



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

INTERIM ORDER MO-2575-I

Appeal MA09-402

York Regional Police Services Board



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NATURE OF THE APPEAL:

The appellant made a request to the York Regional Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about a specified occurrence. The appellant specified that he is seeking all notes, records and material, including copies of the video interviews of the appellant and his two sons conducted by detectives.

The Police located responsive records and granted partial access to them pursuant to the discretionary exemption in section 38(b) (personal privacy). In its decision letter, the Police advised they take the position that releasing the video-taped interviews of the requester's sons would not be in their best interests.

The appellant appealed the police's decision. I conducted an inquiry under the *Act* in which I sought and received representations from the Police and the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure and Practice Direction 7*. After reviewing the representations and the records at issue, which consisted of the severed portions of a General Occurrence Report and two videotaped interviews of the appellant's sons, I issued Interim Order MO-2558-I.

In that order, I found that the appellant was entitled to exercise the same access rights as his sons under section 54(c) of the *Act*, and for that reason, I ordered that the videotaped interviews be disclosed to the appellant. I further found that the Police had failed to exercise their discretion under section 38(b) of the *Act*, which provides the Police with discretion to balance the appellant's right of access to his personal information and the affected persons' right to privacy.

Order provision 2 of Order MO-2558-I requires the Police to exercise their discretion under section 38(b) with respect to the information I found subject to the exemption in section 38(b) and to provide me with its representations as to the factors considered in doing so. Instead, the Police provided me with a copy of their earlier representations and submitted that they had already exercised their discretion to withhold the record under section 38(b).

The following is my finding on the Police's exercise of discretion under section 38(b).

DISCUSSION

The Police submitted that the following excerpt from its representations includes its exercise of discretion:

Under the provisions of section 38(b) of the *Act*, the record holder may refuse to disclose to a requester to whom information relates personal information of the disclosure would constitute an unjustified invasion of another individual's personal privacy. In reviewing these records we have found that they contain the personal information of 9 individuals as well as the personal information of the appellant.

It is our opinion that none of the information being requested falls under the provisions of paragraphs (a) to (e) of section 14(1), paragraphs (a) to (i) of section 14(2) or paragraphs (a) to (c) of section 14(4).

For guidance in determining if the release of the nine individuals whose information is within the identified records would be an invasion of their privacy, we have referred to section 14(3) of the *Act*.

Section 14(3)(b) provides that 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, disclosure of the personal information is presumed to constitute an unjustified invasion of an individual's personal privacy. The personal information contained in the records was compiled and is identifiable as part of an investigation of a possible violation of law. The York Regional Police received a complaint of an assault and forcible confinement which was thoroughly investigated by officers of the York Regional Police service. After a discussion with the crown attorney's office and at the conclusion of this investigation there was no criminal code offences laid. The information at issue is information contained in a police report and two video statements of the alleged victims of the complaint. This information was created as part of an investigation into a violation of law, therefore, our opinion that the information from this investigation was compiled in accordance with the provisions of Section 14(3)(b).

Do any of the sections of 14(2) apply?

Although the disclosure of the personal information of the affected parties may not strictly fall under section 14(2) of the *Act*, it is our opinion of this police service that the release of the information still constitutes an unjustified invasion of personal privacy, particularly the two video statements. The main issue that the police have with releasing the video statements of a 6 and 8 year old boy, is that once the statements are released the police have no control over them and the two young boys who gave the statements could be exposed unfairly to pecuniary or other harm (paragraph e).

An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law (Order MO-1287-I). It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion (Order 58).

Based on the Police's representations, I find that they have still not properly exercised their discretion. Instead, the Police's representations indicate that they have applied section 38(b) as if it were a mandatory exemption to withhold the personal information remaining at issue from the appellant. The Police's representations suggest that once they determined that there was a presumed unjustified invasion of privacy under section 14(3)(b) and the factor against disclosure

in section 14(2)(e) applied, they concluded that the personal information at issue could not be disclosed. I find that the Police have failed to consider a balancing of the appellant's right of access to his own personal information against the particular privacy interests of the affected persons whose personal information was also contained in the records being considered. In fact, it is apparent from the Police's representations that it made no attempt to balance the competing interests under section 38(b) whatsoever.

Accordingly, I have decided to again return this appeal to the Police for the purpose of properly exercising their discretion in making a decision whether or not to withhold the undisclosed personal information pursuant to section 38(b) of the *Act*.

On page 7 of Order MO-2558-I, I set out some of the relevant considerations in an exercise of discretion under the *Act*. I encourage the Police to review this portion of the order before they provide me with further representations on the exercise of their discretion.

INTERIM ORDER:

1. I order the Police to exercise their discretion under section 38(b) of the *Act* with respect to the information I have found exempt under section 38(b) in Order MO-2558-I.
2. I order the Police to provide me with representations on their exercise of discretion by **December 14, 2010**.
3. I may share the Police's representations with the other parties to this appeal unless they meet the confidentiality criteria identified in Practice Direction 7. If the Police believes that portions of their representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to the portions they seek to withhold.
4. I remain seized of this appeal to deal with the Police's exercise of discretion.

Original signed by: _____
Stephanie Haly
Adjudicator

November 30, 2010