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

ORDER MO-2643

Appeal MA10-321

Durham Regional Police Services Board

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NATURE OF THE APPEAL:

The appellant was involved in a domestic dispute. He submitted a request to the Durham Regional Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the video statements of two named individuals (the affected parties) relating to the incident. He also requested a copy of the 911 call made regarding the incident.

The Police located the requested records and denied access to them, in their entirety, pursuant to the discretionary exemption at section 38(b) of the *Act* (personal privacy), with reference to the presumption at section 14(3)(b).

The appellant appealed the decision.

During mediation, the Mediator contacted the two affected parties to seek their consent to the release of the records at issue. With the agreement of the appellant, the Mediator advised the affected parties of his identity as the requester. Neither affected party provided consent.

The appellant confirmed that he is no longer seeking access to the 911 audio tape; however, he wished to continue to pursue access to the two recorded statements.

Mediation did not resolve the appeal and the file was forwarded to the adjudication stage of the appeal process. I sought, and received representations from the Police, and shared them with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction* number 7.

I also sought representations from the two affected parties. One affected party submitted representations in which he/she appeared to consent to disclosure of the information pertaining to him/her. However, the affected party's consent was qualified by the expression of certain concerns. In the circumstances, I do not accept these submissions as evidence of consent to disclosure and intend to consider the comments made in them as submissions going to the issue of privacy protection. I did not share these comments with the appellant; rather I provided a brief summary of them to the extent possible without disclosing confidential information

The appellant provided representations in response.

RECORDS:

The records remaining at issue consist of two digitally recorded statements.

ISSUES:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

Issue B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

DISCUSSION:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual [paragraph (h)].

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.)].

The Police state that the records were "generated as a result of contact made directly with the victim and the witness in relation to a domestic assault which resulted in charges being laid against the appellant." The Police note that the records contain personal identifiers of the affected parties, their accounts of the incident and information about the appellant.

Based on the submissions made by the Police and my review of the records, I am satisfied that they contain the personal information of the affected parties and the appellant. Moreover, due to the nature of the records, I find that the personal information of the appellant and the affected parties is so intertwined that it is not severable.

Issue B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

General principles

I have found that the records at issue contain the personal information of the appellant and other identifiable individuals. 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 the presumptions contained in paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to constitute an unjustified invasion of privacy, unless the information falls within the ambit of the exceptions in section 14(4), or if the "public interest override" in section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The Police submit that the presumption at section 14(3)(b) applies to the withheld portions of the records. This section states that:

> 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].

The Police state that they obtained the digitally recorded statements to assist their investigation into an allegation of assault. The Police describe the incident which led to their involvement with the parties. In essence, the Police were contacted following a 911 call made by one of the affected parties. They attended at the scene and obtained information from the affected parties. The Police subsequently obtained additional information via the recorded statements. As a result of this investigation, the Police laid charges of domestic assault against the appellant.

In their confidential representations, the Police make certain references to one of the affected parties. I have also considered the comments made by this affected party in the statement this individual provided in response to the Notice of Inquiry. The affected party is concerned about how the appellant will use the record relating to this person if it were disclosed to him.

The appellant believes that since he was charged with a criminal offence, he has a right to obtain all of the police records relating to their investigation into the matter. He believes that his *Charter* rights have been infringed as disclosure of these recordings was not made to him during his first two court appearances. He states:

> The Police report that was provided to the appellant by the Attorney General of Ontario on [specified date] as part of the disclosure requirement identified that videos statements were taken from the victim and the witness on [specified date.] The police excluded the video statements made by the victim and the witness in their own words, however summarized the video statements in the disclosure documents…
>
> Withholding this evidence has caused frustration and stress for the defence and is in violation of the Charter of Rights and Freedom and the stated policy of the Attorney General of Ontario. The incident was at the stage were [*sic*] the appellant was to enter a plea and set a trial date without the most critical disclosure. The appellant was to base his plea on hearsay evidence from the police report.

The appellant notes that the Crown subsequently withdrew the charges against him. He points out further that he has already received considerable personal information relating to the affected parties as a result of the Crown disclosure that was made, and thus raises the possibility that withholding the remaining information would result in an absurdity. Finally, the appellant argues that there is a compelling public interest in the Police providing "these critical disclosure records" to the accused in a timely manner.

The records relate to a matter in which the Police responded to an emergency call made to 911. The records identify the parties and describe the events that led to the call being made. I am satisfied that the personal information contained in the records at issue was compiled and is identifiable as part of an investigation into a possible violation of law. Although the Police laid charges against the appellant, the Crown subsequently withdrew them before the matter went to trial. Nevertheless, the presumption still applies since it only requires that there be an investigation into a possible violation of law.

