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

ORDER MO-1330

Appeal MA-990208-1

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 access to a copy of the "police report" relating to the death of the appellant's son.

The Police identified seven responsive records, consisting of a three-page "Sudden Death Report" and four pages of "Supplementary Reports". The Police granted access to portions of four records that contain information about the requester and the identity of her son, and denied access to all remaining records and partial records. The basis for denying access was section 14(1) of the Act (invasion of privacy), and the Police relied on the "presumed unjustified invasion of personal privacy" in sections 14(3)(a) and (b) in support of the section 14(1) exemption claim.

The requester, now the appellant, appealed this decision.

Mediation was not successful, and I sent a Notice of Inquiry initially to the appellant and two individuals identified in the records whose interests might be affected by disclosure (the affected persons). Because some records appeared to contain the appellant's personal information, section 38(b) of the Act was added to the scope of the inquiry.

The appellant submitted representations in response to the Notice, and both affected persons provided written consent to disclose any of their personal information contained in the records. I then sent the Notice of Inquiry to the Police, together with the appellant's representations. I also advised the Police that both affected persons had provided consent. The Police submitted representations in response.

Finally, because I decided that the appellant should be given an opportunity to respond to issues raised in the Police's representations, I provided her with a Reply Notice of Inquiry, along with the non-confidential portions of the Police's representations. The appellant submitted reply representations.

PRELIMINARY MATTER:

Scope of the Request

In her representations, the appellant states that photographs taken at the time of the investigation should have been included within the scope of her request.

The Police disagree, pointing out that the request was for a "police report", and that this would not necessarily include photographs. The Police state:

> At no time did the requester identify to the analyst assigned to this request that she was seeking access to photographs, nor was this issue raised in the Mediator's Report. This institution was only made aware of the request upon receipt of the Notice of Inquiry. Therefore, it is the position of this institution that photographs are not responsive records.

The appellant's reply representations include the following statements:

> A POLICE REPORT (WITHIN THE POLICE DEPT. SYSTEM) MUST BE COMPLETE! A POLICE REPORT (WITHIN THE POLICE DEPT. SYSTEM) HAS MANDATORY INFO REQ'D! PHOTOGRAPHS AT A DEATH SCENE ARE MANDATORY BEFORE THE CORONER CAN MOVE THE DEAD BODY, OR IN ANY WAY DISTURB THE BODY. THIS INCLUDES THE 100% "DEATH SCENE" SPECIFICALLY! BLUNTLY, PHOTOGRAPHS ARE A PART OF MY SON'S "POLICE REPORT!".

I agree with the position of the Police on this issue. I accept that the "police report" in this appeal may not encompass all records produced by the Police during the course of completing its investigation, and that photographs taken at the scene of death may exist. However, the Police interpreted the term "police report" in a reasonable manner, and responded to the appellant accordingly. The file materials reviewed by me during this inquiry contain no reference to the issue of photographs or any other unidentified records having arisen during mediation. The Report of Mediator provided to the appellant at the completion of mediation also describes the records as "the severed portions of the police sudden death report", and makes no mention of photographs. The appellant did not dispute this description when provided with a draft of the Report of Mediator; it was only upon receipt of the Notice of Inquiry, a relatively late stage of the appeal, that the issue of photographs was raised by the appellant.

Given the specific nature of the appellant's request and the actions of the parties during the course of dealing with the request and appeal, I have concluded that any photographs that may exist would fall outside the scope of the appellant's request.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, as recorded information about an identifiable individual.

The records all pertain to a Police investigation into the death of the appellant's son. As such, I find that they all contain the deceased son's personal information.

Certain records contain information obtained from the two affected persons, one of whom is the son's former wife. The other affected person is the individual who discovered the son's body after his death. These records include information provided to the Police, as well as personal identifiers of the affected persons, such as their names, addresses, telephone numbers and dates of birth. I find that these records contain the personal information of the affected persons.

Some records also include the personal information of the appellant but, as previously noted, the portions of records containing this information were provided to the appellant by the Police in response to her request.

Some records also identify various professionals routinely involved in investigations of this nature, including the coroner, pathologist and undertaker. This information consists of names, business addresses and

business telephone numbers. The distinction between personal information and information about an individual's normal professional or employment activities has been canvassed in previous orders. In essence, these decisions conclude that, subject to certain exceptions which are not relevant in the context of this appeal, professional information such as an individual's job title, business address and telephone number are not "about" the individual and therefore do not qualify as "personal information". (See, for example, Orders P-1412, P-1621 and R-980015). I agree with this interpretation. I find that the names, business addresses and business telephone numbers of these professionals do not qualify as their personal information, and therefore this information is not exempt under sections 14(1) or 38(b) of the Act.

Section 2(2) provides that personal information does not include information about an individual who has been dead for more than 30 years. Because the deceased died in 1999, section 2(2) has no application in this case.

