



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

# **ORDER MO-1903**

**Appeal MA-040080-1**

**Timmins Police Service**



Tribunal Services Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

This appeal concerns a decision of the Timmins Police Service (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to copies of all relevant documents with respect to the death of her son (the deceased) on April 22, 2001. The requester also specified that she was seeking access to either audio tapes or written transcripts of 911 calls made to the Police, the times these calls were made, and when the Police phoned her brother to confirm the deceased's death.

The Police denied access in full to the records in accordance with section 14 (personal privacy), read in conjunction with 14(3)(b) (investigation into violation of law) of the *Act*.

The requester (now the appellant) appealed the Police's decision. In her letter of appeal the appellant advised that she was seeking the information on behalf of herself and her husband.

During the mediation stage, the Police confirmed that a 911 call was made but that the tape recording of the call no longer exists as tapes of 911 calls are only kept for a period of one year. However, the Police indicated that the time of the call did exist on a dispatch log and the Police agreed to release this record in full to the appellant. Shortly after the close of mediation, the mediator confirmed that the dispatch log had been released in full to the appellant. With respect to the time that the brother was phoned, the Police confirmed that this part of the request is addressed in the records remaining at issue in this appeal.

Also during mediation, the mediator discussed with the Police the possibility that sections 54(c) (person less than sixteen years of age) and 38(b) (unjustified invasion of another individual's personal privacy) of the *Act* could apply in this appeal. At the time of his death the deceased was fifteen years of age. The Police declined to revise their decision to address the possible application of these sections. However, in light of the circumstances, I will consider their application in my inquiry.

I commenced my inquiry by sending a Notice of Inquiry to the Police, seeking representations on the application of section 54(c) and section 38(b), read in conjunction with section 14. The Police submitted representations and agreed to share them with the appellant in their entirety.

I then sent a Notice of Inquiry to the appellant and included with it a copy of the Police's representations. The appellant submitted representations in response. I subsequently received further representations from the appellant on the application of section 54(c) to the circumstances of this case.

## **RECORDS:**

There are four records remaining at issue, described as follows:

- Record 1 (pp. 8-10) – Homicide/Sudden Death Report (3 pages)
- Record 2 (p. 11) – Supplementary Occurrence Report (1 page)

- Record 3 (p. 12) – Supplementary Occurrence Report (1 page)
- Record 4 (p. 13) – Supplementary Occurrence Report (1 page)

## **DISCUSSION:**

### **PERSON LESS THAN SIXTEEN YEARS OF AGE**

#### **General principles**

Section 54(c) states:

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;

Under this section, a requester can exercise another individual's right of access under the *Act* if he/she can demonstrate that

- the individual is less than sixteen years of age; and
- the requester has lawful custody of the individual.

If the requester meets the requirements of this section, then he/she is entitled to have the same access to the personal information of the individual as the individual would have had. The request for access to the personal information of the individual will be treated as though the request came from the individual him or herself (Order MO-1535).

#### **The parties' representations**

The Police state that section 54(c) is a "very relevant and very important section to consider in a sudden death case as we are dealing with extremely sensitive issues." The Police acknowledge that the first requirement has been met since the deceased was fifteen years of age at the time of his death. However, the Police challenge the appellant to prove that she had lawful custody of the deceased at the time of his death.

In response, the appellant submitted a sworn statement that she had custody of the deceased up until his death on April 22, 2001.

#### **Analysis and findings**

In making their submissions regarding the application of section 54(c) both parties have assumed that this section can apply in circumstances where the individual in question is deceased. However, this office has not made a ruling on this point. Therefore, I must first determine

whether section 54(c) can be interpreted in a way that includes a situation where an individual was less than sixteen at the time of death but is no longer alive.

*Interpretation of section 54(c)*

There is no legislative history that sheds any light on the purpose of section 54(c), so resort must be had to other tools of interpretation.

The modern rule of statutory interpretation is articulated by R. Sullivan in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 131:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

This office therefore should adopt an interpretation of section 54(c) that is plausible in the context of the *Act*, promotes its purposes and leads to a reasonable and just outcome [see Order MO-1238].

