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

ORDER MO-2534

Appeals MA09-261 and MA09-262

Niagara Regional Police Services Board

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NATURE OF THE APPEAL:

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

> I am requesting the police report that led police to track me down at a place other than my residence and accuse me of breaching a bail of [recognizance], Miranda (ing) me, and stating they had a right to arrest me on the spot for a breach that was non-existent. This was found by entering my place of residence at [specified address] uninvited. Three weeks later, two officers attended again at [specified address] questioning me re: the same matter. I want to know how this happened, especially after the first false accusation.

The Police also received an additional request from the same requester:

> I would like all police reports and statements that lead police to arrest for uttering threats x2 including but not limited to statements from [three named individuals].

In response to both requests, the Police identified the responsive records and issued a decision granting partial access, but denying access to parts of the records citing the personal privacy exemption at section 38(b), in conjunction with section 14(1) of the *Act*.

In both cases, the requester, now the appellant appealed the Police's decisions. This office opened appeal MA09-261 for the first request and appeal MA09-262 in relation to the second request.

During mediation of appeal MA09-262, the Police issued a revised decision, adding the personal privacy exemption at section 38(a), with reference to the law enforcement exemption in section 8(1)(c) and the relations with other governments exemption in sections 9(1)(a), (b) and (c). The Police specified that section 38(a) and 8(1)(c) apply to pages 1 and 26 of the responsive record and 38(a) and 9(1)(d) apply to information contained in pages 27, 28, 29 and 30. The Police further noted that the information in portions of pages 31 and 32, and the severances of the printing date on each page are non-responsive to the request. The appellant confirmed that he is appealing the Police's decision to withhold the portions of the record claimed to be not responsive to his request.

Further mediation was not possible in both appeals and the files were moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

I began my inquiry for both appeals by sending a Notice of Inquiry to the Police setting out the facts and issues. The Police provided representations in response to the Notice. I then sent a Notice to the appellant, along with a copy of the Police's representations. Portions of the Police's representations were withheld due to my concerns about confidentiality. I also received representations from the appellant.

This order addresses all of the issues before me in both appeals.

RECORDS:

The records consist of the withheld portions of two general occurrence reports.

DISCUSSION:

RESPONSIVENESS OF RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

The Police submit that portions of pages 31 and 32 of the general occurrence report relating to the appellant's second request are not responsive to the appellant's request. Specifically, the Police state:

> The appellant requested access to all reports and statements in relation to a "threats x 2"… Threats Report [specified number] is the record which is responsive to this request. It is the only report in relation to this incident and it does contain all statements taken in relation to this incident.
>
> The portions of pages 31 and 32 which I deemed to be unresponsive are what are called "follow up reports" which are generated either by our Audit Unit or by

> commanding officers. They are a form of internal communication between officers which relates to housekeeping matters, the assignation of supplementary reports, corrections based on CCJS (stats) matters which ensure information is entered correctly in the reports. This information is external to the report itself.
>
> The badge number and the date the report was printed are also external to the report itself and not part of the original information compiled by the officer(s). This information has generally been omitted in an effort to avoid confusion as to the actual dates of incidents and badge numbers of involved officers.

The appellant did not address this issue in his representations.

Based on my review of pages 31 and 32, I find that the information claimed to be not responsive by the Police does not reasonably relate to the appellant's request. I agree with the Police's representations that these portions of pages 31 and 32 relate to housekeeping matters pertaining to the filing of the report and not to the appellant's request for the statements and reports about the "threats x 2" incident.

Further, I find that the badge number of the individual who printed the report and the date the report was printed that is shown on each page of the record is also not responsive for the purposes of this appeal. This information does not reasonably relate to the appellant's request but instead pertains to the mechanics of printing the report to respond to the appellant's request.

Accordingly, I uphold the Police's decision that portions of pages 31 and 32, as well as the date and badge number on each page of the report, are not-responsive to the appellant's request and should be withheld.

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. Section 2(1) states, in part:

> "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,
>
> (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.)].

Based on my review of the records, I find that the withheld information contains the personal information of both the appellant and other identifiable individuals within the meaning of paragraphs (a), (b), (c), (d), (e) and (g) of the definition of that term in section 2(1) of the *Act*.

Specifically, the record contains the views and opinions of other individuals about the appellant, as well as the appellant's name with other information relating to him. In addition, the record contains information about other individuals including their names, addresses, birth dates, phone numbers, race, employment history and sex.

As I have found that the records contain the personal information of the appellant, as well as other identifiable individuals, his right of access to them is governed by Part II of the *Act* which gives an individual a general right of access to their own personal information held by an institution.