INVASION OF PRIVACY

The two affected persons have consented to disclose their personal information to the appellant. As a consequence, as long as this personal information is not intertwined with the personal information of the deceased or any other identifiable individual, it falls within the scope of section 14(1)(a), and its disclosure would not constitute an unjustified invasion of privacy. I find that the portions of records covered by the section 14(1)(a) exception consist of the names, addresses, telephone numbers and dates of birth of the affected persons, as well as information on Record 6 which deals with contact made by the deceased's ex-wife following the death. This information does not qualify for exemption under sections 14(1) or 38(b) of the Act and the parts of the records containing this information should be disclosed to the appellant. The remaining information concerning the affected persons consists of details provided by these two individuals to the Police during the course of the investigation into the death of the appellant's son. I find that this information is intertwined with the personal information of the deceased son, and it is not possible to determine the proper treatment of this information based solely on the fact that the affected persons have consented to the disclosure of their personal information.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b), where a record contains the personal information of both a requester and another individual, and the institution determines that the disclosure of the information would constitute an unjustified invasion of the other individual's personal privacy, the institution has discretion to deny the requester access to that information. Sections 14(2) and (3) provide guidance in determining whether disclosure would result in an unjustified invasion of privacy. Section 14(2) provides some criteria for the head to consider in making this determination, and 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.

In John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, 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) . This decision was made in the context of

sections 21(2) and (3) of the provincial Freedom of Information and Protection of Privacy Act, which are virtually identical to sections 14(2) and (3) of the Act. The Court stated:

> Having found an unjustified invasion of personal privacy pursuant to s. 21(3)(b), and having concluded that none of the circumstances set out in s. 21(4) existed so as to rebut that presumption, the Commissioner considered both enumerated and unenumerated factors under s. 21(2) in order to rebut the presumption created by s. 21(3).

> The words of the statute are clear. There is nothing in the section to confuse the presumption in s.21(3) with the balancing process in s. 21(2). There is no other provision in the Act and nothing in the words of the section to collapse into one process, the two distinct and alternative processes set out in s. 21. Once the presumption has been established pursuant to s. 21(3), it may only be rebutted by the criteria set out in s. 21(4) or by the "compelling public interest" override in s. 23. There is no ambiguity in the Act and no need to resort to complex rules of statutory interpretation. The Commissioner fundamentally misconstrued the scheme of the Act. His interpretation of the statute is one the legislation may not reasonably be considered to bear. In purporting to exercise a discretion in the form of a balancing exercise, he gave himself a power not granted by the legislation and thereby committed a jurisdictional error.

The Police rely on the presumption of an unjustified invasion of privacy contained in section 14(3)(b), 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 appellant submits:

> In any newspaper I can read details of a person's death & PRIVATE DETAILS RE EMPLOYMENT, HOME, AGE, MEDICAL STATUS, DETAILS OF INJURIES & LOCATION OF DEAD BODY & MUCH MORE INFORMATION. Bluntly, I know more info about strangers deaths than I know of my own son ... Every day newspapers cover privacy & police info that I can't get about my own son. I claim equality with them.

The Police state that all of the information was recorded as a result of an investigation into the circumstances of the death of the appellant's son. The Police submit:

> The focus of a law enforcement investigation in the instance of a sudden death is twofold: to endeavour to establish the factual cause of the event, and further, to endeavour to rule out

> any other possible causes (i.e. foul play). Although a decision with respect to the cause of death lies with the Coroner, the police investigation plays a key role in the determination.

The Police also submit that, in accordance with previous orders of this Office, the fact that no criminal proceedings were commenced by the Police does not negate the applicability of section 14(3)(b). This section only requires that there be an investigation into a possible violation of law. The Police refer to Orders M-198 and P-237 in support of this position.

In my view, the information contained in the records was clearly compiled and is identifiable as part of an investigation into a possible violation of law, specifically the Criminal Code. Therefore, the section 14(3)(b) presumption of an unjustified invasion of personal privacy applies, with the exception of those portions that contain only the appellant's personal information, the portions that contain only the personal information of the affected persons, and the portions I have already determined do not qualify for exemption under sections 14(1) or 38(b). Because the exempt information falls within the scope of one of the section 14(3) presumptions, John Doe, supra, precludes a consideration of the application of any of the factors weighing for or against disclosure under section 14(2).

A finding that section 14(3)(b) applies does not necessarily end the matter, because section 38(b) gives the Police discretion to disclose personal information even if doing so would constitute an unjustified invasion of privacy, in circumstances where a record contains the personal information of both a requester and another identifiable individual. Although disclosure in these circumstances would be rare, the decision is a discretionary one that must be made by balancing the competing interests present in a particular fact situation (Order M-532).

