ORDER MO-2035

Appeal MA-050299-1

Ottawa Police Services Board

NATURE OF THE APPEAL:

The Ottawa Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (*the *Act)* for access to information relating to the investigation of an alleged assault on the requester. The request specified that it was for all information including occurrence reports, investigation reports, test results, witness statements and all other documents relating to the alleged assault.

The Police responded to the request by identifying the responsive records and granting partial access to them. Access was denied to records or portions of records pursuant to sections 14(1) and 38(b) (invasion of privacy) and section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(l) (facilitate commission of an unlawful act).

The requester (now the appellant) appealed the Police's decision.

During mediation, two issues relating to the existence of additional responsive records were resolved. In addition, issues concerning the application of sections 38(a) and 8(1)(l) to a Police 10 code were also resolved, and section 8(1)(l) is no longer an issue in this appeal.

Also during mediation, the appellant identified that she continued to seek access to transcripts or copies of her videotaped interview conducted by the Police, as well as the remaining portions of the identified records. In an effort to obtain consent to disclose some of the records at issue, the mediator notified two of three individuals identified in the records (the affected parties). One affected party provided a written consent to the mediator to disclose his personal information to the appellant.

Furthermore, during mediation, the appellant indicated that she had laid a private information against one of the affected parties. In light of this legal action, the Police issued a supplementary decision letter, advising the appellant that the application of the discretionary exemptions in sections 8(1)(f) (right to fair trial) and 38(a) of the *Act* were now raised for all the records at issue in this appeal.

Finally, during mediation the Police located an additional responsive record, consisting of a videotaped statement of one of the affected parties. The Police denied access to this additional responsive record pursuant to section 38(a) in conjunction with section 8(1)(f), and sections 38(b) and 14(1).

The appellant indicated that she took issue with the late raising of the additional exemptions. She also identified that she continued to appeal the decision to deny access to the severed portions of the records and to all the withheld records, including the videotapes.

No further mediation was possible, and this appeal was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Police, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the complete representations of the Police, to the appellant.

The appellant (through her representative) also provided representations, in which she addressed the issues raised. She also identified that the private information sworn by her against one of the affected parties has now been withdrawn. In light of this withdrawal, the appellant takes the position that the discretionary exemptions provided by sections 38(a) and 8(1)(f) no longer apply to the information at issue.

I then shared the appellant's representations with the Police. I invited the Police to provide additional representations by way of reply, and in particular to address what impact, if any, the withdrawal of the private information has on the issues raised in this appeal.

The Police provided reply representations in which they agree with the appellant that, now that the private information against one of the affected parties has been withdrawn and there is no proceeding before a court, sections 38(a) and 8(1)(f) no longer apply. Accordingly, those exemptions are no longer at issue in this appeal.

In addition, in light of the fact that the discretionary exemptions raised by the Police during the mediation process are no longer at issue, it is not necessary for me to review the issue of the late raising of discretionary exemptions in the circumstances of this appeal, and I decline to do so.

RECORDS:

The records remaining at issue consist of the following:

- the undisclosed records or portions of records consisting of Police investigation reports, occurrence reports, witness statements and officers' case notes;
- the appellant's videotaped interview;
- an affected party's videotaped interview.

DISCUSSION:

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. That term is defined in section 2(1) as follows:

> "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 where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if 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].

The Police take the position that the information contained in the records is the personal information of the appellant and affected parties, as defined by section 2(1) of the *Act*. The appellant agrees that the information is the personal information of the appellant and other individuals.

I concur, and find that the records contain the personal information of the appellant and other identifiable individuals. The records relate to an alleged assault against the appellant and I find that all of the records relate to her. The records also contain the personal information of the affected parties as they include their names, ages (paragraph (a)), addresses and phone numbers (paragraph (c)), and their names along with other personal information relating to them (paragraph (h)).

INVASION OF PRIVACY

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, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the Police must look at the information and weigh the

appellant's right of access to her own personal information against the affected persons' right to the protection of their privacy. If the Police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the Police the discretion to deny access to the appellant's personal information.

In determining whether the exemptions in sections 14(1) or 38(b) apply, 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 affected person's personal privacy.

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 from disclosure under section 38(b).

Section 14(1)(a)

Section 14(1) requires an institution to deny access to personal information of someone other than a requester unless one of the exceptions listed in this section are present. One such exception is section 14(1)(a), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

As noted earlier, one of the affected parties provided the mediator with his signed consent to release his personal information to the appellant.

In this appeal, the consent provided by the affected party is sufficient to justify the disclosure to the appellant of certain personal information relating to the affected party who provided the consent. Specifically, I find that section 14(1)(a) applies to this affected person's name, address phone numbers, and other information that relates directly to him, which is contained on portions of pages 1 and 24 of the Records. Accordingly, I find that the disclosure of this affected party's personal information to the appellant is not an unjustified invasion of privacy under section 38(b) and the information should be disclosed. I have provided the Police with a highlighted copy of these two pages of the records with this order, which indicates the information to be disclosed.

