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

ORDER MO-2162

Appeal MA-060167-1

Niagara 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 Niagara 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 an incident report relating to an alleged theft of a large barbeque owned by the requester.

The Police located a responsive record, a General Incident Report and issued a decision providing partial access, denying access to the withheld information pursuant to section 38(a), read with section 8(1)(l) (right of access to one's own personal information/commission of an unlawful act or control of crime), and section 38(b), read with section 14(1) (right of access to one's own personal information/personal privacy of another individual). In support of its section 38(b)/14(1) claim, the Police raised the application of the presumption in section 14(3)(b) (investigation into a possible violation of law) of the *Act*.

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

During the mediation stage of the appeal process, the appellant confirmed that he was not interested in obtaining access to the police codes that appear in the severed record. Accordingly, the police codes along with the application of sections 38(a) and section 8(1)(l), are no longer at issue.

Further mediation was not possible, and the file was moved to the adjudication stage for an inquiry where the issue to be decided is the application of section 38(b), read with section 14(1), to the information remaining at issue.

I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the Police, who made submissions and agreed to share them, in their entirety, with the appellant.

I then sent a Notice of Inquiry to the appellant along with a complete copy of the Police's representations. The appellant submitted representations in response and agreed to share the non-confidential portions of them with the Police.

In his representations, the appellant raised the application of the absurd result principle to portions of the information severed from the record, specifically the name and telephone number of a third party. I sought and received reply representations from the Police on the appellant's interpretation of the absurd result principle. I then shared the Police's reply representations with the appellant and sought and received sur-reply representations from the appellant on the application of the "absurd result principle".

RECORDS:

There is one record at issue, the severed portions of a three-page General Incident Report.

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether section 38(b) 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,
>
> …
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> …
>
> (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].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

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 parties' representations are not particularly helpful in regard to addressing this issue. The Police simply state that the record contains the personal information of the appellant and a third party. While the appellant does not directly address this issue in his representations, in

addressing the application of the absurd result principle, he submits that the severed portions of the record contain the name and telephone number of the third party.

On my review of the record, I am satisfied that it contains the personal information of the appellant and a third party, including their names, sex, dates of birth, addresses, telephone numbers and other personal information relating to them.

Having made this finding, I will now determine to what extent, if any, section 38(b) applies to the undisclosed information.

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

Application of the section 38(b)/14 exemption

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. The Police take the position that the undisclosed portions of the record are exempt under the discretionary exemption in section 38(b). Under section 38(b), 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.

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. If the presumptions contained in paragraphs (a) to (h) of section 14(3) apply, the disclosure of the information is presumed to constitute an unjustified invasion of privacy, unless the information falls within the ambit of the exceptions in section 14(4), if or the "public interest override" in section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In this case the Police have raised the application of sections 14(3)(b). This section 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;

Section 14(3)(b) may still apply even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

Again, the parties' representations are not helpful in addressing this issue. I am therefore left to consider the contents of the record to determine whether the presumption in section 14(3)(b) applies in the circumstances of this case.

On my review of the record, I am satisfied that it was created as part of a police investigation into the alleged commission of a criminal offence under the *Criminal Code*. It is clear on the face of the record that the Police were responding to a report of theft made by the appellant. While it is also evident, on a review of a portion of the record that was disclosed to the appellant, that the Police did not have sufficient grounds to lay criminal charges, the application of the section 14(3)(b) presumption only requires that there has been an investigation into a possible violation of law. Therefore, under the circumstances, I am satisfied that the section 14(3)(b) presumption applies to the undisclosed information in the record.

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 provision. In addition, the "public interest override" at section 16 of the *Act* was not raised, and I find that it also has no application in the circumstances of this appeal.

In conclusion, as a result of the application of the presumption in section 14(3)(b), I find that the disclosure of the personal information at issue would result in an unjustified invasion of the personal privacy of individuals other than the appellant. Accordingly, subject to my treatment of the absurd result principle set out below, the information at issue in the records is exempt under section 38(b) of the *Act*.

The section 38(b) exemption is discretionary and permits the Police to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so [Orders PO-2129-F and MO-1629].

Upon review of all of the circumstances surrounding this appeal and the representations of the Police on the manner in which they exercised their discretion, and subject to the application of the absurd result discussion below, I am satisfied that the Police have not erred in the exercise of their discretion to decline to disclose the remaining personal information in the record under section 38(b).

Absurd result principle

As stated above, the appellant takes the position that the absurd result principle should apply to the third party's name and telephone number on the basis that he provided this information to the Police.

Where a requester originally supplied the information or 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]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle 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].

In response to the appellant's position, the Police state that while it may be the case that the appellant supplied the third party's name and telephone number to the Police, there is no evidence in the record that this, in fact, occurred. The Police add that if the appellant had provided the third party's name and telephone number in his original request, they agree that the absurd result principle would apply in this case. However, there is no evidence that the appellant provided this information to the Police at the time he made his request.

Turning to my analysis, while I acknowledge the appellant's position that he provided the third party's name and telephone number to the Police, in my view, simply saying as much in his representations, without confirming evidence, is insufficient in the circumstances of the case. Accordingly, I find that the absurd result principle does not apply to the third party's name and telephone number. In making this finding I am persuaded by the Police's representations coupled with the contents of the record. The following sets out my reasoning.

A disclosed portion of the record reveals that during the summer months, the appellant rents large trailer type barbeques. This portion of the record also reveals that the appellant had rented a barbeque to the third party, who he alleges failed to return it. The record indicates that the appellant had rented to the third party in the past.

While I acknowledge that the appellant and third party appear to be known to one another, having had what appears to be a business relationship, there is no evidence, aside from the appellant's own assertion in his representations, that he provided the third party's name and telephone number to the Police.

A portion of page 1 of the record appears to document an interview conducted by the reporting officer with the appellant regarding the theft allegation. In this section of the record, the reporting officer records the first name of the third party followed by a question mark. In my

view, a reasonable interpretation for this notation is that the appellant knew the third party's first name, and provided it to the reporting officer, but did not know his surname.

While the third party's full name and telephone number are set out elsewhere in the record, how this information came to be known to the Police is unclear. I could speculate that the appellant provided this information to the Police owing to the apparent business relationship with the third party, but again, aside from the appellant's assertion in his representations that he provided this information, I have no confirming evidence that this actually occurred. Had the appellant provided additional evidence to support his position, such as, referencing the third party's full name and telephone number in his original request or in his representations, I might then be prepared to apply the absurd result principle. However, short of such confirming evidence, I am not prepared to invoke the absurd result principle where to do so may compromise the privacy rights of another individual.

To conclude, in the circumstances of this case, I am not able to order disclosure of the third party's name and telephone number through the application of the absurd result principle.

ORDER:

I uphold the Police's decision to withhold the undisclosed portions of the record from the appellant.

Original signed by: February 19, 2007
Bernard Morrow
Adjudicator