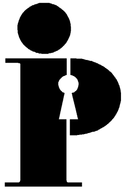

ORDER MO-2336

Appeal MA07-234

Durham Regional Police Services Board

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NATURE OF THE APPEAL:

The Durham Regional Police Services (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "the reports and other available information" related to a Police investigation into the requester's allegations that another individual had committed fraud and theft against him.

In support of the request, the requester attached a copy of a court order from the Superior Court of Quebec, which had been translated into English as a courtesy by the judge. The requester relied on a provision in the court order that "invited all authorities" to assist him in locating the individual who was the defendant in the Quebec civil matter, who was also the same individual alleged to have committed fraud or theft by the requester.

The Police located records responsive to the request: a 26-page occurrence report and a CD-ROM recording of a Police interview with the individual identified by the appellant as the defendant in the Quebec civil matter. In the decision letter sent to the appellant, the Police stated:

> Unfortunately the Court Order that you have provided to us does not specifically direct the Durham Regional Police Service, as record holder, to provide you with unedited copies of police records containing the contact information for the parties you are inquiring about. This Police Service was also not served with a copy of your motion materials prior to you obtaining the Order from the Courts in Quebec. Without both of these conditions being met we are not in a position to provide you with any information pursuant to the Order you have provided and must administer your request for this information in accordance with the provisions of the [*Act*] …

The Police then granted partial access to the records, denying access to the remainder pursuant to section 38(a) (discretion to refuse requester's own information) in conjunction with section 8(2)(a) (law enforcement report), and section 38(b) (personal privacy) with reference to the presumption against disclosure at section 14(3)(b) (investigation into a possible violation of law).

The Police also advised the requester that if he wished to obtain "unedited copies" of the records for "litigation purposes," he could bring a motion for production of records in the Ontario courts under this province's *Rules of Civil Procedure*.

The requester, now the appellant, appealed the Police's decision to this office.

The mediator appointed by this office attempted to resolve this appeal through discussion with the parties. However, when mediation proved not to be possible, the appeal was transferred to the adjudication stage of the process and assigned to an adjudicator.

The adjudicator formerly assigned to this appeal decided to seek submissions from the Police, initially, and sent out a Notice of Inquiry outlining the facts and issues. The Police were specifically asked to review and address certain additional considerations relating to the possible effect of the Quebec court order on their exercise of discretion.

Following the receipt of representations from the Police, the appeal was transferred to me to continue the inquiry. I sent a modified Notice of Inquiry to the appellant, along with the non-confidential representations of the Police, inviting submissions, which I received.

RECORDS:

The records at issue in this appeal are a CD-ROM recording of a Police interview and a general occurrence report (26 pages).

DISCUSSION:

PERSONAL INFORMATION

The Police have withheld certain information contained in the records based on the assertion that its disclosure would constitute an unjustified invasion of other individuals' personal privacy under section 38(b) of the *Act*.

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), it is necessary to determine whether they contain personal information and, if so, to whom it belongs. 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].

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.)]. 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].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". The new provision in section 2(4) is not relevant for the purposes of this appeal.

Representations

The Police submit that the records contain information that fits within the definition of personal information in section 2(1) of the *Act* and state:

> The General Occurrence report contains the name, date of birth, address, telephone numbers, employers, physical descriptors, and personal views of both the appellant and the subject. I have also reviewed the video-tape of the subject, and find that it contains the personal information of the appellant, as well as that of the subject.

The Police also take note of the appellant's position that business information must be disclosed, and assert that all information related to the business in question in this appeal was already disclosed to him.

In his representations, the appellant submits that none of the information at issue is personal information. The appellant takes the position that "[t]he Police do not deny the business nature of the information contained in their records."

Analysis and Findings

In my view, the records contain information about the appellant that meets the definition of "personal information" in paragraphs (a), (b), (d), (g) and (h) of the definition in section 2(1) of the *Act*. In already disclosing significant portions of the records to the appellant, the Police have, in my view, demonstrated their tacit acceptance that releasing the appellant's own personal information to him cannot constitute an unjustified invasion of another individual's personal privacy.

In addition, I find that the records also contain the personal information of seven other identifiable individuals. This information qualifies as personal information for the purposes of section 2(1) of the *Act* because it includes information that fits within paragraphs (a), (b), (c), (d), (g) and (h) of the definition. Accordingly, I will review whether it qualifies for exemption under the discretionary exemption at section 38(b) 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 right. In this appeal, the Police take the position that the undisclosed portions of the record are exempt under the discretionary exemption in section 38(b).

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.

Next, sections 14(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met. 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. In view of the fact that the appellant has referred to the application of section 14(4)(a) and (b), these provisions will be addressed in my reasons, below. However, 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 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 relevant circumstances [Order P-99]. The parties address the relevance of several of these factors in their representations.

