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

ORDER MO-1323

Appeal MA-990304-1

Sault Ste. Marie Police Services Board

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NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Sault Ste. Marie Police Services Board (the Police). The request was for access to all records of the investigation regarding the death of her son.

The Police granted partial access to the records it identified as responsive to the request. Access was denied to parts of the records, including a cassette tape from the appellant's son's answering machine, under section 14(1) (invasion of privacy) of the Act.

The appellant appealed the decision of the Police to deny access to the answering machine cassette tape. The appellant indicated that she had provided the tape to the Police, that it was her property and she wanted it returned.

This office provided a Notice of Inquiry to the Police, initially. The Police provided representations in response. A Notice of Inquiry was then sent to the appellant along with the non-confidential portions of the representations of the Police. The appellant also submitted representations.

RECORDS:

The only record at issue in this appeal is a cassette tape of telephone messages recorded by the appellant's son's answering machine.

DISCUSSION:

PERSONAL INFORMATION/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.

The Police indicate that the cassette tape was recorded on the son's answering machine and that the recorded messages on the tape were intended to be received by the appellant's son, not the appellant. The Police submit that the voices on the tape are identifiable by the appellant and that they contain the personal information of the individuals who left the messages.

The position of the Police regarding the ability of the appellant to identify the voices on the machine is supported by the appellant in her representations. She indicates that she and her son had a "special mother/son bond", that the answering machine belonged to her, and that it was placed in her son's apartment which was located in her home. In her letter of appeal, the appellant indicated that she would check his messages for him and that sometimes people would leave messages for her on the machine.

The cassette tape contains only messages for the deceased son. In several messages, an individual is identified by name. With respect to the remaining messages, I am satisfied that the appellant would be able

to identify the individuals by their voices. While I accept that the appellant owned the machine and may have, at any time, been able to access the information on it, none of the information recorded on the tape pertains to her. The record, therefore, does not contain the appellant's personal information.

I find that the cassette tape contains recorded information about the individuals who left the messages in that it either identifies them by name or renders them identifiable in the circumstances. The information on the tape pertains to their whereabouts, their relationship to the deceased and their reasons for trying to reach him. Similarly, the cassette tape contains the personal information of the deceased in that the messages identify him by name and pertain to his relationships with the individuals leaving them.

Where the record only contains the personal information of other individuals, section 14(1) of the Act prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. In the circumstances, the only exception which could apply is section 14(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

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 head to consider in making this determination. 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.

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 section 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

A section 14(3) presumption 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 section 14 exemption.

Section 14(3)(b)

The Police claim that the presumption in section 14(3)(b) applies to the information recorded on the cassette tape. This section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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 indicate that the cassette tape was "seized from the residence of the deceased during the investigation" into his death and that it formed part of the materials which were gathered or "compiled" from various sources during the investigation.

The appellant disputes the description of the events as given by the Police. She states that the cassette tape was taken out of the machine and brought to her by a friend. She indicates further that it was then brought to the attention of the Police willingly in order to help them in their investigation.

The appellant also states that the "scene was released as a suicide and all was well as far as the police were concerned". She continues, however, that "... I don't feel he would have chosen suicide as a way out. I still await the coroner's report to get answers to the bruising on my son's head and hands and to date there has been no explanation given."

The Police state that a "death investigation" is conducted to determine whether it was a result of murder, manslaughter or criminal negligence (under the Criminal Code). The Police indicate that "foul play" must be ruled out. The Police also note that during their investigation, the appellant indicated to them that she did not believe her son's death was a suicide and that she suspected the involvement of others in it.

I accept that in cases of a sudden death, the Police are required to investigate in order to rule out "foul play" (see Orders M-1039, M-1115 and MO-1256, for example). Section 14(3)(b) only requires that the investigation be into a "possible" violation of law (Orders M-198, MO-1256, P-233, P-237, P-1225 and PO-1777, for example). Therefore, even though as a result of the investigation, the Police determined that the death was by suicide, the presumption may still apply to any personal information compiled during the investigation.

Section 14(3)(b) of the Act only requires that the personal information in a record be "compiled" by the Police, which has been defined as meaning assembled or gathered together as part of an investigation (Order P-666). Therefore, although the tape was given to the Police as opposed to them actively seeking it out, I am satisfied that the personal information in the cassette tape was "compiled" by the Police as part of their investigation into a possible violation of law under the Criminal Code, and the presumption in section 14(3)(b) applies to it.

Absurd Result

It is apparent from the records relating to the Police investigation that were disclosed to the appellant, and the discussions between the mediator and the appellant which are not subject to mediation privilege, that she was present at the time her son was discovered and that she may have had an opportunity to be privy to some of the evidence that was obtained by the Police during their investigation. In this regard, the appellant indicated to the mediator that she knows what is on the tape. However, in her letter of appeal she states:

> My friend was the one who thought to check it and then brought the tape over to my apartment to inform [the constable] who at that time **attempted** to play it on my answering machine in my presence.

