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

ORDER M-741

Appeal M_9500647

Halton Regional Police Services Board

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NATURE OF THE APPEAL:

The appellant's niece alleged that the appellant had sexually assaulted her on several occasions. The Halton Regional Police Service became involved and criminal charges were laid against the appellant. The charges were withdrawn on the eve of trial by the Crown. Subsequently, the appellant and his family brought an action for malicious prosecution, libel and slander, among other causes of action, against his niece and her parents.

Some months later, the appellant submitted a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Halton Regional Police Services Board (the Police). The request was for all records in the possession of the Police connected with the police investigation and the charges against him, including arrest reports, synopses, police officers' notebooks and copies of all witness statements.

The Police identified a number of responsive records. Under section 21 of the Act, the Police then proceeded to notify the appellant's niece and her parents, through their counsel, in order to obtain their views on disclosure. Counsel responded on their behalf, opposing disclosure of his clients' personal information.

After receiving these submissions, the Police issued their decision to the appellant. Full access was granted to the press release issued by the Police when charges were laid. Partial access was granted to the occurrence report (including the arrest report and synopses) and police officers' notebooks. Access was denied to videotapes recording three interviews with the appellant's niece.

In their decision letter, the Police relied on the following exemptions in the Act as the basis for denying access to the undisclosed information:

- invasion of privacy - section 14(1)
- law enforcement - section 8(2)(a) and (c).

The appellant filed an appeal of the decision by the Police to deny access to the undisclosed information. His letter of appeal also raises the possible application of section 16 (compelling public interest in disclosure).

In addition, the letter of appeal disputes the assertion by the Police that a number of records do not exist. During mediation, the appellant agreed not to pursue this aspect of the appeal.

This office sent a Notice of Inquiry to the appellant and the Police. Because the records appeared to contain the personal information of the appellant, the Notice of Inquiry raised the possible application of sections 38(a) and 38(b) of the Act. These sections provide exemptions which may apply to records containing an individual's own personal information.

In response to the Notice of Inquiry, representations were received from both parties.

The records at issue consist of the video recordings of three interviews with the appellant's niece, the undisclosed parts of the occurrence report, and the undisclosed parts of two police officers' notes.

DISCUSSION:

INVASION OF PRIVACY

Section 2(1) of the Act defines personal information, in part, as "recorded information about an identifiable individual ...". I have reviewed the records to determine whether they contain personal information and, if so, to whom the personal information relates.

I find that each of the records at issue contains personal information of the appellant. The records also contain personal information of the appellant's niece and her parents, additional witnesses contacted by the Police, and the appellant's wife and children.

Both sections 14(1) and 38(b) provide exemptions intended to protect personal privacy. However, neither section 14(1) nor 38(b) can apply to information in a record which is exclusively the personal information of the requester (in this case, the appellant). I find that one passage from the notes of one of the police officers involved in this case consists of such information. I have marked this passage in blue on a copy of the relevant page, which is being sent to the Freedom of Information and Privacy Co-ordinator for the Police with a copy of this order. This passage is **not** exempt under section 14(1) or 38(b).

I will now consider the remaining undisclosed information in the records.

Where, as in this case, the records contain the personal information of the individual who made the request, section 14(1) does not apply. Rather, in such a case, the "invasion of privacy" exemption to consider is section 38(b) (Order M-352).

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

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 against disclosure can be overcome is where the personal information falls under section 14(4) 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 institution must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The appellant submits that the disclosure of some withheld information would not be an unjustified invasion of personal privacy because he was allowed to review this material (but not to make photocopies) as part of pre-trial disclosure to him. However, because copies may not be made in connection with pre-trial disclosure, the latter mechanism is very different from disclosure under the Act. In the circumstances of this appeal, I find that pre-trial disclosure does not mean future disclosure under the Act would not be an unjustified invasion of privacy. Therefore, I do not agree with this submission.

The Police submit that the presumed unjustified invasion of privacy in section 14(3)(b) 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.

In this regard, the appellant, in his letter of appeal, submits that:

> disclosure of the third party information "is necessary ... to continue the investigation", namely for the purpose of pursuing criminal charges against those responsible for initiating the original "investigation" ...

In my view, an investigation of the conduct of the appellant's niece and her parents with respect to possible criminal liability arising from the appellant's niece's allegations would not be a "continuation" of the original investigation of the appellant for the purposes of section 14(3)(b). Therefore, I do not agree with this submission.

I am satisfied that the information at issue was "compiled and is identifiable as part of an investigation into a possible violation of law", and therefore it meets the requirements of section 14(3)(b). Accordingly, I find that this presumption applies.

As noted above, the only way such a presumption can be rebutted is if section 14(4) or 16 applies. This interpretation is based on the decision of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767.

The information in the records is not information of the type described in section 14(4), and that provision does not apply.

Section 16 of the Act 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 his representations, the appellant submits as follows, with respect to the application of section 16:

> There is a compelling public interest in ensuring that persons who have committed offences such as [the appellant's niece] should not be allowed to hide behind the [Act].