In addition, although it may also appear that the consent would be sufficient to disclose pages 22 and 23 of the records, which is the consenting affected party's statement, this is not the case because the affected party's statement includes not only his own personal information, and the appellant's, but also the personal information of the other two affected parties.

Former Assistant Commissioner Mitchinson faced a similar situation in Order MO-1868-R, in which a request was made for statements made by certain affected parties, and a number of those affected parties consented to the disclosure of their records. He stated:

> … the Police declined to release the statements for which consent had been obtained on the basis that they also contain the personal information of other individuals, including the person who died in the accident.
>
> It might appear at first blush that these consents would be sufficient to justify their disclosure to the appellant. However, I have determined that, in addition to the witnesses, all of the statements include the "personal information" of the individual who died in the accident, and some contain personal information of other individuals involved in the accident. For obvious reasons, consent from the deceased individual is not an option in these circumstances, and the other involved individuals have not consented. For these reasons, the exception in section 14(1)(a) cannot apply.

I adopt the approach to this issue taken in MO-1868-R and apply it in this appeal. Accordingly, the exception in section 14(1)(a) does not apply to the affected party's statement (pages 22 and 23). I will, however, review the disclosure of this statement under my discussion of the "absurd result" principle, below.

Section 38(b)

None of paragraphs (a) to (e) of section 14(1) apply to the other information in the records. Therefore, I will consider whether its disclosure would constitute an unjustified invasion of personal privacy under section 38(b).

Section 14(2) provides some criteria for the Police 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; and 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 section 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

The Police take the position that disclosure of the information in the records is presumed to constitute an unjustified invasion of privacy under the presumption in section 14(3)(b) of the *Act* which reads:

> 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 state as follows in support of their position that the records were compiled and are identifiable as part of an investigation into a possible violation of law for the purpose of section 14(3)(b):

> The records at issue contain information that is considered to be the personal information of other individuals, as well as the appellant …. This information was collected for the sole purpose of interviewing all parties and ascertaining if charges are warranted.
>
> The personal information of the individuals was compiled by members of the Ottawa Police Service during an investigation into an alleged assault and was used to determine whether an offence under the Criminal Code of Canada had been committed. The information contained in these records was used to investigate this incident …

The appellant's representative does not take issue with the Police's position that section 14(3)(b) applies to the records.

On my review of the records at issue in this appeal, I am satisfied that they were compiled by the Police in the course of their investigation of the alleged assault. As a result, the personal information contained in the records was compiled and is identifiable as part of the Police investigation into a possible violation of law under section 14(3)(b).

The disclosure of the remaining records is, therefore, presumed to constitute an unjustified invasion of privacy under section 14(3)(b). Accordingly, subject to my treatment of the absurd result principle set out below, the remaining records are exempt from disclosure under section 38(b) of the *Act*.

The section 38(b) exemption is discretionary and permits the Police to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

Upon review of all of the circumstances surrounding this appeal and the representations of the Police on the manner in which they exercised their discretion, and subject to the absurd result discussion below, I am satisfied that the Police have not erred in the exercise of their discretion to decline to disclose the records under section 38(b).

Absurd result

The appellant takes the position that the absurd result principle should apply to some of the records at issue in this appeal. She states:

> … the appellant submits that since she originally supplied the information to the Police which she now seeks, the information should not be found to be exempt

> under section 38(b), as this would produce as absurd result clearly inconsistent with the purpose of the exemption.

The appellant then refers to previous orders of this office, including orders M-444, M-451 and MO-1680, and states that any information pertaining to third parties provided by the appellant, or clearly in the appellant's knowledge, ought not to be subject to the exemption on the basis that this would lead to an absurd result.

In addition, the appellant argues that, based on Order MO-1855 (later reconsidered by Order MO-1868-R), the absurd result principle should also apply to the statement of the affected party who consented to the disclosure of his statement to the appellant. She states:

> Moreover … at least one of the affected persons has already consented to the release of their personal information, and/or information they provided to the Police, and accordingly this information should also be released in its entirety. As was stated in Order MO-1855, even where an individual consents to the release of a statement that provides information about *other* individuals who have *not* consented, the consent of the witness providing the statement alone *will trigger the absurd result principle* with respect to the information that witness has provided about *themselves and other affected individuals*. This is because the consent of an affected party to grant a request cannot be meaningfully distinguished from the affected party providing a copy of his or her statement to the requester directly, or themselves requesting a copy of their own statement and providing that to the requester.

Analysis

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]

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].

In most cases, the absurd result principle has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b). It has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the

Act and section 14(2)(a) of the *Freedom of Information and Protection of Privacy Act*) have been claimed for records which contain an appellant's personal information (Orders PO-1708 and MO-1288).

