



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

# ORDER M-693

Appeal M\_9500441

London Police Services Board



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## NATURE OF THE APPEAL:

The London Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the videotape that was shown at a Coroner's Inquest. The inquest was held into the death of a named individual who had been arrested by the Police and who subsequently died while in police custody (the deceased). The requester is a journalist.

The Police denied access to the videotape on the basis of the following exemptions contained in the Act:

- security - sections 8(1)(i), (j) and (k)
- invasion of privacy - section 14(1).

The requester appealed the denial of access. He also maintains that there is a compelling public interest in disclosure of the record, thereby raising the issue of the application of section 16 of the Act.

A Notice of Inquiry was sent to the Police and the appellant. Representations were received from both parties.

## DISCUSSION:

### INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

I have viewed the videotape to determine if it contains personal information and, if so, to whom that personal information relates. The videotape shows an individual, other than the deceased, who was arrested, being removed from a police patrol car and being escorted by the police into the cell block. The videotape also shows the deceased being removed from a patrol car. Subsequently, the Police perform C.P.R. on him. The videotape concludes with the deceased being placed on an ambulance stretcher and being transported out of camera range.

The appellant contends that the information contained on the videotape does not constitute the personal information of the deceased. He asserts that no name or number appears on the videotape which would identify the deceased.

In Order P-230, Commissioner Tom Wright stated:

If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

Applying this approach to the information at issue, I find that there is a reasonable expectation that the identity of the deceased can be discerned from the videotape as the tape itself has been identified as that showing the interactions of the deceased with the Police.

The appellant also maintains that "... depictions of one's person alone does not constitute personal information ...". The videotape does not merely depict the person of the deceased. As I stated, the tape records the involvement of the deceased with the Police.

Accordingly, I find that the videotape contains the personal information of the deceased. Personal information remains so until 30 years after the death of an individual (section 2(2) of the Act). I also find that the videotape contains the personal information of the other individual who is shown on the tape being escorted to the cells.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The appellant submits that the exceptions in sections 14(1)(e)(ii) and 14(1)(f) are applicable in this case.

While the appellant has specifically cited 14(1)(e)(ii), in my view, section 14(1)(e) has to be read and interpreted conjunctively. That is, all three conditions set out in sections 14(1)(e)(i), (ii) and (iii) must be satisfied before the "research purpose" exception can be said to apply.

Section 14(1)(e), in its entirety, and section 14(1)(f) state:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (e) for a research purpose if,
  - (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained;
  - (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, **and**
  - (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[emphasis added]

I will first consider the exception in section 14(1)(e)(ii).

The appellant submits that this section applies because he "... is researching the care of the individual while in police custody for the purpose of scrutiny which cannot be accomplished without information specific to the deceased individual".

Section 14(1)(e) is the only provision of the Act where the granting of conditional access is explicitly contemplated (Order 164). Even if it could be said that the disclosure is for a research purpose, the appellant has provided me with insufficient evidence that the conditions in sections 14(1)(e)(i), (ii) and (iii) have been satisfied. Therefore, the exception in section 14(1)(e) of the Act does not apply.

The appellant next maintains that disclosure of the videotape would not constitute an unjustified invasion of the personal privacy of the deceased. Therefore, he is relying on the exception in section 14(1)(f) of the Act.

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 personal privacy. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

The Police maintain that the presumption in section 14(3)(b) applies to the record. This section states:

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 deceased had been arrested for possession of stolen property. They state that:

... In order to continue the investigation of the offence of possession of stolen property and drugs ... found in the possession of [the deceased] and because of his violent nature, [the deceased] was transported to police cells. Therefore, the

videotape was compiled and is identifiable as part of the investigation into a possible violation of law pursuant to section 14(3)(b) of the Act.

I do not accept the position of the Police on this issue. In Order P-237, Commissioner Tom Wright stated:

The subsection 21(3)(b) [the equivalent of section 14(3)(b) of the Act] presumption applies to a record which describes an investigation into allegations of certain criminal offenses having been committed by the individuals whose personal information is at issue.

