ORDER MO-1568

Appeal MA-010389-1

Ottawa Police Service

NATURE OF THE APPEAL:

The Ottawa Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Privacy Act* (the *Act*) for access to information pertaining to a specified fatal motor-vehicle accident in which the requester's son was killed. Specifically, the requester asked for access to:

> …a complete copy of the investigating police officer's notes, records, photographs or similar material which you have in your possession or could obtain in regards to the above-noted accident.

The requester's son was the driver of one of the vehicles involved in the accident. The driver of the other vehicle, a police officer, has been charged under the *Criminal Code*.

The Police identified three responsive records, consisting of a bound report, a series of photographs, and a videotape, all of which relate to the accident. The Police denied access to all three records in their entirety pursuant to sections 8(1)(a), 8(1)(b), 8(2)(a), 14(1), 38(a) and 38(b) of the *Act*.

The requester (now the appellant) appealed the Police's decision.

During mediation, the Police advised that the investigation phase of this incident had concluded and that it would no longer be relying upon sections 8(1)(a) and 8(1)(b). These sections are therefore no longer at issue in this appeal.

Also during mediation, the appellant confirmed that she is not the personal representative of her deceased son's estate. Accordingly, section 54(a) of the *Act* has no application in this appeal.

Mediation was not successful in resolving the appeal, so it was transferred to the adjudication stage. I sent a Notice of Inquiry to the Police, initially, which outlined the facts and issues and requested written representations. The Police submitted representations, which were then shared with the appellant, along with the Notice. The appellant also provided written representations.

RECORD:

The three records at issue in this appeal can be described as follows:

Record 1: A 553-page, 3-volume, bound report prepared by the police officer in charge of the investigation. It includes a table of contents, and a series of handwritten and typed statements and reports from various police officers, witnesses and others contacted by the Police, all of which relate to the circumstances of the accident and subsequent steps taken by the Police during its investigation. The report has a number of appendices, which include various maps and diagrams, "will say" statements, and police officers' notebook entries.

Record 2: A bound volume of 138 photographs related to the accident.

Record 3: One videotape of the accident scene.

DISCUSSION:

PERSONAL INFORMATION

The first question I must address is whether any of the records contain the personal information of individuals other than the appellant, because if they do, the *Act* sets limits on the right of access to that information.

Section 2(2) of the *Act* states that "personal information" does not include information about an individual who has been dead for more than thirty years. By inference, the personal information of an individual who has been dead for thirty or fewer years is protected by the *Act*. In other words, the *Act* continues to recognize the personal privacy rights of deceased persons, until thirty years after their death. The accident resulting in the death of the appellant's son occurred in November 2001, well within the 30-year period identified in section 2(2).

As stated earlier, the special circumstances identified in section 54(a) are not present in this appeal. I also note that although the appellant is the mother of the deceased, he was not less than sixteen years of age at the time of the accident. Accordingly, the provisions of the *Act* permitting parents to exercise the rights of their children (and therefore to have access to the personal information of their children) do not apply (section 54(c)).

Under section 2(1) of the *Act*, "personal information" is defined as "recorded information about an identifiable individual". The *Act* also provides a list of information that is considered to be "personal information", but this list is not exhaustive. Having reviewed the records, I am satisfied that Record 1 and some of the photographs in Record 2 contain personal information.

Record 1

Record 1 consists of accounts of the accident that led to the death of the appellant's son and subsequent information gathered in the context of investigating the circumstances relating to the accident. As such, I find that it contains personal information about the appellant's son, and the witnesses and other persons who were interviewed as part of the subsequent investigation undertaken by the Police, as well as the police officer charged under the *Criminal Code*. A relatively small number of pages also contain the personal information of the appellant, gathered by the Police in the context of the investigation.

In her representations, the appellant submits:

> After looking at the photographs published in the local newspapers, it is apparent that several police officers investigated this accident. And yet, the appellant has not been provided with the names of the police officers. In Reconsideration Order R-980015, the adjudicator found that information associated with the names of the

> affected persons which relates to them only in their capacities as officials within the organization which employs them is not personal information.

The appellant is correct when she states that, in these circumstances, information about police officers discharging their official functions is not their personal information, and that the names of the various police officers involved in investigating the accident involving the appellant's son's death would not constitute their personal information. Therefore, the names of the police officers do not qualify for exemption under section 14 of the *Act*.

Records 2 and 3

Record 2 consists of various photographs relating to the accident; and Record 3 is a short videotape of the two vehicles involved in the accident, taken in daylight hours, presumably on the morning following the accident before the cars were removed from the scene.

