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

# ORDER MO-2388

## Appeal MA07-401

## Durham Regional Police Services Board

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## NATURE OF THE APPEAL:

The Durham Regional Police Services Board (the Police) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to a police matter involving the requester and another individual (hereafter described as the Complainant). The request was for the following information:

1. A copy of complaint of the Complainant dated [specific date].

2. A statement as to whether the Complainant requested charges to be laid.

3. A copy of a Police officer's statement to the Complainant.

4. A copy of the Police officer's notes.

5. Details of any further contacts (including complaints) between the Complainant and the Police after [specific date], including officer's notes and officer's response.

6. A Copy of officer's notes detailing all conversations and meetings with the requester that took place after a specific date.

7. Details of any information about the incident communicated by the Police to third parties (including the requester's employer and its investigator), after a specific date, including dates and purpose, officer's notes and the authority for its disclosure under the *Act*.

8. Specific reasons why the Police concluded that either the requester's employer or its investigator "have any status as "law enforcement" under Freedom of Information legislation. The requester also asked the Police to "indicate the nature of [the] officer's verification of their credentials as law enforcement trained individuals."

9. Details of any request by the Complainant for service of a summons by the Durham Regional Police upon the requester under section 810 of the *Criminal Code*.

The Police identified records that were responsive to the request and granted partial access to them. The Police relied on the discretionary exemption in section 38(a) of the *Act* (discretion to refuse access to requester's own information), in conjunction with section 8(2)(a) (law enforcement report); and the discretionary exemption in section 38(b) (personal privacy) with reference to the presumption in section 14(3)(b) (investigation into possible violation of law) to deny access to certain portions of the records it withheld. The Police advised that other portions of the records contained information that was not responsive to the request. In addition, relying on sections 8(3) and 14(5) of the *Act*, the Police refused to confirm or deny the existence of a record that is responsive to items five and seven of the request. Finally, the Police advised that

no records exist that are responsive to item eight of the request.

The requester (now the appellant) appealed the decision.

At mediation, the appellant advised that he is not pursuing access to the non-responsive portions of the records. As a result, that information is no longer at issue in this appeal. In addition, the appellant accepted the position of the Police that no records exist that are responsive to item eight of the request. Accordingly, that part of the request is also no longer at issue in this appeal. Also at mediation, the Police maintained their refusal to confirm or deny the existence of records responsive to items five and seven of the request. However, the Police clarified that if the records did exist, they would qualify for exemption under the discretionary exemption in section 38(b) of the *Act*, with reference to the presumption in section 14(3)(b).

Mediation did not resolve the matter and it was moved to the adjudication stage of the appeals process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Police, initially. The Police provided representations in response to the Notice. A Notice of Inquiry, along with the non-confidential representations of the Police was then sent to the appellant, who provided representations in response. Because I determined that the appellant's representations raised issues to which the Police should be given an opportunity to reply, I invited and received submissions from the Police by way of reply.

## RECORDS:

The records consist of a General Occurrence Report and police officer's notes. At issue in this appeal are the withheld portions of the records as well as the Police's refusal to confirm or deny the existence of records responsive to items five and seven of the request.

### PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" in accordance with section 2(1) of the *Act* and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, 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,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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.

To qualify as "personal information", it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

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].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2.1 and 2.2. These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2.1 modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2.2 further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition

in section 2(1).

In my view, all of the records that the Police identified as responsive to the request contain the personal information of the appellant. This information qualifies as his personal information because it is recorded information about him that includes his address and telephone number (paragraph (d)), or contains his name along with other personal information about him (paragraph (h)).

The responsive records also contain the personal information of other identifiable individuals, including the Complainant. This information qualifies as their personal information because it contains their address and telephone numbers (paragraph (d)), or contains their names along with other personal information about them (paragraph (h)).

That said, the Police withheld some information at page seven of the General Occurrence Report that, in my view, is solely the appellant's personal information. I have highlighted this information in a copy of the General Occurrence Report provided to the Police with this order.

## DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38(a) provides a number of exemptions from this right. It reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

## LAW ENFORCEMENT

The Police rely on section 38(a) in conjunction with section 8(2)(a) of the *Act*, to withhold access to information in the General Occurrence Report.

Section 8(2)(a) states:

> A head may refuse to disclose a record,
>
> > 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.

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I]. The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

Generally, and despite the appearance of the word "report" in document names, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1120 and M-1141. In Order M-1109, former Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

> An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".

I agree with this approach and adopt it here. On my review of the General Occurrence Report, I am satisfied that it also does not meet the definition of a "report" under the *Act*, in that it consists of observations and recordings of fact rather than formal, evaluative accounts. The content of this record is descriptive and not evaluative in nature.

As a result, I find that the General Occurrence Report does not fall within section 8(2)(a). Accordingly, I find that the discretionary exemption at section 38(a) of the *Act* does not apply to it.

**PERSONAL PRIVACY**

The Police take the position that the responsive information withheld from the General Occurrence Report and police officer's notes qualifies for exemption under section 38(b).

Section 38(b) reads:

> 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.

