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

ORDER M-608

Appeal M_9500332

Goderich Police Services Board

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NATURE OF THE APPEAL:

The Goderich Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the transcript of a police communication tape made on two named dates which was considered by the Board at its September 15, 1994 meeting. The requester is a reporter with a local newspaper. The Police located the requested transcript and denied access to it in full, claiming the application of the following exemptions contained in the Act:

- solicitor-client privilege - section 12
- invasion of privacy - section 14

The requester appealed the decision of the Police to deny access to the transcript, arguing that the subject of the record has been a matter of profound public concern. During the mediation of the appeal, the appellant agreed to narrow the focus of her request to include only the six pages of transcript which contain a conversation between the Chief of Police (the Chief) and an O.P.P. Sergeant as this was the only portion of the transcript considered by the Board.

A Notice of Inquiry was forwarded to the appellant, the Police and to the Chief, as it appeared that his interests may be affected by the disclosure of the information contained in the transcript. Representations were received from all of the parties.

In their representations, the Police indicate that they are no longer relying on the solicitor-client exemption. I will not, accordingly, discuss the possible application of this section to the record.

PRELIMINARY ISSUE

The Chief has raised the application of the following additional exemptions in his submissions:

- closed meeting - section 6(1)(b)
- right to a fair trial - section 8(1)(f)
- third party information - section 10(1)(a)

In Order P-257, Assistant Commissioner Tom Mitchinson considered whether an affected person, such as the Chief in this appeal, is entitled to raise the application of discretionary exemptions to a record in which he or she may have an interest. He found that:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), [which are the equivalent sections in the provincial Act to sections 10(1) and 14(1) in the Act] it is up to the head to determine which exemptions, if any, should apply to any requested record. . . . In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the

> application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

I agree with the position expressed by Assistant Commissioner Mitchinson. I find that a consideration of the proper application of section 14(1) to the record will address the interests of all parties, and that it is not necessary or appropriate for me to consider the appellant's arguments with respect to sections 6, 8 and 10 of the Act.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the information contained in the record and I find that it satisfies the definition of personal information. In my view, the personal information relates only to the Chief.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the Police must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The Police submit that the personal information contained in the record was compiled and is identifiable as part of an investigation into a possible violation of law and that its disclosure would, therefore, result in a presumed unjustified invasion of privacy under section 14(3)(b).

The Chief argues that the presumption provided by section 14(3)(b) applies as the record relates to and was compiled during the planning stage of the execution of an arrest warrant, which he submits is a law enforcement activity. The Chief also submits that the presumption contained in section 14(3)(g) is applicable to the subject record. In addition, the Chief indicates that sections 14(2)(f) (highly sensitive), 14(2)(g) (the information is unlikely to be accurate or reliable),

14(2)(h) (the information was supplied in confidence) and 14(2)(i) (disclosure may unfairly damage the reputation of an individual) are applicable in the circumstances of this appeal.

The appellant has not raised the applicability of any of the factors listed in section 14(2) but maintains that there exists a public interest in the disclosure of the record. I will address these arguments in my discussion of section 16 of the Act.

I have reviewed the record and the representations of the parties and make the following findings:

1. The record, as narrowed by the appellant, was not "compiled" and is not identifiable as part of an investigation into a possible violation of law. Rather, it serves to document a conversation between the Chief and the O.P.P. sergeant about certain administrative matters not relating to any specific investigation. Accordingly, I find that the presumption provided by section 14(3)(b) is not applicable in the circumstances of this appeal. In addition, I find that the information contained in the transcript does not consist of personnel evaluations within the meaning of the Act. The section 14(3)(g) presumption does not, therefore, apply to the information at issue in this appeal.

2. The personal information contained in the record may be characterized as "highly sensitive" within the meaning of section 14(2)(f). This is a relevant factor weighing in favour of the non-disclosure of the record.

3. I have not been provided with sufficient evidence to demonstrate that the information is unlikely to be accurate or reliable; nor has sufficient evidence been adduced to allow me to make a finding that the information was supplied in confidence. These factors are not, accordingly, relevant considerations in the present appeal.

4. The applicability of section 14(2)(i) is not dependent solely on whether the damage or harm envisioned by this clause is present or foreseeable. This consideration is only relevant in circumstances where the damage or harm would be "unfair" to the individual involved (Order 256).

   In Order P-634, Assistant Commissioner Irwin Glasberg made the following observation regarding the interpretation of the applicability of section 21(2)(i) (which is the equivalent provision in the Provincial Act to section 14(2)(i) of the Act). He held that:

   > In determining whether an employee's reputation might be unfairly damaged by the release of such information, it is relevant to consider the outcome of an investigation which judges the conduct of that individual.
   >
   > In this case, the comments made by the Chief as recorded in the transcript have been the subject of a review by his employer, the Goderich Police Services Board. The Police Services Board chose not to take any disciplinary action against the Chief following the Board's review of the transcript of his conversation with the O.P.P. sergeant. I find that the fact that the Chief's employer did not feel that the

> Chief's actions warranted any sanction is a relevant consideration in determining whether the disclosure of the record would **unfairly** damage the reputation of the Chief.
>
> The circumstances surrounding the conversation and the context from which it took place are important considerations. Taking into account all of the circumstances of this appeal, I find that the disclosure of the transcript may unfairly damage the reputation of the Chief and that section 14(2)(i) is a relevant consideration which favours the protection of the personal privacy of the Chief.

The only factors under section 14(2) which are applicable in the circumstances of this appeal favour privacy protection. I find, therefore, that the disclosure of the requested transcript would constitute an unjustified invasion of the personal privacy of the Chief. Accordingly, the record is properly exempt from disclosure under section 14(1).

PUBLIC INTEREST IN DISCLOSURE

There are two requirements contained in section 16 which must be satisfied in order to invoke the application of the "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

The appellant submits that the information contained in the transcript is of great interest to the public and ought to be disclosed. Numerous newspaper articles by the appellant were tendered as evidence of the interest shown by the public in this issue.

In Order M-600, Inquiry Officer Holly Big Canoe made the following comments about the application of the "public interest override". She noted that:

> One of the principal purposes of the Act is to open a window into government. The Act is intended to enable an informed public to better participate in the decision-making process of government and ensure the accountability of those who govern. Accordingly, in my view, there is a basic public interest in knowing more about the operations of government.
> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information which the public has and can use to effectively express public opinion or make political choices.

The transcript records a conversation in which the Chief describes his views concerning the nature of his job responsibilities. While I agree with the appellant that the Police and the Chief must be accountable to the public, I am not satisfied that disclosure of the transcript, which I have found to be exempt from disclosure under section 14, will contribute in any meaningful way to the public's understanding of the activities of government. Accordingly, I find that there is no compelling public interest in disclosure, and section 16 of the Act does not apply.

ORDER:

I uphold the decision of the Police to deny access to the requested transcript.

Original signed by: October 5,1995
Donald Hale
Inquiry Officer