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

ORDER MO-2097

Appeal MA-050395-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the police investigation file relating to an incident which occurred between the requester and another individual (the affected party) on a specified date.

The Police located the responsive records and issued a decision providing partial access, withholding information under the exemptions in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(l) (facilitate commission of unlawful act) and section 38(b) (personal privacy), in conjunction with the presumption in section 14(3)(b) of the *Act*. The Police also indicated that some of the information had not been disclosed as it was not responsive to the request.

The requester (now the appellant) appealed this decision.

During mediation, the appellant's representative confirmed that the non-responsive information and the severances made under section 38(a), in conjunction with section 8(1)(l), could be removed from the scope of the appeal.

Mediation did not resolve the appeal, and it was moved to the adjudication stage of the process.

I sent a Notice of Inquiry to the Police and to the affected party, initially, outlining the facts and issues and inviting representations. The Police and the affected party filed representations in response. I then sent a Notice of Inquiry, with the non-confidential portions of the Police's representations, to the appellant. The confidential representations of the affected party were summarized in the Notice of Inquiry. The appellant also provided me with representations in response to the Notice of Inquiry.

RECORDS:

The records remaining at issue consist of the withheld portions of the Event Details Report, the Supplementary Records of Arrest, and the Police Officers' Notebooks, withheld under section 38(b) (personal privacy), in conjunction with the presumption in section 14(3)(b) of the *Act*.

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].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

The Police submit that the information contained in the records is the personal information of the affected party, as defined in section 2(1) of the *Act*. The appellant submits that the information is personal information which relates to himself and the affected party.

Based on my review of the records, I conclude that they contain the personal information of the appellant and other identifiable individuals, including the affected party. The records include information contained in statements made by both the appellant and the affected party during a police investigation. They include personal information such as names, ages, addresses and phone numbers and other personal information relating to the affected person, the appellant and another identifiable individual.

I will now review whether disclosure of the records to the appellant would constitute an unjustified invasion of privacy under section 38(b) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

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.

Section 38(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

In this case, I have determined that the records contain the personal information of the appellant and other individuals.

Under section 38(b) of the *Act*, where a record contains the 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. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

If the information falls within the scope of section 38(b), that does not end the matter as the institution may exercise its discretion to disclose the information to the requester. In this case, the Police have decided to provide the appellant with partial access to the personal information contained in these records.

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 head to consider in making a determination as to 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(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], though it 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.

In addition, if any of the exceptions to the section 14(1) exemption at paragraphs (a) through (e) applies, disclosure would not be an unjustified invasion of privacy under section 38(b).

In this case, the Police have decided to provide the appellant with partial access to the personal information contained in the records and to deny access to other portions of the records, on the basis that it is exempt under section 38(b), in conjunction with the presumption at section 14(3)(b). The issue for me to decide is whether the Police properly applied the section 38(b) exemption in deciding to withhold portions of the record.

Representations of the parties

The representations of the Police

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;

Because some of the evidence provided to me with respect to these exemptions is contained in the confidential portions of the Ministry's representations, I am not able to discuss them in any greater detail. However, in their non-confidential representations, the Police state:

- the undisclosed information is that of the affected party,
- section 28 of the *Act* "introduces safeguards to the collection of personal information
- they view "the spirit and intent of the *Act* as placing greater responsibility in safeguarding the privacy interests of individuals where personal information is being collected", and
- they "balanced the access interests of the requester with the privacy rights of another person" and decided to deny access to portions of the record.

The representations of the Affected Party

The affected party provided confidential representations, in which she opposed the release of her personal information, relying on section 38(b), in conjunction with the presumptions under sections 14(3)(b) and (d) of the *Act*.

The representations of the Appellant

The appellant (through his representative) stated that "significant portions of the records were redacted, including the affected party's statements to police". The appellant clarified that he does not seek access to the affected party's personal information, specifically her name, address and phone number. The appellant states that he "merely seeks disclosure of the voluntary statements of the affected party [and] that those statements do not constitute personal information as defined by section 2(1) of the *Act*". The appellant directed me to paragraph (e) of the definition of personal information at section 2(1), which includes: "the personal opinions or views of the individual except if they relate to another individual". The appellant submits that the voluntary statements made by the affected party to the Police are about the incident involving the appellant and the affected party. The appellant argues further that because the statements are related primarily to the "conduct of" the appellant, the statements are the personal information of the appellant, and should be disclosed.

The appellant states the exemption at section 38(b) is not applicable because the information is not the personal information of the affected party, rather, it is the personal information of the appellant and, therefore, disclosure would not result in an unjustified invasion of privacy.

Analysis and Findings

I have carefully reviewed the withheld portions of the records and the representations of the parties. I am not persuaded by the representations of the appellant, who emphasizes what he characterizes as the "voluntary" nature of the affected party's statements. The manner in which the affected party's statements were given to police is not, in my view, a relevant consideration. While the statements may be about the appellant's conduct, they are not solely the personal

information of the appellant, as he suggests. The statements also contain the personal information of the affected party.

The records at issue in this appeal were compiled and are identifiable as part of the Police investigation into a possible violation of law, an assault. Under section 14(3)(b), as noted, the disclosure of that personal information is *presumed* to constitute an unjustified invasion of the personal privacy of the individuals, to whom it relates. Once that presumption has been made, it cannot be rebutted unless the personal information 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.

