



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1623

Appeal MA-020264-1

Durham Regional Police Services Board



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NATURE OF THE APPEAL:

The Durham Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified incident involving the requester, including any videotapes relating to this matter.

The Police located the responsive records and granted partial access to them. Access to the remaining records was denied on the basis that they were exempt from disclosure under the following exemptions found in the *Act*:

- Law enforcement report/discretion to refuse access to requester's own information – sections 8(2)(a) and 38(a);
- Invasion of privacy – section 38(b), with reference to the consideration listed in section 14(2)(f) (highly sensitive information) and the presumption in section 14(3)(b) (information compiled as part of a law enforcement investigation).

The requester, now the appellant, appealed the Police's decision. Subsequent to the filing of the appeal, the Police disclosed six additional records to the appellant. During the mediation stage of the appeal process, the appellant narrowed the scope of the appeal to include only two Supplementary Reports and the videotaped statement of another individual (the affected person). As a result of mediation, the Police indicated that they were no longer relying on the discretionary exemptions found in section 8(2)(a) and 38(a) of the *Act* for the remaining records and their application is no longer an issue in this appeal.

As further mediation was not possible, the appeal was moved to the adjudication stage of the process. I decided to seek the representations of the Police initially, as they bear the onus of demonstrating the application of the exemptions claimed to the records. The Police submitted representations, the non-confidential portions of which were shared with the appellant, along with a copy of the Notice of Inquiry. The appellant provided me with oral submissions, as he was unable to make written representations due to a medical problem.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

The personal privacy exemption in section 38(b) applies only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*. "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 the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The Police submit that the Supplementary Reports and the videotape contain the personal information of both the appellant and the affected person within the meaning of section 2(1). Based on my review of the records, I find that they contain personal information relating to both the appellant and the affected person as that term is defined in section 2(1)(h).

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 exceptions to this general right of access.

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester 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.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [See Order PO-1764]

If none of the presumptions in section 14(3) applies, the institution 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 both the Supplementary Reports and the videotape was gathered and formed part of its investigation into allegations of domestic assault made by the affected person against the appellant. As a result, the Police submit that the information contained in the records falls within the ambit of the presumption in section 14(3)(b) of the *Act*. The Police also rely on the consideration listed in section 14(2)(f) of the *Act*.

The appellant submits that he requires the information contained in the videotape and the Supplementary Reports in order to determine whether or not to pursue an action against the

affected person for defamation. This raises the possible application of the consideration listed in section 14(2)(d) of the *Act*.

These sections read:

- (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
 - (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
 - (f) the personal information is highly sensitive;
- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
 - (b) 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;

I find that the personal information contained in the records was compiled as part of an investigation undertaken by the Police into a possible violation of law under the *Criminal Code* and that this information falls within the ambit of the presumption in section 14(3)(b). As noted above, the only way in which a presumption against disclosure may be overcome is if the exceptions listed in section 14(4) apply or if the information is subject to the “public interest override” in section 16. I find that none of the exceptions in section 14(4) apply and that the appellant has not raised the possible application of section 16 to the records.

The Divisional Court’s decision in *John Doe* makes it clear that once a presumption has been found to apply to the personal information contained in a record, it cannot be rebutted by any of the considerations listed in section 14(2), either alone or taken together. As a result, I find that the Supplementary Reports and the videotape which comprise the records at issue in this appeal qualify for exemption under section 38(b).

Based on the circumstances under which the information was obtained by the Police and the contents of the records themselves, I find that the Police have properly exercised their discretion under section 38(b) in favour of the non-disclosure of the information contained in the records.

ORDER:

I uphold the decision of the Police to deny access to the records.

Original signed by:
Donald Hale
Adjudicator

March 19, 2003