The Police submit:

> The question arises whether the access rights of the requester prevails over the privacy rights of the deceased.
> ...
>
> The requester has also raised the issue of emotional need. Although this institution can sympathize with the requester over this issue, this need must be balanced against the privacy rights of the deceased.
>
> In the case where an individual receives injuries and survives, family members who raise the question of emotional need for information would have no right of access to that information without the express permission of the injured party. For obvious reasons a deceased person is unable to provide consent or express a desire for privacy even to a family member. The fact that an individual is deceased should not alter their right to privacy.
>
> This very fact is addressed in the 1999 IPC Year End Report which, in an item entitled, "Don't deny grieving families access", states:

> *"Except in certain limited circumstances, institutions **must** deny relatives access to this information because disclosure is presumed to be an unjustified invasion of the deceased's personal privacy under the provincial and municipal Acts."* [emphasis added by the Police]

> Institutions should not be obligated to guess whether or not a deceased person would have consented or not to release of their information. In fact, by enacting specific sections of the Act to address the rights of a deceased individual, the Legislature has taken that decision making obligation away from institutions.
> ...
>
> In weighing access versus privacy, the institution also considered that the requester would be entitled to certain information pursuant to the Coroner's Act, which may satisfy some of her questions as well as the sensitivity of the personal information. In conclusion, this institution has found that the relevant factors in this appeal weigh in favour of privacy protection.

Where the interests of a deceased individual are at issue, I accept that the factors identified by the Police in exercising discretion under section 38(b) are reasonable and appropriate. In the circumstances of this appeal, I am satisfied that the Police have properly exercised discretion in favour of withholding the personal information of the appellant's deceased son. Consequently, I find that disclosure of the remaining personal information of the deceased son would constitute an unjustified invasion of his privacy, and this information qualifies for exemption under section 38(b) of the Act.

I understand the appellant's desire to know more details surrounding her son's death, and realize that she will be disappointed that she is not entitled to access to all of her son's personal information under the Act. However, my role is to interpret and apply the provisions of the Act, even if the result may seem unfair to the appellant. The Divisional Court's statement in John Doe, supra, that presumptions of the kind found in section 14(3) are not rebuttable by factors in section 14(2), would not support a result in this case that would satisfy the appellant's desire for more information. Under the Act, according to the Divisional Court's interpretation, any disclosure of the personal information I have found to fall within section 14(3)(b) would constitute an unjustified invasion of personal privacy.

In the 1999 Annual Report of the Information and Privacy Commissioner, Commissioner Ann Cavoukian recommended statutory changes which would recognize the needs of grieving families, and remove restrictions from the Act preventing them from having greater access to information about the death of a loved one. The Report states:

> Of the various types of appeals processed by the IPC, those involving a request for information about a deceased family member are among the most sensitive. Requests of this type are submitted to institutions (most often to local police forces or the Ontario Provincial Police) by immediate family members, or their representatives, in order to obtain information surrounding the circumstances of the relative's death.

> Except in certain limited circumstances, institutions must deny relatives access to this information because disclosure is presumed to be an unjustified invasion of the deceased's personal privacy under the provincial and municipal Acts.
> In 1999, the IPC undertook a study on the impact of the legislation on individuals seeking access to information about deceased loved ones. We surveyed appellants for their experience and view of the legislation; contacted professionals with expertise in the field of bereavement counselling; looked at the legislative history, including the reports of the provincial and municipal three-year review committees; and reviewed freedom of information and privacy legislation across Canada. We also consulted broadly with freedom of information professionals in the police community, since they are most frequently the point of first public contact by grieving family members.
>
> A broad consensus emerged from our discussions: the *Acts* do not serve the interests of relatives of deceased family members in these circumstances.

After highlighting a number of findings from this review, the Report goes on to state:

> A statutory amendment to address this sensitive and compelling issue is clearly required, and would be supported by a broad cross section of stakeholders: requesters and appellants; Freedom of Information and Privacy Co-ordinators in both the provincial and municipal sectors, including the police community; professionals in the field of grief counseling; and [the Commissioner's Office].
>
> Specific language for a new subsection for section 21 (section 14 of the municipal Act) is included in the Commissioner's Recommendations section, which follows this review of key issues.

In future, the Act may be amended to reflect the recommendations of the Commissioner. However, for present purposes, I must apply the Act as it stands today.

ORDER:

1. I order to the Police to disclose to the appellant the personal information of the two affected persons, and information concerning the various professionals involved with the Police investigation by **August 21, 2000**. I have attached a highlighted copy of the records with the copy of this order sent to the Freedom of Information and Privacy Co-ordinator for the Police, which identifies the portions that should be disclosed.

2. I uphold the decision of the Police not to disclose the remaining parts of the records.

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

Original signed by: August 4, 2000
Tom Mitchinson
Assistant Commissioner