The appellant submits:

> There is a video and a booklet of photographs among the items listed in the notice of appeal. Order M-927 finds that photographs of the damaged vehicle does not contain any individual's personal information, and are ordered to be released to the appellant. It is the appellant's position that this should also apply to both the video and the photographs [at issue in this appeal].

In Order M-927, former Adjudicator John Higgins dealt with a similar request for access to records compiled by a police service in the context of a fatal accident involving the requester's child. He found that photographs of the accident scene in that case did not contain "personal information", and therefore could not qualify for exemption under section 14 of the *Act*. I have reached the same conclusion in this appeal, as it relates to Record 3 and some of the Record 2 photographs. In my view, the videotape and some of the photographs depict the two vehicles from various perspectives that would be observable by anyone standing in a public space near the accident scene. Other photographs are aerial shots of the general area of the accident taken from a considerable distance. I find that the Record 3 videotape and Record 2 photographs F1020012 through F1020024, F1030001 through F1030010, F1030012 through F1030014, F1070001 through F1070023, and F1080014 through F1080023, that meet these descriptions, do not contain "personal information" of any identifiable individual, and therefore do not qualify for consideration under section 14(1) of the *Act*.

Some other photographs, in contrast, depict identifiable individuals, while others reflect specific additional evidence gathered by the Police during the course of its investigation of the accident. I find that these photographs are about the individuals depicted in them, or of the police officer who is the subject of criminal charges, and therefore qualify as "personal information" pursuant to section 2(1) of the *Act*.

INVASION OF PRIVACY

Under the *Act*, individuals have a general right of access to records that contain their own personal information. However, the *Act* imposes restrictions on access to records containing the personal information of others. In the present appeal, none of the Record 2 photographs and most of Record 1 do not contain the appellant's personal information; rather, they contain only the personal information of other individuals, including the appellant's deceased son. Under section 14(1) of the *Act*, the Police must refuse to disclose this personal information, unless certain specified circumstances are present.

The only circumstance that might provide an exception to the section 14(1) exemption in this appeal is set out in section 14(1)(f), which provides:

> 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 institution 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.

Most relevant to this case 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;

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, 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 submit that:

> [A]ll the information in the record at issue was gathered and compiled into a possible violation of law. The sections that were considered in this case were Criminal Code offences and were driving related violations. Section 294.4 C.C., dangerous driving causing death was considered and charges were laid.

The appellant addresses section 14(3)(b) in her representations. She points out that the investigation undertaken by the Police following the accident is now complete, and that a criminal trial has been scheduled. In this regard, the appellant submits:

> … The Police would have had to provide disclosure to the accused in preparation for trial. The accused has therefore received the records containing the personal information of all the affected parties. The appellant was not contacted in order to obtain her consent to the release of this information to the accused.

Disclosure to the accused in the context of a criminal trial is governed by the common law. In my view, this type of disclosure is permitted by the exception built into section 14(3)(b), specifically, that the presumption does not apply "to the extent to which disclosure is necessary to prosecute the violation". There is clearly no need to seek the appellant's consent to any such disclosure.

The appellant goes on to submit:

> In addition, the records were compiled and are identifiable as part of an investigation, however the investigation has now concluded. The Police, in charging the officer, have satisfied themselves that a violation of the law has occurred. Therefore, this section cannot apply as the possible violation no longer exists; it is now a criminal code charge.

> All along, this was a highly publicized case. There is nothing more personal than one's photograph, and both [the appellant's son and the accused] have appeared in all of the papers several times. And yet, the appellant has not been provided with the name of the police officer who was involved in the accident, which police force he was with, his number of years of experience, his age, or anything of the like. All of this information was in the newspapers.

As far as the appellant's first point is concerned, although the Police acknowledge that the investigation has been completed, that does not alter the fact that the personal information at issue in this appeal was compiled and is identifiable as part of this investigation. While any record created by the Police after the investigation was completed would not attract the protections of the section 14(3)(b) presumption, as long as a record that contains personal information was compiled during the course of the investigation itself, the presumption continues to apply irrespective of whether the investigation itself is no longer active (See, for example, Orders M-701, MO-1256 and MO-1431).

In her second point, the appellant would appear to be arguing that information already published about the accused should be made available to her under the *Act*. I accept that the name of the accused and his employer may be known to the appellant through the media or publicly accessible court records. However, in my view, it does not follow that this same information contained in records compiled in the context of a criminal investigation would necessarily fall outside the protections of the section 14(1) mandatory exemption claim. In deciding whether this information is accessible under the *Act*, it is my responsibility to review the records within the statutory framework, and to determine, first, whether the information is "personal information", as defined in section 2(1) and, if so, whether any of the exceptions to the mandatory exemption for this information are present. In the context of this appeal, I find that the names of the accused and his employer that are contained in Record 1, as well as the other types of information about the accused referred to by the appellant (i.e., age, years of employment, etc.) were compiled in the context of a criminal investigation involving this individual. As such, this information is properly characterized as "personal" rather than "professional" in nature, and must be considered in the same manner as other personal information compiled by the Police in this context.

