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

INTERIM ORDER MO-2558-I

Appeal MA09-402

York Regional Police Services Board

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NATURE OF THE APPEAL:

The appellant made 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 all information about a specified occurrence. Specifically, the appellant noted that he is seeking all notes, records and material, including copies of the video interviews of the appellant and his two sons by detectives.

The Police located responsive records and granted partial access to them pursuant to the discretionary exemption in section 38(b) (personal privacy), in conjunction with the presumption in section 14(3)(b) of the *Act*. In its decision letter, the Police advised that releasing the video-taped interviews of the requester's sons would not be in the best interests of the children.

Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During the inquiry into the appeal, I sought and received representations from the Police and the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

RECORDS:

The records at issue consist of the severed portions of a General Occurrence Report and two videotaped interviews of the appellant's sons.

DISCUSSION:

PERSON LESS THAN SIXTEEN YEARS OF AGE

Section 54(c) states:

> Any right or power conferred on an individual by this *Act* may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual;

Under this section, a requester can exercise another individual's right of access under the *Act* if he/she can demonstrate that

- the individual is less than sixteen years of age; and
- the requester has lawful custody of the individual.

If the requester meets the requirements of this section, then he/she is entitled to have the same access to the personal information of the individual as the individual would have. The request for access to the personal information of the individual will be treated as though the request came from the individual him or herself [Order MO-1535].

The Police do not dispute that the appellant is the custodial parent of the children whose personal information is the subject of the request. Further, the Police do not dispute that the children are less than sixteen years of age. The Police also acknowledge that under other circumstances, the appellant would be granted access to his children's information. The Police submit though, that in the present circumstances, it would not be in the best interests of the children to release the records to their father.

The Police explain that the appellant has made several complaints to the York Region District School Board, York Region Children's Aid Society and the Police regarding his children's detention at their school. The Police state:

> ... prior to the matter being reported to the police, the appellant had his children interviewed on video by another individual and then allowed the videos to be posted on a national website…

The Police submit that should the appellant be granted access to the videotaped statements of his sons, he will once again post this sensitive personal information on the internet. The Police argue that the appellant is seeking the records to further his own personal objectives and that he is not considering the best interests of his children, including protecting their privacy.

The appellant submits that he is motivated by his concern to protect other children from the treatment his own sons received at their school.

The Police cite order P-673 as the basis for not allowing the appellant access to his sons' records. In Order MO-1907, Adjudicator Sherry Liang dealt with a similar argument on the part of the Toronto District School Board. Adjudicator Liang did not accept the Board's argument and held the following:

> In Order P-673, on which the Board relies, former Assistant Commissioner Irwin Glasberg found that the disclosure of records maintained by the Office of Child and Family Service Advocacy responsive to a request from a custodial parent for records relating to his son would not be in the best interest of the child. The records related to a custody and child protection dispute involving the father and his former spouse. The former Assistant Commissioner found that the requester father was seeking the information contained in the records in order to "meet his personal objectives and not those of his son." As a result, he held that the father was not entitled to exercise the access rights of his son in accordance with the provincial equivalent provision to section 54(c).
>
> I find the circumstances of this appeal to be very different from those discussed in Order P-673, which arose out of a custody and child protection dispute. This argument was also previously raised by the Board in Appeal MA-010272-2, in relation to the appellant. Adjudicator Donald Hale rejected the Board's position, finding no basis for its contention that the request was made for some improper or collateral purpose (see Order MO-1574-F, upheld by the Divisional Court on judicial review in *Toronto District School Board v. John Doe*, above). The

> request in that appeal and the one before me arise out of the same set of circumstances, and can be viewed as part of ongoing issues between the appellant and the Board in relation to the education and treatment of his son by the Board. Although it may be that, as found by Adjudicator Hale, there is a high degree of animosity between the appellant and the Board's administration, this does not establish that the appellant is attempting to use the access provisions under the *Act* for improper or collateral purposes. I see no basis to reach a different conclusion from Adjudicator Hale, and I find that the appellant is entitled to exercise the access rights of his son under section 54(c).

In Order MO-1574-F, Adjudicator Donald Hale described the set of circumstances present in Order P-673 as unusual and unique and thus the reason why section 66(c) [the provincial equivalent of section 54(c)] did not apply in that particular appeal.

In the present appeal, I find that the unique and unusual circumstances to those in Order P-673 do not exist such that section 54(c) would not apply. The Police do not agree with the appellant's actions relating to his sons. However, I find that the appellant's past actions are no basis for a determination in the present appeal that the appellant is seeking the records solely to further his own personal objectives, without regard for the privacy rights of his sons.