*Plausibility*

*Driedger* states (at p. 101) that to be plausible, an interpretation “must be one that the text of the legislation is reasonably capable of bearing”. This suggests that more than one definition may be considered plausible. One way of ascertaining the “range” of plausible definitions is to refer to dictionary definitions. As *Driedger* states (at p. 12):

The chief virtue of dictionary definition is that it fixes the outer limits of ordinary meaning. It offers a more or less complete characterization of the conventional ways in which a word or expression is used by literate and informed persons within a linguistic community. It thus indicates the possible range of meanings that the word or expression is capable of bearing. This is valuable information because, generally speaking, the courts prefer meanings that are plausible, that is, meanings that the words are reasonably capable of bearing.

In my view, it is plausible that the words “if the individual is less than sixteen years of age” should be read broadly, permitting the section to apply at any time, as long as the individual in question was less than 16 years of age at the time of death.

On the other hand, it is also plausible to read the word “is” as conveying a stricter time-based meaning. The attraction of this argument is that the word “is” suggests that the individual is alive, and cannot have been intended to apply to an individual that is no longer alive. Further, the fact that section 54(a) exists, which addresses deceased individuals, suggests that the legislature intended that 54(a) be the sole section dealing with deceased individuals, regardless of age. That section reads:

Any right or power conferred on an individual by this Act may be exercised,  
if the individual is deceased, by the individual’s personal representative if exercise of the right or power relates to the administration of the individual’s estate.

The weakness of this latter argument is that, as a practical matter, it would be highly unlikely for an individual who dies before reaching the age of sixteen to have an estate. Therefore, the counter-argument would suggest that it is section 54(c) that the legislation intended to apply as a whole to young persons, regardless of whether they later became deceased.

*Promotion of the purposes of the Act/reasonable and just outcome*

The purposes of the *Act* are set out in section 1. Section 1(b) reads:

The purposes of this Act are,  
to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

It could be argued that the stricter approach discussed above furthers the purposes of the *Act* set out in section 1(b) because it is more privacy protective, since it would prevent disclosure of a young person’s personal information to a parent where the young person is deceased. On the other hand, an important purpose of the *Act* is to ensure individuals are provided with access to information “about themselves”.

In my view, by enacting section 54(c), the Legislature signalled its intent that a custodial parent should be able to “stand in the shoes” of his or her young child, and that the child’s information should be treated as if it were the parent’s. Therefore, permitting disclosure to a parent in these circumstances would promote the “access to one’s own information” purpose of the *Act*.

Finally, allowing a parent access where the child died before the age of sixteen leads to a more reasonable and just outcome. In circumstances where the parent clearly would have gained access had the child been alive and under the age of sixteen, it is difficult to argue that it is reasonable for access to be denied, solely on the basis that the child is deceased. In fact, one could argue that the degree of “invasion of privacy” is lessened rather than increased upon the death of the child, due to the notion of “diminished privacy interest after death” [see, for

example, Order PO-1736, upheld on judicial review in *Ontario (Public Guardian and Trustee) v. Goodis* (December 13, 2001), Toronto Doc. 490/00 (Ont. Div. Ct.), leave to appeal refused (March 21, 2002), Doc. M28110 (C.A.)].

On balance, having considered both sides of the issue, I am satisfied that the broader interpretation more fully promotes the purposes of the *Act* and leads to a more reasonable and just outcome.

As a result, section 54(c) should be interpreted as applying where:

- (i) the child died under the age of sixteen; and
- (ii) the parent had lawful custody of the child at the time of death.

### ***Conclusion***

In these circumstances, I am satisfied on the evidence before me that the deceased was under the age of sixteen when he died and that the appellant had lawful custody of the deceased at the time of death. Accordingly, I find that section 54(c) applies in the circumstances of this appeal.

Having reached this conclusion I will now consider the application of the section 38(b) exemption, read in conjunction with section 14, to the information at issue.

### **PERSONAL INFORMATION**

#### **What constitutes “personal information”?**

In order to determine whether section 38(b) applies, it is necessary to determine whether the records contain “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,

- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if 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 parties' representations**

The Police submit that the withheld information contains the personal information of several individuals, including the deceased. The Police state that the records contain the names, addresses and telephone numbers of the deceased and several other individuals as well as the deceased's personal history, including cause of death and condition at time of death.