Accordingly, under section 38(b) where a record contains personal information of both the appellant and another identifiable individual, and disclosure of that information would "constitute an unjustified invasion" of that other individual's personal privacy, the Police may refuse to disclose that information to the appellant.

Despite this, the Police may exercise their discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

The factors and presumptions in sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met.

Section 14(1) sets out certain exceptions to the general rule against the disclosure of personal information that relates to an individual other than the requester. 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). I find that none of the paragraphs in section 14(1) would apply to the personal information in the General Occurrence Report and police officer's notes.

Section 14(2) provides some criteria for the institution to consider in making a determination whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met: 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 under section 14(3), 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 (*John Doe*)] 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 exemption. [See Order PO-1764]

As I stated above, the Police withheld some information at page seven of the General Occurrence Report that, in my view, is solely the appellant's personal information. Disclosing this information to the appellant would not, therefore, constitute an unjustified invasion of another individual's personal privacy under section 38(b). I have already found that section 38(a) in conjunction with section 8(2)(a) does not apply to this information. As a result, I will order that this information be disclosed to the appellant. I have highlighted this information on page seven of the General Occurrence Report that I have provided to the Police along with a copy of this order.

***Section 14(3)(b)***

Section 14(3)(b) reads as follows:

> 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 submit that the information in the records that they obtained on or before the date their investigation was closed is personal information that was compiled and is identifiable as part of an investigation into a possible violation of law. As a result, they argue that disclosure would result in a presumed unjustified invasion of personal privacy under section 14(3)(b). The appellant submits that the personal information is relevant to a fair determination of his rights, referring to the factor favouring disclosure at section 14(2)(d) of the *Act*.

I find that section 14(3)(b) applies in the circumstances of this appeal. I have reviewed the withheld portions of the General Occurrence Report and police officer's notes and I conclude that the personal information in them was obtained on or before the conclusion of the Police investigation was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code*. Whether or not charges are laid does not affect the application of 14(3)(b) [Order PO-1849]. Because this presumption applies, in accordance with the ruling in *John Doe* cited above, I am precluded from considering the possible application of any of the factors or circumstances under section 14(2). This would include any consideration of the factor in section 14(2)(d) that was referred to by the appellant in his representations.

The presumed unjustified invasion of personal privacy at section 14(3)(b) therefore applies to this information. Section 14(4) does not apply and the appellant has not raised the possible application of the "public interest override" at section 16. Accordingly, I conclude that the disclosure of the withheld personal information contained in the severances remaining at issue (aside from the portion that I have already ordered disclosed) would constitute an unjustified invasion of personal privacy. As a result, this information is exempt from disclosure under section 38(b). I now turn to the final issue in this appeal.

## REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

The Police rely on sections 8(3) and 14(5) of the *Act* as the basis for their decision to refuse to confirm or deny whether any records responsive to items five and seven of the request exist.

Item five is a request for the records relating to any further contacts (including complaints) between the Complainant and the Police that took place after the conclusion of the Police investigation.

Item seven is a request for details of any information about the police matter communicated by the Police to third parties (including the appellant's employer and its investigator), after the conclusion of the Police investigation. The appellant asserts that after the police investigation had closed, his employer's investigator spoke to the Police investigating officer. In particular, the appellant refers to a specified date that he believes a conversation took place between his employer's investigator and the Police investigating officer and requests the details of any contact that occurred on that date.

***Section 8(3)***

Under section 8(3) of the *Act* a head may refuse to confirm or deny the existence of a record to which section 8(1) or 8(2) of the *Act* applies. In this case, the Police have not tendered any evidence to establish the application of section 8(1). I have already dismissed the claim that section 8(2) applies. As a result, I find that section 8(3) of the *Act* has no application in this appeal.

***Section 14(5)***

Section 14(5) provides that:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

Section 14(5) gives an institution discretion to refuse to confirm or deny the existence of a record in certain circumstances.

A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339].

Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.
>
> [Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy*

*Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802]

The effect of this interpretation is that the institution may *not* invoke section 14(5) where disclosure of the mere existence or non-existence of the record would not itself engage a privacy interest.

**Part one: disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy**

***Definition of personal information***

Under part one of the section 14(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. Under 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. Records of the nature requested in item five, if they exist, would reveal that the Complainant had been involved with the Police in law enforcement matters. I find that such information, if it exists, would qualify as personal information of the Complainant. Records of the nature requested in item seven, if they exist, would relate to the substance of the police matter that pre-dated the closing of the investigation and would inevitably contain information that would qualify as the personal information of both the Complainant and the appellant.

***Unjustified invasion of personal privacy***

Where a record only contains the personal information of an individual other than the requester, the mandatory exemption in section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) applies. Section 14(1) is found in Part I 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 discretionary exemption in section 38(b) of the *Act* allows an institution to refuse to disclose that information to the requester. Section 38(b) is found in Part II of the *Act*.

I have determined that records of the nature requested in item five, if they exist, would reveal that the Complainant had contact with the Police in the context of law enforcement matters. I find that such information, if it exists, would qualify as personal information of the Complainant and section 14(1) would apply. I have also determined that records of the nature requested in item seven, if they exist, would relate to the substance of the police matter that pre-dated the closing of the investigation and would inevitably contain information that would qualify as the personal information of both the Complainant and the appellant. In that case section 38(b) would

apply to that information. [See in this regard Orders M-615 and MO-2379]

In both cases, the factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of privacy".