The appellant is the custodial parent and his children are under 16 years of age, accordingly I find that the appellant is entitled to exercise the access rights of his sons under section 54(c) of the *Act*.

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.)].

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 and 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 and MO-2344].

The Police submit that the records at issue contain the personal information of the appellant, his sons and various members of the school board and the Children's Aid Society. The Police further submit that the business contact information for the school board members and the Children's Aid Society employees were released to the appellant, and that the only information remaining at issue is the sex and date of birth of these individuals.

The occurrence which is the subject of the appellant's request is his complaint to the police that his sons had been detained by their school principal at the request of the Children's Aid Society. The records contain the general occurrence report and the videotaped statements of the appellant's two sons. The only information remaining at issue from the general occurrence

report is the sex, ethnicity and birth dates of individuals at the school board as well as the Children's Aid Society. The videotaped statements include the interviews of the appellant's two sons by the Police relating to the incident at the school.

Based on my review of the records, I find that the records contain the personal information of the appellant's sons and a number of other individuals, within the meaning of paragraphs (a), (c), (d), (e), (g) and (h) of the definition of that term in section 2(1). I accept the Police's statement that the information relating to the school board members and Children's Aid Society employees, namely their sex and birth date, is their personal information and not their professional or business information for the purposes of section 2(1) of the *Act*. Further, I note that the records do not contain the personal information of the appellant.

As I have found that section 54(c) applies, I will now consider the appellant's right of access to the withheld personal information under section 38(b) of the *Act*.

PERSONAL 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 exemptions from this right.

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

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under sections 38(b). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In the present appeal, section 14(4) does not apply and the appellant has not claimed the application of section 16.

The Police submit that section 14(3)(b) applies as the personal information in the records was compiled and is identifiable as part of an investigation of a possible violation of law, namely the *Criminal Code*. The Police state:

> The York Regional Police received a complaint of an assault and forcible confinement which was thoroughly investigated by officers of the York Regional

> Police service. After a discussion with the crown attorney's office and at the conclusion of the investigation there was no criminal code offences laid.

Based on my review, I accept that the personal information in the records was compiled and is identifiable as part of the Police's investigation into an alleged occurrence involving the appellant's sons. Further, I accept that section 14(3)(b) applies such that disclosure of this personal information is presumed to be an unjustified invasion of the individuals named therein. As I have found that section 14(3)(b) applies to the personal information in the records, I find that section 38(b) applies to exempt the information from disclosure, subject to the discussion of absurd result, and my finding on the Police's exercise of discretion.

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 sections 14 or 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444 and 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 and M-451]
- the requester was present when the information was provided to the institution [Orders M-444 and P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679 and 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 and MO-1378].

In the present appeal, the appellant's two sons were interviewed by the police following the occurrence. The interviews were videotaped. As the appellant's sons were present when this information was provided to the Police, the absurd result principle would otherwise apply if they had requested the records themselves. However, in the present appeal, I have found that section 54(c) applies and that the appellant has the right to request the copies of the video-taped interviews in the place of his two sons. I find that it would be absurd in the present appeal and inconsistent with the purposes of the section 38(b) exemption, to withhold this information from him. Accordingly, I find that the exemption in section 38(b) does not apply to withhold the videotaped interviews from the appellant.

On the other hand, I find that the absurd result principle does not apply to the personal information in the record relating to the Children's Aid society employees or the school board employees. This personal information in the occurrence report would not be within the appellant

or his children's knowledge, nor do I have reason to believe that the appellant or his children were present when this information was given. Thus, I conclude that the personal information relating to the Children's Aid Society and school board employees is exempted from disclosure under section 38(b), subject to my finding on the Police's exercise of discretion.

EXERCISE OF DISCRETION

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

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

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

Relevant considerations

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.

The Police did not provide representations on their exercise of discretion as they argued that section 14(1) applied and not section 38(b). In the absence of their representations on this issue, I will order the Police to exercise their discretion under section 38(b) with respect to the personal information I have found exempt in the occurrence report, taking into account the considerations listed above.

ORDER:

1. I order the Police to disclose the videotaped interviews of the appellant's two sons by providing him with a copy of the interviews by November 25, 2010.

2. I order the Police to exercise its discretion under section 38(b) of the *Act* and to provide both the appellant and me with an outline of the factors it considered in exercising its discretion by November 16, 2010.

3. I remain seized of this matter in order to deal with any issues stemming from the exercise of discretion by the Police.

4. In order to verify compliance with Order Provision 1, I reserve the right to require the Police to provide me with a copy of the records disclosed to the appellant, upon request.

Original signed by: October 26, 2010
Stephanie Haly
Adjudicator