I find that all of the personal information contained in Records 1 and 2 was clearly compiled and is identifiable as part of an investigation into a possible violation of law, specifically the *Criminal Code*. Therefore, pursuant to section 14(3)(b), it must be presumed that disclosing the personal information of the appellant's son and other individuals whose personal information was compiled in this context, would constitute an unjustified invasion of their privacy. Because the personal information falls within the scope of one of the section 14(3) presumptions, *John Doe*, *supra*, precludes me from considering the application of the factors weighing for or against disclosure under section 14(2). To put it another way, having found that section 14(3)(b) applies, I cannot consider whether any of the circumstances set out in section 14(2) might justify disclosure of the information in this case.

As far as the portions of Record 1 containing the appellant's personal information are concerned, they also contain the personal information of other identifiable individuals, including the appellant's son. Under section 38(b) of the *Act*, where a record contains the personal

information of both the requester 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. In the circumstances, I find that disclosing the appellant's personal information would constitute an unjustified invasion of the personal privacy of these other individuals, and that these parts of the record qualify for exemption under section 38(b).

LAW ENFORCEMENT

I must now determine whether any of the information that does not qualify as "personal information" qualifies for exemption under section 8(2)(a) of the *Act*. This section states:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order for a record to qualify for exemption under this section, the Police must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

(See Order 200 and Order P-324)

In Order 200, former Commissioner Tom Wright determined that in order to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information and that, generally speaking, results would not include mere observations or recordings of fact. I agree with this analysis and adopt it for the purposes of this appeal.

The appellant acknowledges that an investigation took place, but argues that materials created after the investigation had concluded would not be "prepared in the course of law enforcement". Having reviewed the records, I find that all three of them were prepared during the course of the investigation, and not after it had concluded. I am also satisfied that the Police have the function of enforcing and regulating compliance with various laws, including the *Criminal Code*. Accordingly, parts 2 and 3 of the test have been established.

The remaining question to consider under section 8(2)(a) is whether any of the records qualify as a "report".

I find that Records 2 and 3 do not qualify as "reports" for the purpose of section 8(2)(a). In my view, the videotape and photographs taken at the accident scene are accurately described as "observations or recordings of fact". No text or dialogue accompanies the visual materials, nor are they organized, indexed or collated in any way with Record 1.

On the other hand, I find that Record 1 does qualify as a "report" as that term has been defined and applied by this office. This record is a bound 3-volume compilation of various pieces of information and evidence gathered during the course of the criminal investigation. It has a table of contents, as well as a number of listed appendices of supplementary information thought by the police officer in charge of the investigation to be relevant. The record has been collated by the investigating police officer, and the information is organized in a logical manner in an effort to present the results of the investigation in an understandable and comprehensive way.

For these reasons, I find that all three parts of the section 8(2)(a) test have been established for Record 1, and it qualifies for exemption on that basis.

In my previous discussion of the personal privacy exemption, I found that the names of the various police officers involved in investigating the accident did not constitute their personal information and therefore did not qualify for exemption under section 14. This information is contained in the table of contents found at the beginning of the first volume of Record 1. In the circumstances of this appeal, I find that the names of these police officers can be severed from the table of contents, pursuant to the severance requirements of section 4(2) of the *Act*, and disclosed to the appellant without disclosing the substance of the report that qualifies for exemption under section 8(2)(a).

General Comments

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. The Divisional Court's statement in *John Doe, supra,* that the presumptions found in section 14(3) are not rebuttable by any factors in section 14(2), does not permit a result in this case that would satisfy the appellant's desire for more information. In keeping with the Divisional Court's interpretation of the *Act*, 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 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.

ORDER:

1. I order the Police to disclose Record 3, and Record 2 photographs F1020012 through F1020024, F1030001 through F1030010, F1030012 through F1030014, F1070001 through F1070023, and F1080014 through F1080023 to the appellant by **September 27, 2002.** I further order the Police to identify the names of all police officers who participated in the investigation of the traffic accident involving the appellant's son from the 7-page table of contents at the front of volume 1 of Record 1, and to sever this information and disclose it to the appellant by **September 27, 2002**.

2. I uphold the decision of the Police not to disclose all other portions of Record 1 and the remaining photographs in Record 2 not covered by Provision 1.

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 that are disclosed to the appellant pursuant to Provision 1.

Original signed by: September 6, 2002
Tom Mitchinson
Assistant Commissioner