LAW ENFORCEMENT

Section 36(1) 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(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

The Police rely on section 38(a) in conjunction with section 8(1)(c) and 9(1)(d) of the *Act* to deny access to portions of the occurrence report in appeal MA09-262.

Section 8(1)(c) of the *Act* states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

In the case of section 8(1)(c), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487, MO-2347-I and PO-2751].

The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Fineberg*, cited above].

The Police submit that disclosure of the withheld information on pages 1 and 26 of the occurrence report will reveal investigative techniques and procedures currently in use. Moreover, the Police submit that disclosure of this technique or procedure to the appellant could reasonably be expected to compromise its effective utilization.

The Police's representations regarding this exemption were not shared with the appellant. However, based on the Police's representations and the circumstances in this appeal, including the nature of the charges described in the responsive records, I find that disclosure of the information on pages 1 and 26 of the occurrence report could reasonably be expected to hinder or compromise the technique and/or procedure set out in the information. Furthermore, I find that the technique and/or procedure set out in the withheld information is both investigative and for enforcement. Accordingly, I find that section 8(1)(c) applies to the withheld information on pages 1 and 26 and that it is, accordingly, exempt from disclosure under section 38(a), subject to my finding on the Police's exercise of discretion.

RELATIONS WITH GOVERNMENTS

The Police submit that this section applies to withheld information on pages 27, 28, 29 and 30 of the occurrence report at issue in appeal MA09-262 and should be exempt under section 38(a).

Section 9(1)(d) of the *Act* states:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> > an agency of a government referred to in clause (a), (b) or (c); or

The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" [Order M-912].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In order to deny access to a record under section 9(1), the Police must demonstrate that disclosure of the record could reasonably be expected to reveal information that the Police received from one of the government agencies or organizations listed in the section **and** that this information was received by the Police in confidence.

An expectation of confidentiality must have been reasonable, and must have an objective basis. In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case. It is not sufficient to simply assert an expectation of confidentiality with respect to the information received by the institution. [Order MO-1288]

The Police submit that the withheld information in the record was received from CPIC. Specifically, the Police state:

> The information pages 27, 28 and 29 is a CPIC record; page 27 is a CPIC Person Query; pages 28 and 29 are Canadian Name Index (CNI) Queries; and page 30 is a Police Automated Registration Information System (PARIS) query….
>
> All information is supplied in confidence to police services via CPIC which is the repository of information supplied to the RCMP by individual police services throughout the country. The information on the PARIS system is supplied to CPIC by the Ministry of Transportation (MTO).
>
> The use of CPIC comes with the following warning: "All information contributed to or retrieved from CPIC must be protected against disclosure to unauthorized agencies or persons. Before releasing this information, ensure that the requester is an authorized person. This information shall not at any time be utilized for personal reasons…
>
> [The Police] therefore treat all information on CPIC as confidential and given the above warning believe that [we] are not authorized to do otherwise.
>
> …

This office has considered the application of section 9(1)(d) to information provided to police forces by CPIC in several prior decisions and found that this section of the *Act* does not apply to exempt requested information if the appellant is the individual referred to in the record. In Order MO-1288, Adjudicator Holly Big Canoe addressed similar records, which were obtained by the Toronto Police from CPIC, though in that case the information held by CPIC originated with another Canadian police agency. She found that applying the principles set out above respecting the expectation of confidentiality on the part of the senior government agency:

> The CPIC computer system provides a central repository into which the various police jurisdictions within Canada enter electronic representations of information they collect and maintain. Not all information in the CPIC data banks is personal information. That which is, however, deserves to be protected from abuse.

> Hence, a reasonable expectation of confidentiality exists between authorized users of CPIC that the personal information therein will be collected, maintained and distributed in compliance with the spirit of fair information handling practices. However, the expectation that this information will be treated confidentially on this basis by a recipient is not reasonably held where a requester is seeking access to his own personal information.
>
> There may be specific instances where the agency which made the entry on the CPIC system may seek to protect information found on CPIC from the data subject. Reasons for this might include protecting law enforcement activities from being jeopardized. These concerns will not be present in every case, and will largely depend on the type of information being requested. The Police have not identified any particular concerns in this area in the circumstances of this appeal, and it is hard to conceive of a situation where an agency inputting suspended driver or criminal record information would require the Police to maintain its confidentiality from the data subject. In fact, although members of the public are not authorized to access the CPIC system itself, the CPIC Reference Manual contemplates disclosure of criminal record information held therein to the data subject, persons acting on behalf of the data subject, and disclosure at the request or with the consent of the data subject.
>
> Accordingly, I find that there is no reasonable expectation of confidentiality in the circumstances of this appeal, where the appellant is the requester and the information at issue relates to the suspension of the appellant's drivers licence and a history of his previous charges and convictions, the fact of which he must be aware.