While not expressly saying so, the appellant implies that the records contain the personal information of the deceased and other individuals. The appellant has enclosed with her representations signed consents from two individuals – another son and her brother - to the release of their personal information. Also, as indicated above, the appellant has advised that she is making the request on her own behalf and on behalf of her husband.

### **Analysis and findings**

#### ***Records 2, 3 and 4***

I find that these records contain the personal information of the deceased, including his name and other personal information relating to him, within the meaning of paragraph (h) of section 2(1). I also find that record 3 contains the personal information of the appellant, her husband, their other son and the appellant's brother, including their names, their relationship to the deceased and their views or opinions about the deceased, within the meaning of paragraphs (a) and (g) of section 2(1). These records do not contain personal information relating to any other individual. In the circumstances, I will consider the husband, their other son and the appellant's brother to be consenting to disclosure of their personal information. In addition, as I found above, the appellant is entitled to access the personal information of the deceased. Therefore, it cannot be

said that disclosure of any of the information in these records would constitute an unjustified invasion of another individual's privacy. Accordingly, the section 38(b) exemption cannot apply, and these records should be disclosed to the appellant in full.

### ***Record 1***

This record contains personal information relating to the same individuals as Records 2, 3 and 4. However, this record also contains personal information of two other individuals who have not consented to disclosure. In the case of one of these individuals, the personal information includes that individual's name, address, telephone number, her views and opinions about the deceased and other personal information relating to her, within the meaning of paragraphs (d), (g) and (h) of section 2(1). With regard to the other individual, the personal information includes his name, age, address, telephone number, and other personal information relating to him, within the meaning of paragraphs (a), (d) and (h) of section 2(1). Therefore, I must consider the possible application of section 38(b) to this record, to the extent it contains personal information of the two other individuals.

## **RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF OTHER INDIVIDUALS**

### **General principles**

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Section 38(b) of the *Act* provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

If the information falls within the scope of section 38(b), the institution may choose to exercise its discretion to disclose the information to the requester. I will review the Ministry's exercise of discretion under section 38(b) later in this order, after I have decided whether the exemption applies.

Sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met.



In this case, the Police have raised the application of the presumption in section 14(3)(b), which reads:

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 parties' representations**

The Police submit that the records were compiled and are identifiable as part of an investigation into a possible violation of law regarding a death that occurred in a private residence. The Police state that due to the circumstances surrounding the death they were required to investigate potential foul play and a possible violation of law. Accordingly, the Police submit that disclosure of the personal information contained in the records is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(b).

The appellant submits that an investigation was unnecessary as the cause of death was clear and there was no foul play involved.

### **Analysis and findings**

I understand the appellant takes the position that the cause of the deceased death is clear to her and, as a result, an investigation was unnecessary. However, it is clear that the Police conducted an investigation into the matter to determine whether there was a violation of law under the *Criminal Code*, and I am satisfied that Record 1 was compiled and is identifiable as part of the investigation. As a result, disclosure of the personal information of the two other individuals in this record is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(b). Therefore, this information qualifies for exemption under section 38(b).

### **EXERCISE OF DISCRETION**

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

The exercise of discretion under section 38(b) involves a balancing principle. The institution must weigh the appellant's right of access to his or her own personal information against the other individuals' right to the protection of their privacy.

Although the Police's representations focus on the exercise of their discretion regarding the non-disclosure of the deceased's personal information to the appellant, I am satisfied that the Police have properly balanced the appellant's right of access against privacy considerations in denying the appellant access to the personal information of the other two individuals.

**ORDER:**

1. I order the Police to disclose records 2, 3 and 4 to the appellant in their entirety on or before **March 11, 2005**.
2. I order the Police to disclose portions of record 1 to the appellant, on or before **March 11, 2005**, in accordance with the highlighted version of this record included with the Police's copy of this order. To be clear, the Police should not disclose the highlighted portions of this record.
3. In order to verify compliance with provisions 1 and 2 of this order, I reserve the right to require the Police to provide me with copies of these records, as disclosed to the appellant.

Original Signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

February 18, 2005 \_\_\_\_\_