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

ORDER MO-2321

Appeal MA07-289

Durham Regional Police Services Board

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NATURE OF THE APPEAL:

The Durham Regional Police Services Board (the Police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> I would like to see the copy of my interview also the two tapes of [a named individual] being interviewed. [Specified incident number].

The Police identified three records (videotapes) responsive to the request and issued a decision letter granting the requester access to his own videotaped statement, but denying access to the two remaining records, the videotapes containing the statement of the named individual (the affected party). In denying access, the Police claimed the application of section 38(a), in conjunction with section 8(2)(a) (law enforcement report), and section 38(b) (discretion to refuse requester's personal information), taken together with the presumption against disclosure in section 14(3)(b) and the factor in section 14(2)(f).

The requester, now the appellant, appealed the decision to deny access to the two records.

The appeal proceeded to the Mediation stage to try to resolve the issues. During mediation, the Police withdrew their reliance upon section 38(a) of the *Act*, in conjunction with section 8(2)(a), to deny access to the records. However, the Police maintained their position that section 38(b) of the *Act* applies to the records. As it was not possible to resolve the appeal through mediation, it was transferred to the Adjudication stage of the process, where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry outlining the facts and issues to the Police, initially, to seek representations. I did not contact the affected party whose videotaped statement is at issue.

After I received submissions from the Police, I sent a complete copy of them and a modified Notice of Inquiry to the appellant, inviting submissions from him. The appellant did not submit representations for my consideration in this appeal.

RECORDS:

The records at issue consist of the affected party's videotaped witness statement contained on two VHS format tapes.

DISCUSSION:

PERSONAL INFORMATION

For the purpose of deciding whether or not the disclosure of the records would constitute an unjustified invasion of personal privacy under section 38(b) of the *Act*, it is necessary to decide first whether the record contains "personal information" and, if so, to whom it relates. The definition of personal information is found in section 2(1) of the *Act* 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. 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]. In addition, 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.)].

Representations

The Police refer to the definition of "personal information" in section 2(1) of the *Act* as including "recorded information about an identifiable individual," and submit simply that the records contain the personal information of both the appellant and the affected party.

Analysis and Findings

I have reviewed the videotapes to determine whether they contain personal information and, if so, to whom the information relates. I find that they contain the personal information of the appellant and also the personal information of the affected party and several other identifiable individuals. The information contained in these records satisfies the definition of personal information under paragraphs (a), (b), (e), (g) and (h) of section 2(1) of the *Act*.

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

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 general right of access.

In circumstances where a record contains both the personal information of the appellant and other individuals, the relevant personal privacy exemption is the exemption at section 38(b). Under section 38(b) of the *Act*, the Police have the discretion to deny the appellant access to the information if the Police determine that the disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy. However, under section 38(b), the Police may choose to disclose a record with mixed personal information upon weighing the appellant's right of access to his own personal information against another individual's right to protection of their privacy.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The information at issue in this appeal does not fit within these paragraphs.

Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 14(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of the personal privacy of another individual. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under 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].

Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. None of the section 14(4) exceptions apply in the circumstances of this appeal. Similarly, the "public interest override" in section 16 has not been raised or argued in this appeal and would not apply, in any event.

If none of the presumptions against disclosure contained in section 14(3) apply, the Police must make their decision about access to the information with consideration of the factors listed in section 14(2) of the *Act* as well as all other considerations which are relevant in the circumstances of the case [Order P-99].

Representations

The Police claim that the presumption against disclosure in section 14(3)(b) applies to the records at issue. This section 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 that the records in this appeal are recordings of the affected party's account, and descriptions, of incidents involving her and the appellant and that disclosure would constitute an unjustified invasion of her personal privacy.

In addition, the Police state:

> This police service is a law enforcement agency mandated under the *Police Services Act* with the responsibility of investigating offences under the *Criminal Code of Canada*. …
>
> These records were created as a result of an investigation into a formal complaint made to this police service that the appellant had conducted himself in an inappropriate … manner towards [the affected party]. In considering the information contained within the videotapes, as well as other information obtained during the investigation, it was determined that offences under the *Criminal Code of Canada* had been committed and the appellant was subsequently charged.

> … the personal information at issue was collected and [is] indisputably identifiable as part of this police service's investigation into allegations of [offences committed against the affected party].

In addition, the Police provided representations on the possible application of one of the factors in section 14(2) of the *Act*. The Police assert that because the personal information at issue is "highly sensitive", the factor in section 14(2)(f) supports their position that such personal information should not be disclosed.

Analysis and Findings

Having reviewed the videotaped statements in their entirety, I find that they contain the personal information of the appellant, the affected party, and other identifiable individuals, that was obtained by the Police during their investigation into the charges ultimately laid against the appellant. I find that this information was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code of Canada*. Therefore, it is subject to the presumption in section 14(3)(b) of the *Act*.

Having found that the presumption against disclosure in section 14(3)(b) applies, it is not strictly necessary to consider the possible relevance of the factors in section 14(2) in weighing the appellant's right of access against the right of other individuals to protect their privacy. However, even had section 14(3)(b) not applied, I would have found, in the alternative, the affected party's personal information to be highly sensitive and of the nature that its disclosure would likely cause significant personal distress in the sense contemplated by section 14(2)(f) [see Order PO-2518]. In my view, the relevance of this factor would have warranted an attribution of significant weight in favour of protecting the privacy of the affected party in relation to the appellant's access rights.

