted, bearing in mind the stated principle that exemptions from the general right of access should be limited and specific. The fact that there may exist other means for the production of the same documents has no bearing on these statutory obligations.

I agree with the above comments. In my view, the two schemes work independently. The fact that information may be obtainable through discovery or disclosure is not determinative of whether access should be granted under the *Act*. Although the appellant may have knowledge of the content of the videotape because of its limited disclosure to him through the criminal disclosure process, I am mindful that the limitation placed on its subsequent use *via* the undertaking given by the appellant's criminal lawyer reflects the sensitivity of the information.

EXERCISE OF DISCRETION

Section 38(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

The section 38 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 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information

- the historic practice of the institution with respect to similar information

Representations of the Police

The Police submit that:

> This institution understands that 38(b) of the *Act* introduces a balancing principle. We looked at the information and weighed the requester's right of access to his own information against the affected individuals' right to the protection of their privacy. The appellant does have a right to his own personal information. In this case, he was the accused in an utter death threats investigation wherein the affected party, his ex-wife, was the victim. The appellant has clearly stated that he intends to use these records in a civil litigation suit against the victim. The appellant has means of obtaining these records through the civil discoveries process of the civil litigation process. The affected party also has a right to the protection of her privacy.

The Police also took a number of factors into consideration in exercising their discretion not to disclose information, including the fact that the former wife gave a video statement to the police for the purpose of stopping the harassment she was being subjected to and so that criminal charges could be laid against the appellant in order to protect her against the continued harassment. The Police submit that the statement was not given for the purpose of being released to the appellant at a later date for his use in the civil court case against her. It is also the position of the Police that the disclosure of the records would be considered a further continuation of the harassment that the victim had felt she has suffered at the hands of the appellant.

Findings

I have found above that the records contain the personal information of both the alleged victim and accused in a criminal matter. The information in the records pertains to a sensitive personal relationship and includes the perceptions of the alleged victim in the dispute that has arisen between them. In denying access to the records, I find that the Police exercised their discretion under section 38 in a proper manner, taking into account all relevant factors and not taking into account any irrelevant factors.

Consequently, I conclude that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of the individuals identified in them, other than the appellant, and they are properly exempt under section 38(b) of the *Act*.

ORDER:

I uphold the Police's decision to withhold access to the records.

Original signed by: November 6, 2006
Laurel Cropley
Adjudicator