In this appeal, however, the main argument of the Police is that the presumption against disclosure at section 14(3)(b) of the *Act* applies. 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;

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].

Representations

The representations provided by the Police start by noting that the Durham Regional Police Service is a law enforcement agency that is vested with the authority and responsibility under the

Police Services Act of investigating offences under the *Criminal Code of Canada.* The Police describe the circumstances of the creation of the records at issue in the following manner:

> The appellant attended at the Pickering branch of the [Police] on [a specific date] and asked that the police investigate a criminal matter (fraud/theft allegation) involving himself and the subject, as [identified] in the General Occurrence report. An investigation ensued, and through interviewing the subject, the investigator in this matter determined that no fraud/theft had in fact occurred. …[T]he investigator informed the appellant, by email, that this matter was no longer deemed to be a criminal matter … but a business dispute and considered a civil matter by the [Police].

The Police submit that the personal information at issue was prepared or compiled by the Police and is identifiable as part of their investigation into the appellant's allegations of theft and fraud against the subject individual, that is, a possible violation of law under the *Criminal Code*. The Police add that although their investigation determined that no criminal offence had been committed, section 14(3)(b) may still apply even though no criminal proceedings were commenced (Order P-242).

Further, the Police submit that as an institution, they were aware of the exceptions in section 14(4) but do not believe that any of those exceptions applied in the circumstances. Moreover, the Police submit that since the information was deemed to fall within the scope of section 14(3)(b), the exemption in section 38(b) applies.

The appellant's main argument appears to be that notwithstanding the provisions of the *Act*, the terms of the Quebec court order constitute sufficient justification for the Police, or this office, to disclose the information remaining at issue in the records to him. The appellant states:

> I reiterate that [the named judge's] order which he translated [into] English for the purpose of assisting me with all competent persons in order to serve the judgement is [a very] relevant consideration. … The fact that [the Police were] not served with a motion prior to the judgment is irrelevant.
>
> Paragraphs a & b of section 14(4) apply and therefore the Police should disclose the information which includes information about me, which the Police admit that I am entitled to have. Section 14(2) par. [(a) & (b)] are relevant and will add clarity.

Analysis and Findings

I will preface my findings in this section by noting that this appeal relates only to the access decision issued by the Police under the *Municipal Freedom of Information and Protection of Privacy Act*. I am bound by the provisions of the *Act* and in this inquiry, and the resulting decision, I do not have jurisdiction over any civil matter in which the appellant may be involved.

In particular, I have no authority to decide any issues relating to the interpretation, or enforcement, of the Quebec court order presented by the appellant to the Police to support his request for information.

Turning now to the information remaining at issue in this appeal, I have reviewed the paper records, as well as the recorded interview contained on the CD-ROM. Having done so, I am satisfied that they contain the personal information of the appellant and other identifiable individuals that was gathered by the Police in the course of their investigation into possible criminal charges against one of the identifiable individuals. 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*.

Given 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) since no combination of these factors may outweigh a presumed invasion of personal privacy. However, several comments are warranted in the circumstances of this appeal.

As I understand the appellant's submissions, he is arguing that the exceptions in section 14(4)(a) and (b) apply to the information at issue and justify its disclosure. This section reads, in part:

> (4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> > (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution;
> >
> > (b) discloses financial or other details of a contract for personal services between an individual and an institution; or

I reject the appellant's argument that the referenced section 14(4) exceptions apply. The exceptions in section 14(4)(a) and (b) identify information related to an individual's employment or contractual relations with an institution under the *Act*, which are to be disclosed by that institution upon request. Previous orders have established that these exceptions to the presumptions against disclosure in section 14(3) of the *Act* signal the Legislature's intention to release the identified types of information in the public interest [Order M-23]. The information at issue in this appeal clearly does not fit within the parameters of sections 14(4)(a) or (b), and I find that neither of these exceptions applies.

Since the appellant has also argued that the factors in section 14(2)(a) and (b) are relevant, I will address these considerations briefly, even through they could not override the application of the section 14(3)(b) presumption. The appellant provided no evidence to support the relevance of these considerations apart from the simple assertion that these factors "will add clarity" in this

appeal. In my view, this is insufficient to support the position that access to the particular information at issue is either desirable for the purpose of subjecting the activities of the Police to public scrutiny (section 14(2)(a)) or to promote public health and safety (section 14(2)(b)).

For the purposes of this appeal, and in light of my findings on the application of the presumption against disclosure in section 14(3)(b), it is unnecessary for me to review any of the other factors in section 14(2).