Accordingly, subject to the possible application of the absurd result principle and my review of the exercise of discretion by the Police, I find that the personal information in the records is subject to the 14(3)(b) presumption and that it qualifies for exemption under section 38(b).

ABSURD RESULT

As previously noted, the appellant did not submit representations during my inquiry into this appeal. However, earlier in the appeal process, he informed the mediator that when the records at issue were entered into evidence in court, he viewed them and took notes. This raises the possible application of the "absurd result" principle.

Whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under either section 38(b) or section 14(1), 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]

The Police take the position that the absurd result principle should not be given effect in the circumstances of this appeal because the information provided was not given by the appellant, nor was he present when the information was provided. The Police also submit that there is no evidence to suggest that the videotapes have ever been viewed by the appellant, even though he is aware that they do exist. The Police refer to Order M-757 in which Inquiry Officer Anita Fineberg found that although the appellant had previously obtained copies of the records at issue in that appeal through another source, the information was still subject to the presumption in section 14(3)(b) of the *Act*.

Analysis and Findings

I agree with the Police that the absurd result principle does not apply in the circumstances of this appeal. Even though the videotaped statements at issue may have formed part of the Crown's case for prosecuting the appellant and may have been viewed by him in court, I find that disclosure of the records would be inconsistent with the purpose of the exemption in section 14(3)(b).

In Order PO-2285, former Senior Adjudicator David Goodis reviewed the issue of disclosure and consistency with the purpose of the section 14(3)(b) exemption. He stated:

> Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester. In my view, this situation is similar to that in my Order MO-1378, in which the requester sought access to photographs showing the injuries of a person he was alleged to have assaulted.

The former Senior Adjudicator then proceeded to review the following excerpt from Order MO-1378:

> The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is

in possession of either similar or identical photographs.

In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:

> Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the *Act*.

In my view, **this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals** [see section 1(b)]**, as well as the particular sensitivity inherent in records compiled in a law enforcement context.** The appellant has not persuaded me that I should depart from this approach in the circumstances of this case [emphasis added].

I agree with the approach taken by the former Senior Adjudicator with respect to the absurd result principle in Orders MO-1378 and PO-2285, as well as by Inquiry Officer Fineberg in Order M-757, and adopt it for the purposes of the present appeal. From this perspective, whether or not the appellant has had access to the information contained in the records through the court process, the section 14(3)(b) presumption may still apply.

I have carefully considered the contents of the specific records at issue, and have done so with consideration of the background to the creation of the records, and the nature of the investigation undertaken by the Police. I find that there is a particular and inherent sensitivity to the information in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act* described by former Senior Adjudicator Goodis in Order MO-1378. Accordingly, in consideration of protecting the privacy of individuals, as well as the particular sensitivity inherent in records compiled in a law enforcement context, I find that the absurd result principle does not apply in this appeal.

EXERCISE OF DISCRETION

In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, this office may review the institution's decision to exercise its discretion to deny access. I will review the exercise of discretion in this appeal since the Police *could* have disclosed the personal information in the records.

An institution must exercise its discretion. On appeal, the Commissioner, or her delegate, 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; or it fails to take into account

relevant considerations. In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. I may not, however, substitute my own discretion for that of the institution [section 43(2)].

Some of the factors considered relevant in the exercise of discretion are listed below. However, the individual circumstances of an appeal may render some of these factors irrelevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]. Considerations include:

- 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; and
    - 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
- the relationship between the requester and any affected persons
- 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 historic practice of the institution with respect to similar information

Representations

In their submissions, the Police explain the reasons for their exercise of discretion under section 38(b) of the *Act* as follows:

> This institution is aware that the appellant should have a right of access to his own personal information. However, in this case of shared personal information, the appellant's right of access was weighed against the victim's expectation of privacy. The nature of the records at issue and the extent to which they are

> significant and sensitive to the victim was a major factor in exercising discretion to deny access.

The Police add the following comments about severance under section 4(2) of the *Act*:

> In all instances where the appellant is mentioned in the video taped statements, it is the victim that is talking about him or being asked questions about him and/or his actions.

The Police state that they are aware that section 4(2) requires them to disclose as much of a record as can reasonably be severed without disclosing the information that is exempt. However, the Police take the position that severance of the appellant's personal information from that of the affected party is either impossible or would render any remaining non-exempt information meaningless. As I understand it, this influenced the exercise of discretion by the Police to deny access to the record in its entirety. The Police conclude by stating that the affected party's right to privacy outweighed the appellant's right of access to all of the information in the records.

Analysis and Findings

With careful consideration of the circumstances of this appeal, including the content of the videotapes and in view of the representations provided, I am satisfied that the Police exercised their discretion under section 38(b) of the *Act* properly.

I agree with the Police that the nature and sensitivity of the information at issue are relevant factors to be considered in the exercise of discretion. In my view, the sensitivity of the information reasonably led to the conclusion that the privacy rights of the affected party are sufficiently significant to outweigh the access rights of the appellant under section 38(b). In the circumstances, I find that the Police have properly exercised their discretion to withhold the personal information in the records and I will not interfere with it on appeal.

Accordingly, I uphold the exercise of discretion by the Police and find that the records are exempt under section 38(b) of the *Act*.

ORDER:

I uphold the decision of the Police to deny access to the records.

Original signed by: June 18, 2008
Daphne Loukidelis
Adjudicator