Similarly, I find in the present case that there is no reasonable expectation of confidentiality in the information relating to the appellant that is the subject of this appeal. In the appeal before me, as was the case in Order MO-1288, the appellant is the requester and in this case, the information contained in the CPIC entries is about him. Having found that section 9(1)(d) does not apply, I find that the information in the record from CPIC relating to the appellant is not exempt under section 38(a). As no other exemptions have been claimed for this information and no mandatory exemptions apply to it, I will order that this information in the occurrence report be disclosed to the appellant.

On the other hand, the withheld information also includes CPIC information about other identifiable individuals for which the Police have also claimed the application of section 38(b). I will consider whether this information is exempt under section 38(b) in my discussion below.

PERSONAL PRIVACY

The Police rely on section 38(b) together with the presumption in section 14(3)(b) to exempt the information remaining at issue in both the occurrence reports.

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. See below for a more detailed discussion of the exercise of discretion issue.

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

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). I find that none of these paragraphs apply in the circumstances of this appeal.

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 section 14(1). 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, I find that section 14(4) does not apply and the appellant has not claimed the public interest override in section 16.

Section 14(3)(b) of the *Act* 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;

The Police submit that the personal information in the records were compiled for the purpose of an investigation into a possible violation of a breach of recognizance in appeal MA09-261. In appeal MA09-262, the Police submit that the personal information in the record was compiled for the purpose of investigation other possible violations of law, including "Utter Threat of Bodily Harm/Death" and "Utter Threat Against Personal Property", described in sections 264.1(1)(a) and (b) of the *Criminal Code*.

The appellant does not address the application of section 14(3)(b) but instead provides representations on the nature of the allegations made about him in the records and the individuals who provided the information to the Police.

Based on my review of the records, I find that the withheld personal information was compiled by the Police and is identifiable as part of investigations into possible violations of the *Criminal Code*. In the first report, relating to Appeal MA09-261, the withheld personal information pertains to two identifiable individuals and includes their statements to the Police about the appellant within the context of an investigation into the violation of his recognizance of bail. In the second report, the withheld information consists of the personal information of other identifiable individuals and their statements to the Police about the appellant within the context of an investigation of Utter Threats. The occurrence report also includes CPIC information about other identifiable individuals.

Accordingly, I find that the section 14(3)(b) presumption applies to the personal information in the two reports such that disclosure of the personal information is presumed to be an unjustified invasion of the personal privacy of the identified individuals in the records under section 38(b).

As stated above, once the section 14(3)(b) presumption is established it cannot be rebutted by one or more factors under section 14(2) [*John Doe*, cited above]. As a result, it is not necessary for me to consider the application of the factors in section 14(2).

Consequently, I find that the personal information in the reports qualifies for exemption under section 38(b) of the *Act*, subject to my review of 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)].

The Police submit that in exercising its discretion under section 38(a) and (b) it considered the following:

> …that the appellant should have the right to his own information. The institution attempted to release as much information as permitted under the Act without either breaching the privacy of other individuals or without releasing information that was exempt for a law enforcement reason or that was supplied to the institution in confidence. It is the historic practice of the institution not to release information it has received in confidence from the CPIC system…The institution attempted to balance the appellant's right to access against other individuals' rights to the protection of their privacy. The institution is not aware of a sympathetic or compelling need on the part of the appellant to receive the information.

The appellant's representations allege the Police were wrong in accusing him of breaching his bail of recognizance and allege that he was being harassed by the Police and other individuals. The appellant submits that the Police are using the *Act* for an improper purpose and to harass the appellant.

Based on my review of the records and the representations of the parties, I find that the Police properly exercised their discretion to withhold the information that I have found to be exempt under sections 38(a) and (b). Despite the appellant's accusations of wrongdoing on the Police, I have no evidence to suggest that the Police have acted improperly by withholding the undisclosed information at issue in the records. The Police properly considered the appellant's right to his own information, the interests to be protected by the exemptions and the privacy rights of the other individuals referred to in the record. Accordingly, I uphold the Police's exercise of discretion to withhold the information from the appellant.

ORDER:

1. I order the Police to disclose the portions of the occurrence report responsive in appeal MA09-262 that are the CPIC entries relating to appellant by providing a copy to him. For greater certainty, I have provided a highlighted copy of this record to the Police, with the portions of the record **to be** disclosed highlighted by **August 5, 2010** but not before **July 28, 2010**.

2. I uphold the Police's decision to withhold the remaining information.

3. 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 record which is disclosed to the appellant.

_Original signed by:_____ June 29, 2010
Stephanie Haly
Adjudicator