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

ABSURD RESULT

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) 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]

Representations

In reference to the absurd result principle, the Police submit that:

> … [it] should not be considered in this circumstances, as the information provided in the subject's video-taped statement was not given by the appellant himself, he was not present when the information was provided to the Police, and we have no evidence that the video-tape has ever been viewed by the appellant, even though he is aware that it does exist.

The appellant takes the position that the absurd result principle should be applied in this appeal because he "supplied the information about the scheme and the suspect … for [whom] … the judge has ordered [that correct information be provided]."

Analysis and Findings

I agree with the Police that the absurd result principle is not applicable in the circumstances of this appeal.

Although the Police only expressly address the CD-ROM interview in their representations, I am satisfied that the same principles would apply to the 26-page Occurrence Report at issue. In my view, the personal information of other individuals that remains at issue was not provided by the appellant nor was he present when it was provided or compiled. Moreover, this is an appeal in which the appellant is not aware of the information remaining at issue. Finally, the information that was originally provided by the requester himself has already been disclosed to him.

In my view, this is a clear case where disclosure of the remaining personal information of other individuals contained in the records is not consistent with the purpose of the exemption, which is to protect the personal privacy of individuals other than the requester [see Order PO-2285]. Accordingly, I find that the absurd result principle does not apply.

EXERCISE OF DISCRETION UNDER SECTION 38(b)

My finding that the personal information of other identifiable individuals qualifies for exemption under section 38(b) does not conclude the matter. 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.

The Commissioner, or her delegate, may also 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 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)].

This office has identified a number of considerations that may be relevant in exercising its discretion. It should be noted that not all those listed below 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

- 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

In addition to the list of considerations above, the Police were also invited to comment on their exercise of discretion in relation to the following points raised by the appellant:

- he has a court order directing other "competent persons" to assist him in tracking down the defendant to his action;

- he has a right to have a correct address in order to serve his judgment;

- the information the police have recorded is inaccurate and they do not have the right to provide wrong information;

- all business information must be disclosed;

- if the records would be disclosed in response to a court order from an Ontario court, then they should be disclosed now to save the appellant the time and cost of taking his case to an Ontario court.

Representations

The Police submit that in exercising their discretion to withhold the information, it was understood that section 38(b) of the *Act* introduces a balancing principle. The Police state:

> We considered the information and weighed the appellant's right of access to his own information against the affected individual's right to the protection of his privacy. … [The appellant's] personal information is repeatedly intertwined with that of the subject and another individual [in the CD-ROM interview].

The Police confirm their awareness that the appellant has a right of access to his own personal information, but submit that the nature of the records at issue and the extent to which they are significant and possibly harmful to the interviewed individual was "a major factor in exercising discretion to deny access." The Police maintain that all business information has already been disclosed to the appellant. In addition, the Police maintain that they did not exercise their discretion in bad faith or for an improper purpose, but only to protect the privacy of the other individual.

In addressing the additional points set out in the Notice of Inquiry, the Police explained that they considered the discretionary and non-specific wording of the provision in the court order presented by the appellant, and concluded that the request must be processed under the *Act*. With respect to the appellant's contention that the records should be disclosed to save him the time and cost of taking his case to an Ontario court, the Police submit that they cannot, and should not, pre-determine the outcome of any motion brought by the appellant to compel the Police to release these records.

The appellant submits that the Police exercised their discretion in bad faith because, he alleges, they initially indicated that the "business contacts and addresses" would be disclosed to him. The appellant also submits that the Police did not take all the relevant factors into consideration and suggests that they did not consider the court order directing them to assist him in locating the individual with whom he is involved in litigation. Finally, the appellant asserts that he has "a serious, urgent and compelling need to have the information."

Analysis and Findings

I have considered the submissions provided by the Police on the factors it took into consideration in exercising its discretion to not disclose the records, or portions of records, for which it had claimed exemption under section 38(b). I have also considered the circumstances of this appeal, including the content of the records.

In my view, the appellant has not provided me with sufficient evidence to establish a finding that they exercised their discretion in bad faith. On the contrary, in the circumstances of this appeal, I am satisfied that the Police exercised their discretion with consideration of relevant factors and principles. I take note that the Police considered the balancing of the appellant's right of access and the protection of privacy of other individuals. In my view, this much is evident by the amount of information the appellant has already received through the initial disclosure. Overall, I am satisfied that the Police exercised their discretion under section 38(b) of the *Act* properly, and I will not interfere with it on appeal.

Accordingly, I uphold the exercise of discretion by the Police and find that the personal information of the other identifiable individuals found in the records is exempt under 38(b).

In view of my finding, it is not necessary for me to consider the possible application of section 8(2)(a) of the *Act* to this information.

ORDER:

I uphold the Police's decision to deny access to the withheld information pursuant to section 38(b) of the *Act*.

Original signed By: ______________________ August 14, 2008
Daphne Loukidelis
Adjudicator