In this regard, the appellant's representations also refer me to his letter of appeal. In that letter, the appellant states that one of the issues to consider is:

> the extent to which third parties **who have made false allegations of criminal misconduct** should be allowed to have "personal information" which is germane to such false allegations withheld from the party who is so falsely accused. [emphasis added]

Later in the letter of appeal, he states:

> The instances of false allegations of sexual assault being made has increased to absurd proportions and in many cases is the easiest crime to falsely allege and in most cases difficult to disprove. If access to whatever information does remain in the hands of the institution is granted in the instant case, and other similar cases, then the instances of false reporting of sexual offences will most likely be lessened ...

The appellant goes on to argue that reduced false allegations of sexual misconduct "... will result in a savings in resources available to both the Ontario Legal Aid Plan and to Childrens Aid Societies ...".

The appellant enclosed newspaper articles and other documentation in support of these submissions.

An analysis of the appellant's submissions with respect to section 16 makes it clear that, in a fundamental way, they are based on his assertion that his niece's allegations are false. In my view, this is not established by the Crown's decision to withdraw the charges against the appellant. While it is true that, in our system of justice, a person is presumed innocent until proven guilty, and therefore the appellant is entitled to be presumed innocent, I have not been provided with sufficient facts or argument to justify a conclusion that his niece's allegations are, in fact, false.

Therefore, I find that the factual basis for the appellant's section 16 claim is not established. Moreover, even if I were satisfied that this factual basis were established, I would find that the appellant's interest in disclosure is a private one relating to his lawsuit and his desire to clear his name, and that a compelling public interest in disclosure of these records has not been established. For these reasons, I find that section 16 does not apply.

Because the presumption in section 14(3)(b) has not been rebutted, I find that disclosure of the withheld information (except the passage from the officer's notebook which I have highlighted

in blue on the copy being sent to the Freedom of Information and Privacy Co-ordinator with a copy of this order, as described above) would constitute an unjustified invasion of personal privacy, and the exemption in section 38(b) applies.

In his representations, the appellant has expressed his frustration in dealing with "Police, Crown and bureaucratic bodies involved in the administration of 'justice' in the Province of Ontario". No doubt my decision to uphold the application of the section 38(b) exemption to a substantial amount of material will also frustrate the appellant. However, my role is not to redress the appellant's frustration, but to decide whether the withheld information is exempt based on the considerations outlined in the Act.

In this regard, I would draw the appellant's attention to the provisions of section 51 of the Act, which states:

> (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
>
> (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

This provision indicates that, for the purposes of his lawsuit, the appellant's rights to obtain discovery or to require production of documentary evidence are preserved, whether or not he is entitled to access under the Act.

LAW ENFORCEMENT/DISCRETION TO DENY REQUESTER'S OWN INFORMATION

As previously indicated, section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.
Section 38(a) of the Act gives the Police the discretion to deny access to records containing a requester's own personal information where certain listed exemptions, including section 8, would otherwise apply. The Police claim that sections 8(2)(a) and 8(2)(c) apply to the undisclosed information.

I have already exempted most of the withheld information under section 38(b). The exception is the part of the officer's notebook highlighted in blue on the copy of the relevant page which is being sent to the Freedom of Information and Privacy Co-ordinator with a copy of this order. In this discussion, I will only consider this highlighted information, which I have not previously found to be exempt.

In order to determine whether section 38(a) applies to that information, I will consider whether it qualifies for exemption under section 8(2)(a) or (c).

Sections 8(2)(a) and (c) state:

> A head may refuse to disclose a record,

> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
>
> (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability.

With regard to section 8(2)(a), one of the fundamental requirements is that the record must be a "report". In that regard, the definition of the word "report" in Order 200 is relevant. In that order, then Assistant Commissioner Tom Wright stated:

> The word "report" is not defined in the Act. However, it is my view that in order to ... be a report, a record must consist of **a formal statement or account of the results of the collation and consideration of information**. Generally speaking, results would not include mere observations or recordings of fact.

I agree with this interpretation. The record under consideration here is part of a police officer's notebook. In my view, this record does not qualify as a "report" because it is not a formal statement or account of the results of the collation and consideration of information; if anything, it is a recording of fact, and fits squarely within the exclusion articulated in the definition I have just quoted.

Since a record which is not a report cannot be exempt under section 8(2)(a), I find that the passage under consideration here does not qualify for exemption under this section.

I will now turn to section 8(2)(c). Despite the fact that the appellant has already launched a lawsuit in respect of the accusations against him, I find that, with respect to the particular passage under consideration here, it has not been established that disclosure could reasonably be expected to expose the author or any individual mentioned in this passage to civil liability. Therefore, I find that this passage does not qualify for exemption under section 8(2)(c).

As neither section 8(2)(a) nor (c) applies to this information, it is not exempt under section 38(a). As no other discretionary exemptions have been claimed, and no mandatory exemptions apply, this information should be disclosed.

ORDER:

1. I uphold the decision of the Police to deny access to the undisclosed parts of the records at issue, except the passage from a police officer's notebook highlighted in blue on a copy of the relevant page which is being sent to the Freedom of Information and Privacy Co-ordinator for the Police with a copy of this order.

2. I order the Police to disclose the passage from a police officer's notebook highlighted in blue on a copy of the relevant page which is being sent to the Freedom of Information and Privacy Co-ordinator for the Police with a copy of this order, by sending a copy to the appellant on or before **April 26, 1996** but not earlier than **April 22, 1996**.

3. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the record which is disclosed to the appellant in accordance with Provision 2.

Original signed by: March 22, 1996
John Higgins
Inquiry Officer