In my view, the personal information contained in the videotape does not describe the investigation into the offence of possession of stolen property with which the deceased was charged. Rather, it was recorded as part of the standard Police practice of monitoring the cell block admittance area at Police headquarters, by way of “video security cameras”, as the monitoring devices are called by the Police. Therefore, I find that the personal information contained in the videotape was not compiled, nor is it identifiable **as part of an investigation into a possible violation of law**. Accordingly, the presumption in section 14(3)(b) does not apply.

I will now consider the factors in section 14(2) of the Act which the appellant submits weigh in favour of disclosing the videotape. He suggests that the considerations in sections 14(2)(a) and (b) are relevant in the circumstances of this case. These sections state:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (b) access to the personal information may promote public health and safety.

It is the position of the appellant that it is clearly in the interest of the public to scrutinize the behaviour of the police as an institution when caring for members of the public (section 14(2)(a)). He also suggests that section 14(2)(b) is a relevant concern as citizens must surrender the control of their own health and safety while in the custody of the police. Therefore, he suggests that “... citizens have the right to scrutinize the level of care provided by their ‘protectors’ when control has been transferred to the police”. In my view, this is not the type of information to which section 14(2)(b) was meant to apply. Moreover, the appellant’s submissions on both sections relate to the same concern - scrutiny of the actions of the Police when dealing with members of the public. I will therefore consider these arguments in the context of section 14(2)(a).

The Police have not made submissions on the application of this section. However, as I have indicated, the appellant did raise the issue of the application of section 16 of the Act, the public

interest override. The Police have made submissions on the application of section 16 which, in my view are relevant in the context of the application of section 14(2)(a).

The Police submit that their activities have already been scrutinized by the use of the videotape at the Coroner's Inquest. They state:

The Coroner's Inquest was the forum which served the purpose of informing the citizenry about the activities of the London Police concerning the unfortunate death of this young person. It also provided opportunity for them to examine, question and cross examine the actions, motive and conduct of the London police and ensure that they were held accountable for their actions.

Pursuant to section 10(4) of the Coroners Act, a Coroner's Inquest **must** be conducted into the death of an individual who dies while in the custody of the police. This was the situation in this appeal. The appellant acknowledges this but indicates, correctly, that the Coroner's jury had no authority to assess responsibility for the death of the deceased. Pursuant to section 31(2) of the Coroners Act, the jury shall not make any finding of criminal responsibility or express any conclusion of law. Rather, the purposes of an inquest are to inquire into the circumstances of the death and to make recommendations to avoid the death in similar circumstances. Thus, the appellant maintains that the Police have yet to be held accountable for their involvement in the death of the deceased.

In my view, the Legislature has already determined that when an individual dies in police custody, the activities of the police **must** be scrutinized. As I have indicated, the Coroners Act **requires** that an inquest be held when an individual dies in these circumstances. This may be contrasted with other circumstances in which a coroner has discretion in making a determination whether the holding of an inquest is necessary or unnecessary. In such cases, the coroner shall have regard to whether the holding of the inquest "would serve the public interest" (section 20).

In my view, the activities of the Police have been scrutinized through the holding of the Coroner's Inquest. The newspaper reports of the inquest, submitted by the appellant as part of his representations, indicate that interested parties, including counsel for the deceased's family, attended at the inquest and had the opportunity to examine and cross-examine the police witnesses. If any party had felt that further action needed to be taken against the Police, they could have subsequently done so.

Furthermore, the press report of June 1, 1995 submitted by the appellant indicates that the death was investigated by the provincial Special Investigations Unit (the SIU). This investigation had taken place shortly after the death of the deceased. The press report indicates that the SIU "... ruled out abuse as a cause of death.."