In responding to my queries on this issue, the appellant indicates that she did not actually hear the cassette tape. Rather, her friend went to her son's apartment and listened to the tape after which she brought it to the appellant. The appellant indicates that her friend told her what was on the tape. The appellant indicates further that one individual who left a message contacted her and told her what he said on the tape. The appellant confirms that she gave the cassette tape to the officer and that he placed it in her answering machine and attempted to listen to it in her presence, but was unable to play it on her machine.

In her representations, the appellant states "I lost my son and am unable to receive the answers to questions that still haunt me over a year later". She indicates that she is simply trying to "regain ownership of the cassette tape" and she does not understand how such a "simple request" could be denied. She concludes "I don't want to be written off as an angry parent, I just need to be afforded the closure I deserve".

The Police state that the cassette tape was "merely turned over to the investigating officer during the investigation. It is not reflected in the officer's report or notes how he came to be in possession of the tape". The Police submit that withholding the cassette tape from disclosure would not lead to an "absurd result", primarily because the cassette tape does not contain the appellant's personal information. The Police state further that:

> ... there is an overwhelming difference between disclosure of information to an individual who provided personal information to an institution first hand, as in making a verbal or written statement, or provided a document/record that the individual received from a third party, and handing over a tape that an individual may have discovered during a police investigation. The tape could have been discovered by any one of the individuals in the residence during the investigation and turned over to police.

In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first place would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This approach has been applied in a number of subsequent orders and has been extended to include not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (Orders M-451, M-613, MO-1196, P-1414, P-1457 and PO-1679, among others).

In Order M-444, former Adjudicator Higgins also noted that it is possible that, in some cases, the circumstances would dictate that the "absurd result" principle should not be applied even where the information was supplied by the requester to a government organization. I agree and find that all of the circumstances of a particular case must be considered before concluding that withholding information to which an exemption would otherwise apply would lead to an absurd result.

The reasoning in Order M-444 was based on the principle that individuals should have access to records containing **their own personal information** unless there is a compelling reason for non-disclosure. The circumstances of this appeal raise the question whether the "absurd result" may also apply to a record which contains another individual's personal information despite the fact that the record does not contain the appellant's personal information. In examining this issue, I have considered the rationale behind the findings in Order M-444 and the purposes of the Act.

As noted above, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the Act in recognition of these competing interests.

In most cases, the "absurd result" has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial Act). The reasoning in Order M-444 has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the Act and section 14(2)(a) of the provincial Act) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288).

In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

In all cases, the "absurd result" has been applied **only** where the record contains the appellant's personal information. In these cases, it is the contradiction of this higher right of access which results from the application of an exemption to the information. In my view, to expand the application of the "absurd result" in personal information appeals beyond the clearest of cases risks contradicting an equally fundamental principle of the Act, the protection of personal privacy. In general, I find that the fact that a record does not contain the appellant's personal information weighs significantly against the application of the "absurd result" to the record. However, as I indicated above, all of the circumstances must be considered in determining whether this is one of those "clear cases" in which the absurdity outweighs the privacy protection principles.

Turning to the facts of this case, I find that, based on the evidence and argument presented and outlined above, I am not persuaded that this is one of those "clear cases". I accept that the appellant had possession of the cassette tape and that she provided it to the Police. I agree with the position taken by the Police that the fact that an individual may have had possession of a record is not, in and of itself, sufficient to engage the "absurd result" principle.

The appellant argues, however, that she did not merely have possession of the tape but that she knows what it contains. In my view, having indirect knowledge about the contents of the cassette tape is very different from having listened to it first hand. Although the appellant may have a general idea of what is on the tape, I am not convinced that she knows everything, including the identities of all of the callers, the specific language they used or the tone of the delivery. All of this is part of what renders the information as personal and it is not information to which the appellant is privy. In these circumstances, I am not prepared to find that withholding the record would result in an absurdity.

Having said that, I leave open the possibility that the absurd result principle may be considered and found applicable in other circumstances in appeals involving personal information or in appeals which do not involve records which contain personal information.

I am sympathetic to the appellant's desire to know and understand what happened to her son. However, based on the evidence I have before me, I find that the principles underlying the reasoning in Order M-444 are not present, and the "absurd result" should not be applied in the circumstances of this case. I found above that the presumption in section 14(3)(b) applies to the record. I find further that neither section 14(4) nor 16 applies to the personal information in the record in the circumstances of this appeal. The record is, therefore, exempt under section 14(1) of the Act.

ORDER:

I uphold the decision of the Police.

Original signed by: July 20, 2000
Laurel Cropley
Adjudicator