



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

ORDER MO-1322

Appeal MA-000003-1

Sudbury Regional Police Services Board



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NATURE OF THE APPEAL:

The appellant wrote to the Sudbury Regional Police Services Board (the Police) seeking access to records concerning the Police investigation into the death of his daughter. The appellant later made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for these records. The appellant indicated that he intended to commence an action against “the party who was responsible for [the daughter’s] care at the time of the incident which lead to her death.”

The Police identified records responsive to the request and denied access to them on the basis of the exemptions at sections 8(2)(a) (law enforcement report) and 8(2)(c) (exposure to civil liability), and section 14(1)(f) in conjunction with 38(b) (unjustified invasion of another individual’s privacy). The Police also referred to section 54(c) of the Act (right of access by person who has lawful custody of individual less than 16 years of age). The Police stated that they had “not been supplied with any documentation confirming that [the appellant] had lawful custody of [the daughter] at the time of her death.”

The appellant appealed the decision of the Police to this office.

During the mediation stage of the appeal, the Police clarified that they were relying on all of the cited exemptions to deny access to all of the responsive records.

I sent a Notice of Inquiry setting out the issues in the appeal to the Police initially. The Police sent representations in response to this Notice of Inquiry. I then sent the representations of the Police, together with a Notice of Inquiry, to the appellant. I received representations from the appellant in response.

RECORDS:

The records at issue in this appeal consist of occurrence reports, supplementary reports, “will say” statements, an excerpt from an Investigations Record Book, police officers’ notes, hand written notes, photographs and videotapes. The records (not including the videotapes) consist of 77 pages.

ISSUES:

RIGHT OF ACCESS BY PERSON WITH LAWFUL CUSTODY

Section 54(c) of the Act reads:

Any right or power conferred on an individual by this Act may be exercised,

if the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

The appellant submits:

... We are not dealing with the right of a custodial parent to obtain information about his or her child who is under the age of 16 years. We are dealing with the right of a parent to find out when, why and how his or her child died before attaining the age of 16 years.

The Police submit:

[The requested] information was denied, in part, on the basis that [the Police have] not received documentation that would indicate that [the appellant] had custody of his daughter at the time of her death as stipulated in section 54 of [the Act] which would entitle him to access this information.

The material before me indicates that the appellant did not have lawful custody of his daughter at the time of her death. As a result, section 54(c) cannot apply in these circumstances.

PERSONAL INFORMATION

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

The records contain information about the appellant's daughter and various witnesses to the events surrounding the death of the appellant's daughter, including detailed information about her physical and medical condition. As a result, information in the records qualifies as personal information of those individuals under the definition of that term in section 2(1) of the Act, subject to any finding I may make under section 2(2). That section reads:

Personal information does not include information about an individual who has been dead for more than thirty years.

Since the daughter has been deceased for less than thirty years, the information in the records about her qualifies as the daughter's personal information.

The written records, as well as the videotapes, also contain minimal references to the appellant. As a result, the Police correctly cited section 38(b) as the appropriate section under which the personal privacy issues should be determined.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF OTHER INDIVIDUALS' PRIVACY

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) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an

unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 14(2) and (3) 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 institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which 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) [Order P-1456, citing John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The Divisional Court has stated that the only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where 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.

In this case, the Police have cited section 14(1)(f) (unjustified invasion of personal privacy), together with the presumptions at sections 14(3)(a) and (b). Those sections read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) 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:

. . . Release of this information . . . would constitute an unjustified invasion of [other individuals'] personal privacy.

We contend that disclosure of the personal information contained in the records would result in a presumed unjustified invasion of the personal privacy of the deceased child pursuant to section 14(3)(a) and 14(3)(b) of [the Act]. Further, the record contains personal information about other individuals in which sections ... 14(1)(f), 14(3)(b) ... and 38(b) of [the Act] apply and must be considered before any release.

The appellant submits:

. . . [T]here is no justification for refusing to provide this information and . . . section . . . 14(1)(f), 14(3)(a) [and] 14(3)(b) have no application and there is no justification for refusing to provide the information requested . . .

In my view, the records contain personal information of the appellant's daughter which relates to her medical history, diagnosis, condition, treatment or evaluation and, as such, this information falls within the scope of the presumption of an unjustified invasion of personal privacy at section 14(3)(a). In addition, the information at issue includes personal information relating to witnesses to the events in question, which information was compiled and is identifiable as part of an investigation into a possible violation of law. It is clear that the Police compiled these records to determine whether or not charges were warranted against one or more individuals under the Criminal Code. As a result, the section 14(3)(b) presumption applies to this information.

The appellant has implied that the factor favouring disclosure at section 14(2)(d) applies. That section reads:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

As indicated above, once a presumption under section 14(3) is established, that presumption cannot be overcome by one or any combination of factors under section 14(2). As a result, even if I were to find that section 14(2)(d) applied, disclosure of the withheld information would still be considered an unjustified invasion of other individuals' privacy.

In the circumstances, I am satisfied that disclosure of any of the information in the records would constitute an unjustified invasion of the privacy of individuals other than the appellant. Therefore, the records are exempt under section 38(b) of the Act.

As a result of my findings above, it is not necessary for me to consider the application of section 38(a), in conjunction with sections 8(2)(a) and (c) of the Act.

ORDER:

I uphold the decision of the Police to withhold the requested records from the appellant.

Original signed by: _____
David Goodis
Senior Adjudicator

July 19, 2000