In view of the significant degree of scrutiny already applied to this incident by means of the Coroner's Inquest and the SIU Investigation, I find that section 14(2)(a) is not a relevant consideration favouring disclosure of the videotape. The actions of the Police have already been scrutinized by the bodies charged to do so.

In my view, there are no other listed factors in section 14(2) which weigh in favour of disclosure of the videotape.

As far as the section 14(2) factors weighing in favour of privacy are concerned, I find that the personal information of the deceased and the other individual contained on the videotape is highly sensitive as it depicts the involvement of these individuals with the Police. Therefore, section 14(2)(f) of the Act is a relevant consideration which favours non-disclosure of the tape.

Section 14(2) requires the consideration of "all the relevant considerations" of a case when determining whether a disclosure of personal information will constitute an unjustified invasion of personal privacy. Although the appellant has not specifically referred to this fact, I have considered whether the showing of the videotape at the Coroner's Inquest is a factor which weighs in favour of its disclosure at this time.

In Order P-392, Commissioner Tom Wright considered the issue of the disclosure of statements given by an individual to Crown counsel with the intent that they be used in a public prosecution. He stated:

It is a fact that certain personal information will be disclosed to the public during a public court proceeding. However, it does not necessarily follow that by becoming involved in such a proceeding an individual has waived his or her privacy rights and the personal information should, therefore, be freely and routinely available to anyone who asks, particularly if a public court proceeding has not commenced.

In the case before me it is true that the personal information has already been disclosed. However, it cannot be said that either the deceased or the other individual depicted on the videotape waived their privacy rights. Moreover, it is clear that when the videotape was shown at the Coroner's Inquest, the Police did not intend to provide access to it in accordance with the Act.

The Police submit that:

.. the requested videotape was made an exhibit at the Coroners Inquest and at that time became in essence the property of the court. The television screen was positioned so that the coroner's jury, members of the public and other officials could see the videotape being played. It is our position that although the coroner's inquest was open to members of the public, the videotape was not available to them. Exhibits, once introduced, essentially become the property of the court. The public has no legal or proprietary right of claim to this evidentiary item, then or now, pursuant to the Act. If it were not for the inquest, the tape would never have been publicly aired. It was certainly not intended to be generally circulated.

The Act contemplates that where access is given to a requester, it is access to the world, and there are no limitations (subject to the limitations imposed by other laws, such as those pertaining to libel and slander) on the use to which the requester may put the record (Order P-

164). That being so, in my view it is clear that the airing of the videotape at the inquest was not access under the Act. However, the fact that the personal information was disclosed is a relevant consideration when determining whether disclosure under the Act would be an unjustified invasion of the personal privacy of the deceased and the other individual depicted on the recording.

To summarize, I have found that there is one factor in section 14(2)(f) (highly sensitive personal information), which favours non-disclosure of the videotape. The only consideration weighing in favour of disclosure is the fact that the tape was previously shown at the Coroner's Inquest. However, in my opinion, given the very specific and limited purpose for which the tape was viewed, this consideration is outweighed by the privacy rights of the deceased and the other individual shown on the tape. Having considered all the relevant circumstances of this case, I find that to disclose the videotape would constitute an unjustified invasion of the personal privacy of the deceased and the other individual. Accordingly, section 14(1) applies to exempt this personal information from disclosure.

### **COMPELLING PUBLIC INTEREST IN DISCLOSURE**

Much of the appellant's submissions on the public interest in the disclosure of the record relate to the issue of subjecting the Police to public scrutiny which I have dealt with in addressing the application of section 14(2)(a).

It has been stated in a number of previous orders that, in order to satisfy the requirements of this section, there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption. In the circumstances of this appeal, I am not convinced that there is a compelling public interest sufficient to outweigh the purpose of the exemption under section 14, which is essentially the protection of personal privacy. It is my view that section 16 of the Act does not apply in the circumstances of this appeal.

### **ORDER:**

I uphold the decision of the Police.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_  
January 18, 1996