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

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 (section 14(3)(b)). The Police submit that if records exist, then access would be denied on the basis of this presumption.

In his representations, the appellant submits that there was no ongoing investigation at the time frame covered by items five and seven of the request. The appellant submits that the personal information is relevant to a fair determination of his rights, referring to the factor favouring disclosure at section 14(2)(d) of the *Act*.

I find that if records of the nature requested in item five exist, they would be considered as highly sensitive, because they would reveal whether or not the Complainant has had contact with the Police in the context of law enforcement matters, thereby raising section 14(2)(f) as a relevant consideration favouring privacy protection. In my view, section 14(2)(f) outweighs any factor favouring disclosure, including the section 14(2)(d) factor raised by the appellant and disclosure of records responsive to item five, if they exist, would constitute an unjustified invasion of personal privacy when considering the factors and circumstances in section 14(2).

I also find that disclosure of any records of the nature requested in item seven, if they exist, would constitute a presumed unjustified invasion of personal privacy because they fall within the section 14(3)(b) presumption. This is because, if they exist, they would contain "[d]etails of any information about the incident" which would have been compiled during the course of the investigation and, therefore, pre-date the closure of the investigation.

Records of the nature requested in items five and seven are not among those listed in section 14(4) and the appellant did not raise the application of the "public interest override" at section 16 of the *Act*.

In the result, I find that the Police have satisfied part one of the section 14(5) test.

**Part two: disclosure of the fact that the record exists (or does not exist)**

Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

With respect to part five of the request, I find that disclosure of the fact that a record of the nature requested exists (or does not exist), would reveal personal information about the Complainant; specifically, whether or not the Complainant has had contact with the Police in the context of law enforcement matters. I find that the factor in section 14(2)(f) relating to the disclosure of responsive records, if they exist, is applicable here, which in my view, outweighs any other section 14(2) factor, including the section 14(2)(d) factor raised by the appellant. I therefore find that disclosing the existence or non-existence of records responsive to item five of the request would constitute an unjustified invasion of personal privacy.

With respect to item seven of the request, I find that simply disclosing the fact that a record of the nature requested exists (or does not exist), would not, in the circumstances of this appeal, reveal personal information about an identifiable individual. Confirming that a record of the nature requested exists (or does not exist), would only reveal whether or not there was contact between the Police and unidentified "third" parties, or whether or not there was contact between the Police and the appellant's employer (or its investigator) which would relate only to a business capacity. In either case, this would not disclose any personal information. I therefore find that disclosing the existence or non-existence of records responsive to item seven of the request would **not** constitute an unjustified invasion of personal privacy.

Accordingly, I conclude that the Police have established both requirements for section 14(5), regarding records that would responsive to item five of the request, if they exist, but not those that would be responsive to item seven, if they exist. Accordingly, I will order the Police to search for records responsive to item seven and provide a decision letter identifying whether any such records exist, as well as setting out any exemptions that may be applicable.

Normally when this office does not uphold an institution's refusal to confirm or deny the existence of records the release of the order is delayed. However, because this order does not reveal whether or not any records exist that are responsive to item seven of the request, I am providing a copy of the order to the appellant at this time.

## SEVERANCES

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information that what is disclosed is substantially unintelligible. The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and

disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)]. In my view it is not possible to further sever any of the personal information of the appellant from the General Occurrence Report and the police officer's notes without disclosing the information that I have found to be exempt.

**EXERCISE OF DISCRETION**

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because sections 14(5) and 38(b) are discretionary exemptions, I must also review the Police's exercise of discretion in deciding to rely on section 14(5) and to deny access to the information they withheld. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Police erred in exercising their discretion where, for example:

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations

In these cases, I may send the matter back to the Police for an exercise of discretion based on proper considerations [Order MO-1573].

On the basis of the circumstances of this appeal and the representations of the Police, some of which I am unable to reproduce in this order due to their confidential nature, subject to my determination that the exemption in section 14(5) did not apply to any records, if they exist, that are responsive to item seven of the request, I conclude that exercise of discretion by the Police to withhold the information in the General Occurrence Report and the police officer's notes that I have not ordered to be disclosed, and to apply section 14(5) to item five of the request, was appropriate.

## ORDER:

1. I order the Police to disclose to the appellant the highlighted portion of page seven of the General Occurrence Report that I have provided to the Police along with a copy of this order by sending it to the appellant by **February 6, 2009** but no earlier than **February 2, 2009**.

2. I order the Police to provide a decision letter to the appellant identifying any records that are responsive to item seven of the request, if they exist, as well as setting out any exemptions that may be applicable to any records that are identified.

3. I reserve the right to require a copy of page seven of the General Occurrence Report as disclosed to the appellant under provision 1 of the order, as well as any decision letter provided to the appellant pursuant to order provision 2, above.

Original signed by: January 30, 2009
Steven Faughnan
Adjudicator