Accordingly, I find that the presumption at section 14(3)(b) applies to the personal information of the individuals other than the appellant who are identified in the records at issue. As a result, the records at issue qualify for exemption under section 38(b) of the *Act*.

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 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]

However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

I have considered the appellant's submissions regarding the amount of information he has already been provided with as a result of Crown disclosure. It is clear that he has been made well aware of the evidence given to the Police by the affected parties, and has been provided with some of the personal information relating to these individuals which also appears in the records. In my view, it is significant that, rather than providing the digitally recorded statements themselves, the Police chose to summarize them. The records at issue not only provide the statements made by the affected parties, which the appellant is already aware of, but they provide additional information about the affected parties themselves as they were providing their statements, such as their state of mind at the time, their speaking manner and other similar personal characteristics. In my view, this information is very personal to the affected parties and is not known to the appellant. Accordingly, I find that withholding the records at issue in these circumstances would not lead to an absurd result.

Charter argument relating to Crown disclosure

I am not persuaded that denying access to the records under the *Act* results in a *Charter* infringement. In arriving at this decision, I have taken into consideration section 51(1) of the *Act*, which provides:

> This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.

This section of the *Act* has been considered in a number of previous orders (see, for example: Orders P-609, M-852, MO-1109, MO-1192 and MO-1449). In Order MO-1109, former Assistant Commissioner Tom Mitchinson commented on this section as follows:

> Accordingly, the rights of the parties to information available under the rules for litigation are not affected by any exemptions from disclosure to be found under the *Act*. Section 51(1) does not confer a right of access to information under the *Act* (Order M-852), nor does it operate as an exemption from disclosure under the *Act* (Order P-609).
> Former Commissioner Sidney B. Linden held in Order 48 that the *Act* operates independently of the rules for court disclosure:
>
> > This section [section 64(1) of the provincial *Freedom of Information and Protection of Privacy Act*, which is identical in wording to section 51(1) of the *Act*] makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair ...

With respect to the obligations of an institution under the *Act*, the former Assistant Commissioner stated:

> The obligations of an institution in responding to a request under the *Act* operate independently of any disclosure obligations in the context of litigation. When an institution receives a request under the *Act* for access to records which are in its custody or control, it must respond in accordance with its statutory obligations. The fact that an institution or a requester may be involved in litigation does not remove or reduce these obligations.
>
> The Police are an institution under the *Act*, and have both custody and control of records such as occurrence reports. Therefore, they are required to process requests and determine whether access should be granted, bearing in mind the stated principle that exemptions from the general right of access should be limited and specific. The fact that there may exist other means for the production of the same documents has no bearing on these statutory obligations.

I agree with the above comments. In my view, the two schemes work independently. The fact that information may be obtainable through Crown disclosure is not determinative of whether access should be granted under the *Act*, even where, as the appellant alleges, he has not received full disclosure.

Compelling public interest

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 484 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner),* [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391 and M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614].

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

- the records do not respond to the applicable public interest raised by appellant [Orders MO-1994 and PO-2607].

I find that the appellant's interest in obtaining the records at issue is essentially a private one. Moreover, I am not persuaded that this private interest in disclosure raises issues of more general application. Although the appellant is not satisfied with the level of disclosure provided by the Crown, even though charges against him were withdrawn before trial, I am not persuaded that this situation brings the integrity of the criminal justice system into question. Moreover, given the amount of disclosure the appellant was given through the alternate disclosure mechanism, as discussed above, I find that there is no public interest in disclosure of the personal information of the affected parties that is contained in the records at issue in the circumstances of this appeal.

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 54(2)].

Recognizing that the records also contain the appellant's personal information, the Police indicate that the primary consideration in their exercise of discretion not to disclose the records is the sensitive and complex nature of domestic violence incidents. It is also to be noted that the appellant has already received significant information about the matter as a result of Crown disclosure, and this is a relevant consideration in determining whether to provide him with the remaining records that contain his own personal information as well as that of others.

In denying access to the records in these circumstances, I find that the Police exercised their discretion under section 38 in a proper manner, taking into account all relevant factors and not taking into account any irrelevant factors.

Consequently, I conclude that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of the individuals identified in them, other than the appellant, and they are properly exempt under section 38(b) of the *Act*.

ORDER:

I uphold the decision of the Police.

Original Signed by: August 15, 2011
Laurel Cropley
Adjudicator