



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1918

Appeal MA-040196-1

Town of Amherstburg Police Services



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NATURE OF THE APPEAL:

The Town of Amherstburg Police Service (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a journalist for a named newspaper for toxicology test results of a named individual who died in a motor vehicle accident. The deceased was employed as a Police Officer with the City of Windsor and was off-duty at the time of the accident.

The Police located a one-page "Homicide/Sudden death report" containing the requested information and denied access to it, relying on section 14(1)(f) (invasion of privacy) in conjunction with section 14(3)(a) (medical diagnosis). The decision letter reads:

In making my decision I have applied section [14(3)(a)] of the *Act* stating:

"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."

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

During the course of mediation, the appellant raised the issue of whether a compelling public interest exists to support the disclosure of the record. Section 16 (public interest override) of the *Act* was added as an issue in the scope of the appeal.

The parties were unable to arrive at a mediated settlement and the file was transferred to former Assistant Commissioner Tom Mitchinson for adjudication. With Assistant Commissioner Mitchinson's retirement, I have taken over responsibility for the adjudication of this appeal.

Assistant Commissioner Mitchinson began his inquiry by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the Police. The Police provided him with their representations in response. Assistant Commissioner Mitchinson then sent a Notice of Inquiry to the appellant, together with a copy of the representations submitted by the Police. The appellant, in turn, submitted representations. The Police were then given an opportunity to reply to the appellant's representations dealing with the application of section 16. The Police provided reply representations.

RECORD:

At issue are the results of the toxicology test, originally received by telephone, from the Coroner's Office. The results are recorded in a one-page "Homicide/Sudden death report". As the request was specifically for the toxicology results, the remainder of the one-page report is not responsive to the appellant's request and is not relevant to this appeal.

DISCUSSION:

DOES THE RECORD CONTAIN PERSONAL INFORMATION?

The section 14(1) personal privacy exemption applies only to information that qualifies as “personal information” as defined in section 2(1) of the *Act*. Personal information is defined, in part, to mean “recorded information about an identifiable individual”, including the individual’s age [paragraph (a)], the individual’s address or telephone number [paragraph (d)] or 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 [paragraph (h)].

The Police submit that the information at issue qualifies as personal information and that “the appellant is seeking the information of another individual.”

The appellant does not specifically comment on whether the information contained in the record qualifies as personal information.

I have reviewed the records and I find that it contains the personal information of the deceased individual including that individual’s name, age, address, telephone number and other personal information.

WOULD DISCLOSURE OF THE PERSONAL INFORMATION RESULT IN AN UNJUSTIFIED INVASION UNDER SECTION 14(1)?

General principles

Section 14(1) is a mandatory exemption that protects information when disclosure constitutes an unjustified invasion of another individual’s personal 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 Ministry relies on section 14(1)(f) to deny access to the record. Section 14(1)(f) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

14(1)(f)

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information may result in an unjustified invasion of the personal privacy of the individual to

whom the information relates. Section 14(2) provides some criteria for determining whether the personal privacy exemption applies. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) lists the types of information for which disclosure does not constitute an unjustified invasion of privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 14(3) it cannot be rebutted by either one or a combination of factors set out in section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue is caught by section 14(4) or if the “compelling public interest” override at section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In the circumstances of this appeal, none of the circumstances listed in section 14(4) apply.

The Police rely on the “presumed unjustified invasion of personal privacy” in section 14(3)(a) of the *Act* which states:

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;

Representations, analysis and findings

The Police submit:

The information contained in the record at issue is definitely medical information. There are a number of previous orders that have found that forensic test results involving blood alcohol analyses form part of the medical history and/or condition of a deceased person, and that the presumption in section 14(3)(a) applies to this information (Order P-362, P-412, P-482, P-945 and P-1121)

Disclosure of this information would constitute a presumed unjustified invasion of their personal privacy under section 14(3)(a).

In response the appellant submits:

Contrary to several previous orders by the commission brought to our attention, an argument could be made against the application of 14(3)(a) – by the Amherstburg police – when it comes to withholding post-mortem toxicological test results following a fatal crash on a public highway.

Having reviewed the record, I find that the personal information at issue in the record consists of medical information belonging to the deceased. The record contains the results of a toxicology

report on the blood alcohol level of the deceased person. Consistent with the reasoning in past orders of this office, the presumption in section 14(3)(a) therefore applies. This presumption is not rebutted by section 14(4) in this case.

I therefore find that disclosing the personal information would constitute an unjustified invasion of personal privacy under section 14(1), and this information is therefore exempt under that section. I turn now to the question of whether section 16 applies.

IS THERE A PUBLIC INTEREST IN DISCLOSURE OF THE RECORD?

During the mediation stage of the appeal, the appellant indicated his belief that there exists a public interest in disclosure of the personal information contained in the records, most specifically those relating to the toxicology testing of the deceased driver of the vehicle.