In Order MO-1868-R, former Assistant Commissioner Mitchinson also applied the absurd result principle to witness statements made by individuals who consented to the disclosure of their statements. The relevant portion of that order reads as follows:

> To date, this office has not applied the absurd result principle to a situation where an individual has consented to disclose his or her witness statement which may contain personal information of individuals other than the witness and the requester. Having carefully considered the various interests at play in this type of situation, I have concluded that the principle should be extended to this type of situation.
>
> Order M-444 and other subsequent similar orders have made it clear that if an individual makes a formal request for access under the *Act* to his or her statement made as a witness to a police investigation, that statement will be provided to the requester, regardless of the fact that it contains personal information of other individuals. These orders are saying, in effect, that denying a requester access to information that originated with that same person cannot be justified on the basis that some parts of the statement may relate to other individuals as well. This office has applied the absurd result principle to that set of circumstances, and institutions routinely disclose statements of this nature in response to requests under both the provincial and municipal statutes. This practice reflects a clear balancing of interests in favour of disclosing information that might otherwise be caught by a presumption in section 14(3)(b), on the basis of what Adjudicator Cropley described as a "higher" right of access to one's own personal information.
>
> What I am talking about in the current appeal is extending the principle one step further. In my view, if a witness consents to disclose his or her statement to a requester, barring exceptional circumstances, that alone should be sufficient to trigger the absurd result principle. While I acknowledge that this situation differs from the case where the information in the statement originates with a requester, in my view, it is a difference without a meaningful distinction. From a practical perspective, in many cases a consenting witness would have a copy of his or her statement and could simply pass it on to a requester. If no copy is in the possession of a witness, that individual could make a request under the *Act* for the record, which would be granted, and then simply provide it to the requester, without somehow raising any concerns regarding the privacy protection provisions in Part II of the *Act*. I can see no useful purpose in creating hurdles to a right of access that are not rooted in a legitimate concern for privacy protection. In my view, barring exceptional circumstances that are clearly not present here, I do not accept that the Legislature could have intended to cloak all witness statements with the highest degree of privacy protection inherent in a section

> 14(3) non-rebuttable presumption in circumstances where the author of the statement has expressed a clear intention to share the content of the statement with a requester.
>
> Accordingly, I find that applying the section 14(3)(b) presumption as the sole basis for denying access to witness statements where the witness has consented to disclosure would produce a manifestly absurd result.
>
> Different considerations apply in circumstances where consent has not been obtained. The rationale for applying the absurd result principle is not present in these circumstances, and the presumption in section 14(3)(b) as it applies to witness statements where no consent is present is sufficient to establish the requirements of section 14(1).

I adopt the approach taken to the absurd result principle as set out in the orders referred to above. Applying this principle to the circumstances of this appeal, in which the sole basis for denying access to the remaining records is that the disclosure of the records would constitute an unjustified invasion of the privacy of the affected parties, I find that denying access to the appellant's own statements made to the Police would lead to an absurd result. Although I appreciate the sensitivity of the subject matter of the allegations resulting in the creation of the records in this appeal, I am satisfied that denying the appellant access to information that originated with her cannot be justified on the basis that some parts of the statement may relate to other individuals as well. I find that because the information was provided to the Police by the appellant herself, its disclosure to her would not result in an unjustified invasion of the personal privacy of any other individuals. Accordingly, I am satisfied that the appellant is entitled to access to her videotaped statement, in its entirety, as well as to the portions of her signed statement which were severed from the copy provided to her (pages 20 and 21 of the records).

With respect to the statement of the affected party who consented to the disclosure of his statement to the appellant, I follow the approach taken by former Commissioner Mitchinson in Order MO-1868-R. I find that this statement should also be provided to the appellant. To deny access to it on the basis that its disclosure would constitute an unjustified invasion of other individuals' privacy, where the affected party who made the statement has consented to its disclosure to the appellant, would lead to an absurd result.

Again, I am mindful of the sensitivity of the subject matter of the records. On my review of the statement of the affected party who provided the consent, I find that it includes much information about the affected party himself, as well as information about the appellant, but that it contains little direct information about the other affected parties in this appeal. In the circumstances, I am satisfied that the "exceptional circumstances" referred to by former Assistant Commissioner Mitchinson in MO-1868-R do not exist in this appeal, and I find that the absurd result principle extends to the signed statement of the affected party.

Accordingly, I will order that the appellant's own videotaped statement, the severed portions of her signed written statement, and the signed statement of the affected party who provided

consent to the disclosure of his personal information, be disclosed to the appellant, on the basis of the absurd result principle.

Finally, there is some overlap in the information contained in the records which I have found should be disclosed on the basis of the absurd result principle (the two signed statements and the appellant's videotaped statement) and some other information contained in the severed records which has not been disclosed. In the circumstances, and due to the nature of the information which is to be disclosed as a result of this order, it is not necessary for me to review the severed information in detail to determine which portions of it reflect the information contained in the disclosed records.

ORDER:

1. I order the Police to provide the appellant with copies of the following records or parts of records by sending her a copy on or before April 14, 2006:

   - Pages 20 – 23 (the unsevered signed statements of the appellant and the consenting affected party)
   - the highlighted portions of pages 1 and 24 (as highlighted in the copy of these pages provided to the Police with a copy of this order)
   - an unsevered copy of the appellant's videotaped statement.

2. I uphold the Police's decision to withhold the remaining records and parts of records from disclosure.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Police to provide me with a copy of the records or parts of records which are disclosed to the appellant pursuant to Provision 1.

Order Signed By March 24, 2006

Frank DeVries