I agree with the appellant that the information in the records concerning him should be disclosed to him. I have carefully reviewed the records and, in my view, the Police have disclosed all of the information that relates solely to the appellant.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under any of the *Act's* discretionary exemptions.

Because section 38(b) is a discretionary exemption, I must also review the Police's exercise of discretion in deciding to withhold the information.

The Police set out the factors they relied upon in deciding to exercise their discretion, in their representations. Based on my review of those submissions, I find that the Police properly exercised their discretion in refusing to disclose the information at issue under section 38(b). They took into account and appropriately balanced relevant considerations, including the appellant's right of access and the interests section 14(3)(b) seeks to protect. I also find that they did not rely on irrelevant considerations.

The appellant makes "in the alternative" arguments, should I find that section 38(b) applies to exempt disclosure, regarding disclosing the records either under section 16 (compelling public interest) and/or the absurd result principle. I will now address each in turn.

COMPELLING PUBLIC INTEREST

The appellant submits that there is a compelling public interest in the disclosure of the records requested under section 16 that "clearly outweighs the purpose of the [privacy] exemption in section 14(1). He provides the following reasons:

- The "guiding principles of the *Act*", specifically that information should be "available to the public … individuals should have a right of access to their own personal information and that the exemptions from the right of access should be limited and specific".

- The parties are well known to each other and that "there is no personal information contained in the records that [are] not already known to the Appellant nor would disclosure of the records reveal the identity of the affected party".

- The affected party's statements to Police resulted in a number of consequences to the appellant. The appellant "has never seen the statement of the affected party … [and] … requires disclosure … to properly defend the claim against him". [emphasis in original]

- The appellant states that had the charges not been withdrawn against him he would have been entitled to full disclosure of the records, including the statements of the affected party. The appellant submits that his right to disclosure has been recognized as a "constitutional right" under section 7 of the *Canadian Charter of Rights and Freedoms*. The appellant states that the rationale for this principle is applicable in the present case, even though criminal charges were withdrawn.

- The affected party "voluntarily provided a direct statement to the police that implicated the appellant in criminal activity". The appellant states that "it can only be assumed that the affected party intended her statement to be relied upon by police, acted upon by the police and, ultimately, made public…"

- It is not in the public interest to "protect the personal information contained" in the records.

- The appellant will not "improperly [rely] upon or disseminate the information in the records" because the claim he seeks to defend himself against is in the United States.

- The disclosure of the information would "increase public confidence in the operations" of the police because "secrecy can only serve to undermine public confidence".

- The information is not "significant or sensitive" to the police. The appellant states that the affected party's privacy interest is "minimal".

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 order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the information contained in the records and the

Act's central purpose of shedding light on the operations of government [Order P-984]. 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 the citizenry about the activities of their government, 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 [Order P-984].

A public interest does not exist where the interests being advanced are essentially *private* in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of a more general application, a public interest may be found to exist [Order MO-1564]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

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. 488 (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, 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]

- 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]

I do not agree that section 16 applies in the circumstances of this appeal to override the application of the section 38(b) exemption. In my view, the interest identified by the appellant is a private interest, and involves a civil action brought against the appellant in the United States. Other than the arguments provided by the appellant that the appellant may have been wrongly accused, I have not been provided with sufficient evidence to indicate that a strong public interest exists in this matter. [See also, for example, Order PO-1816]

I agree that the public generally has an interest in the proper administration of justice, and an interest in ensuring that individuals who are wrongly accused of crime have the ability to right that wrong. However, in the circumstances of this appeal, I do not find that there exists a public interest in those portions of the records remaining undisclosed.

Additionally, I acknowledge that the appellant's right to disclosure in criminal matters has been recognized as a "constitutional right" under section 7 of the *Canadian Charter of Rights and Freedoms*. I do not agree with the appellant that the rationale for this principle is applicable in the present case, even though criminal charges were withdrawn. The disclosure under this *Act* is a completely different disclosure mechanism from that available in the context of a criminal proceeding.

Having carefully reviewed the evidence, I do not find that there is a compelling public interest in the disclosure of the records that "clearly outweighs the purpose of the [privacy] exemption in section 14(1).

I will now review the disclosure of the records under my discussion of the "absurd result" principle, below.

Absurd result

The appellant takes the position that the absurd result principle should apply to the records at issue in this appeal. According to the appellant, because he contacted the police, the affected party made statements to police which resulted in his arrest, being charged and detained in custody. The affected party is now using those statements in a civil proceeding she has begun against the appellant in the United States. The appellant argues that much of the information contained in the record is within his knowledge and that he is "merely seeking the specific detail that is contained within". The appellant also argues that disclosure would not violate the affected party's "privacy interest" because the records do not contain her personal information.

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].

I adopt the approach taken to the absurd result principle as set out in the orders referred to above.

However, in 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 party, I do not find that denying access to the affected party's statements made to the Police would lead to an absurd result. Additionally, based on the evidence in the present appeal, I find that disclosure of the records would be inconsistent with the purpose of the *Act*. In my view, regardless of whether the appellant may be aware of much of the information and whether the affected party and appellant are well known to each other, the section 14(3)(b) presumption still applies. Keeping in mind the two fundamental purposes of the *Act*, the protection of privacy of individuals, as well as the particular sensitivity inherent in records compiled in a law enforcement context, the appellant has not persuaded me that the absurd result applies in the present appeal.

ORDER:

I uphold the decision of the Police.

October 11, 2006

Beverley Caddigan
Adjudicator