Section 16 of the *Act* provides:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

For section 16 to apply, two requirements must be met. First, a compelling public interest in disclosure of the records must exist. Second, this interest must clearly outweigh the purpose of the exemption, in this appeal, section 14(1). [Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* [1999], O.J. No. 488 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

“Compelling” is defined as “rousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*’s central purpose of shedding light on the operations of government. In order to find that there exists a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balancing exercise is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

Representations

In their representations, the Police submit that there is no compelling public interest in releasing this record especially since the deceased was off duty at the time of the accident.

In response, the appellant submitted that a compelling public interest does exist in the release of the results of the toxicology tests. The appellant submitted the following in support of this position:

Denying access by arguing this is personal information relating to a medical diagnosis ignores the fact such information is routinely made public in criminal and civil court cases – and routinely reported on through the media. Such information becomes part of the public interest. If, for example, alcohol was a factor in a fatal motor vehicle collision, divulging such information serves strongly in the public interest by alerting and warning others, including legislative authorities. Section 14(3) arguments aside, however, the [appellant newspaper] believes strongly that all the facts of this specific case (MA-040196-1) deserve to be made public under section 16 of the *Act*...

The mediator with this FOI request cited Order PO-2215 and MO-1722 in ruling in favour of withholding the document requested by [the appellant newspaper]. Neither of those cases, we contend, makes a sufficiently strong argument against [the appellant newspaper's] own request for the application of the section 16 public interest override provision...

I agree with the Commission that a public interest is not automatically established where the requester is a member of the media (Orders M-773, M-1704). But based on [the appellant newspaper's] series, and the public response to it, we consider the Commission's definition of "compelling" as being met. Disclosing the records sought here, we believe, would further "rouse strong interest or attention" (Order P-984) to an issue we also feel needs to be further aired and addressed in public.

The awareness of the potential dangers of prescription painkiller use is only now emerging. There is currently not a significant amount of information to help inform the public, and there has not yet been wide public coverage or debate of the issue. This would negate any arguments against disclosure based on order P-532, P-568 or P-613...

...if addiction to a legally and readily available narcotic was in any way a factor in this officer's untimely death, then the public has a right to know and ought to be informed. That the victim was a veteran patrol officer further underlines the public interest. Police officers are not only held to a higher standard in the

community, but they also understand foremost the dangers of driving while being impaired in any way...

Our news series called on medical and government authorities to act on this emerging problem, which speaks to the Act's section 16 exemptions. If this police officer's death can be attributed to the danger inherent in existing medical practices, then sweeping the facts of this case under the carpet would not only not serve in the best public interests but could indeed impede moving this issue progressively forward.

On reply, the Police submit:

On at least two occasions the appellant spoke with Sgt. McWhinnie, and was advised that alcohol was a contributing factor in this motor vehicle collision within days of the accident. This information is also contained in the motor vehicle collision report available to the public for a fee, which the [appellant newspaper] has recently obtained a copy of this report from our office [sic].

Our police service has always provided the media with information as to whether alcohol has been a contributing factor in any motor vehicle collision as it is important for the public to be informed of the dangers of alcohol and driving.

Analysis and findings

In Order MO-1722, mentioned above in the appellant's representations, Adjudicator Donald Hale found that there did not exist a compelling public interest in disclosure of records including information detailing the result of a deceased individual's toxicology tests and his blood alcohol reading. In that order, Adjudicator Hale stated:

The circumstances surrounding the accident that is the subject of the records are very compelling and were of great interest not only in the community where it occurred but also throughout Ontario. However, I am of the view that the disclosure of the information contained in the records would not serve the purpose of informing the public about the activities of the Police or government. The public interest in this case revolves around the need to know more about the tragic circumstances which led to the accident and the loss of four young lives. In my view, there is no public interest in disclosure that would serve the purposes envisioned by section 16. As a result, I find that section has no application to the records under consideration here.

In my view, the reasoning applied by Adjudicator Hale in Order MO-1722 is equally applicable in the circumstances of the current appeal. I accept the appellant's position that the awareness of the potential dangers of prescription painkiller use is now emerging in the media as a subject matter that deserves to be discussed. I also agree that if alcohol is a factor in fatal motor vehicle

collisions, providing such information to the public may serve a public interest by alerting the public to the dangers of impaired driving. However, I find that disclosure of the specific information in the record at issue in this appeal would not serve the purpose of informing the public about such matters. The police have informed the appellant that alcohol was a contributing factor to the accident and therefore the death of the deceased. For the purpose of furthering the public interest by alerting citizens to the dangers of impaired driving, this information is sufficient and, in my view, disclosure of the actual blood alcohol level would not add any meaningful detail to support this purpose. Further, I note that the deceased was not on duty at the time of the accident. As a result, I am unable to conclude that there is a connection between the toxicology results requested and informing the public about the activities of the police.

I therefore conclude that there is no compelling public interest in releasing the toxicology results of the deceased and as such, section 16 has no application to this appeal.

ORDER:

I uphold the decision of the Police to deny access to the record.

Original Signed By:

Brian Beamish
Assistant Commissioner

April 14, 2005