



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1369

Appeal MA-000128-1

Ottawa-Carleton Regional Police Services Board



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NATURE OF THE APPEAL:

The Ottawa-Carleton Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for “a complete copy of [a numbered report] regarding the circumstances in the sudden death of my son ...”.

The Police identified a number of responsive records, and notified one individual (affected person #1) to determine whether he would consent to the disclosure of any of his personal information contained in the records. After receiving no response, the Police issued a decision to the requester, denying access on the basis of the following exemptions contained in the *Act*:

- section 8(2)(a) - law enforcement
- section 14(1) - personal privacy
- sections 38(a) and (b) - discretion to refuse requester’s own information

The Police referred to the presumptions in sections 14(3)(a) (medical condition or treatment) and 14(3)(b) (investigation into possible violation of law) in support of the section 14(1) exemption claim.

The requester, now the appellant, appealed the Police's decision.

During the course of mediation, the Police received a belated response from affected person #1, providing his consent. As a result, the Police disclosed a small portion of one of the records to the appellant.

During mediation, the appellant confirmed that she is not the executrix of her deceased son’s estate, and that section 54(a) of the *Act* is not relevant in this appeal.

Mediation was not successful, and the appeal moved to the inquiry stage. I sent a Notice of Inquiry initially to the Police, and received representations in response. I then sent the Notice to the appellant, along with the non-confidential portion of the Police's representations. The appellant did not provide representations.

Efforts were made by this Office to notify a second individual referred to in some of the records (affected person #2), but this person could not be located.

RECORDS:

There are five records at issue in this appeal, all of which were created by the Police in the context of the investigation into the sudden death of the appellant’s son:

1. General Occurrence Report (one page).
2. Person/Vehicle Report (one page).
3. Sudden Death Report (one page).

4. Property Report (one page)
5. General Occurrence/Sudden Death Report (two pages).

A small portion of Record 5 was released to the appellant.

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 an investigation by the Police into the death of the appellant’s son. As such, I find that they all contain the deceased son’s personal information.

Records 2, 3 and 5 also contain information obtained from or concerning affected person #2. This information consists of information provided by her to the Police, as well as personal identifiers such as her name, address, telephone number and date of birth. I find that Records 2, 3 and 5 contain the personal information of both the deceased son and affected person #2.

None of the records contain any of the appellant’s personal information, so section 38 of the *Act* has no application in the circumstances of this appeal.

Section 2(2) of the *Act* provides that personal information does not include information about an individual who has been dead for more than 30 years. Because the appellant’s son died in 2000, section 2(2) has no application in this case.

INVASION OF PRIVACY

Where a requester seeks the personal information of another individual, 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. The only exception with potential relevance in this appeal 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) provide guidance in determining whether disclosure would result in an unjustified invasion of privacy. Section 14(2) provides some criteria for an institution 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, and 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 stated that once a presumption against disclosure has been established under subsection (3), it cannot be rebutted by either one or a combination of the factors set out in subsection (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.

In this appeal, one of the presumptions relied on by the Police is section 14(3)(b), which provides:

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

The personal information of the parties involved was compiled by members of the [Police] during an investigation to determine if an offense under the *Criminal Code of Canada* may have been committed. The information contained in these records was to investigate a death and determine if there were any offences committed by any party involved in this incident. If an offense was committed then the individual(s) would be charged and prosecuted, which would lead to a court proceeding.

I find that 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*. The fact that no criminal proceedings were commenced by the Police has no bearing on this issue, since section 14(3)(b) only requires that there be an investigation into a possible violation of law (See Orders M-198 and P-237). Therefore, I find that the section 14(3)(b) presumption of an unjustified invasion of personal privacy applies. Because the exempt information falls within the scope of one of the section 14(3) presumptions, *John Doe, supra*, precludes me from considering the application of any of the factors weighing for or against disclosure under section 14(2). None of the considerations in section 14(4) apply, and the appellant has not raised the possible application of the "public interest override" provision in section 16 of the *Act*.

Consequently, I find that disclosure of the personal information contained in the record would constitute an unjustified invasion of his privacy, and that this information qualifies for exemption under section 14(1) 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 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.

In Order MO-1330, I commented on the issue of access to the personal information of deceased family members as follows:

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 counseling; 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.

I am similarly required to apply the *Act* as it stands today in the circumstances of this appeal.

Because I have found that section 14(1) applies to all records, it is not necessary for me to determine whether they also qualify for exemption under section 8(2)(a).

ORDER:

I uphold the decision of the Police.

Original signed by: _____ November 28, 2000
Tom Mitchinson
Assistant Commissioner