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

ORDER MO-1901

Appeal MA-040148-1

Hamilton Police Services Board

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NATURE OF THE APPEAL:

The Hamilton Police Services Board (the Police) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a double murder that occurred in 2000. The requester is the sister of one of the murder victims.

The Police located 26 responsive records comprising 1226 pages and denied access to the majority of them, in their entirety, under the discretionary exemptions in sections 8(1)(c) (law enforcement), (e) (endanger life of safety) and (l) (facilitate commission of an unlawful act) and 8(2)(a) and (c) of the *Act* (law enforcement), as well as the mandatory exemption in section 14(1) (invasion of privacy), with reference to the considerations listed in sections 14(2)(e) (pecuniary or other harm), (f) (highly sensitive information) and (h) (supplied in confidence) and the presumptions in sections 14(3)(b) (compiled as part of a law enforcement investigation), (d) (relates to employment or educational history) and (g) (consists of personal recommendations or evaluations) of the *Act*. The requester's own statement to the Police was disclosed to her, in its entirety.

The requester, now the appellant, appealed the decision by the Police. Mediation was not successful and the matter was moved to the adjudication stage of the process. I sought and received the representations of the Police, the non-confidential portions of which were shared with the appellant, who also made submissions in response to the Notice of Inquiry.

RECORDS:

The records consist of various investigation records totaling approximately 1222 pages. These records include police officer notes, occurrence reports, witness statements and other records compiled by the Police during the course of their investigation into the murders specified in the request.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The Police submit that the records contain personal information pertaining to the appellant's brother, the other murder victim, the individual charged and ultimately convicted of the crimes and other identifiable individuals who were involved in some way or provided information to the Police in the course of their investigation. The Police indicate that the information includes the address, telephone number, name, date of birth, medical history and employment information and the views and opinions of a large number of identifiable individuals who were connected to the investigation, including the appellant's brother. The Police argue that this information qualifies as the personal information of these individuals within the meaning of sections 2(1)(b), (d) (e) and (g).

I have reviewed each of the records at issue and find that all of them contain personal information relating to individuals other than the appellant. The information relates to the two individuals who were originally investigated in relation to the murders (one of whom was ultimately convicted), the two murder victims (including the appellant's brother) and a number of other identifiable individuals who were contacted by the Police during the course of their investigation. The personal information contained in the records includes:

- information relating to the race, age, sex and marital or family status of a number of individuals (section 2(1)(a));

- information relating to the medical, criminal or employment history of these individuals (section 2(1)(b));

- the addresses and telephone numbers of a number of identifiable individuals (section 2(1)(d));

- the personal views or opinions of these individuals (section 2(1)(e));

- the views or opinions of others about these individuals (section 2(1)(g)); and

- the individuals' names appearing with other personal information relating to them (section 2(1)(h))

None of the remaining records at issue contain the personal information of the appellant.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. In the circumstances, it appears that the only exception that could apply is paragraph (f). The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of privacy under section 14(1)(f).

If any of paragraphs (a) to (h) of section 14(3) apply, the information is exempt under section 14, unless one of the exceptions listed in section 14(4) are present or there exists a compelling public interest in the disclosure of the personal information under section 16 of the *Act*. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The Police submit that the personal information in the records falls within the ambit of the presumption against disclosure 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 Police argue that the personal information was compiled in the course of their murder investigation by its officers. They also indicate that none of the personal information qualifies under one of the exceptions in section 14(4) and that there is no compelling public interest in the disclosure of this information within the meaning of section 16.

I find that the personal information contained in all of the records at issue in this appeal was compiled and is identifiable as part of the Police investigation into a violation of law, a double murder. Accordingly, I find that the disclosure of that personal information is presumed to constitute an unjustified invasion of the personal privacy of the individuals to whom it relates, including the victims, the convicted person and other identifiable individuals, under section 14(3)(b).

The appellant argues that any personal information relating to the convicted person would have been presented in court as part of the trial proceedings if the convicted person had not plead guilty, negating the need for a trial. She also indicates that she has seen a video and read a transcript of the Police interrogation of the convicted person and that any privacy interest that may have existed in the information relating to this person has been lost as a result of this disclosure to her by the Crown Attorney.

In their reply representations, the Police submit that the personal privacy provisions in the *Act* require that they not disclose personal information about an identifiable individual for 30 years, except in accordance with the provisions of the *Act*. In addition, the Police point out, properly in my view, that even when information is made publicly available in a public forum, such as a trial before a Court, the personal information again is subject to the privacy protection provisions in the *Act* upon the completion of the trial. For this reason, the Police argue that notwithstanding the fact that the Crown Attorney granted the appellant access to view the videotaped statement given by one of the accused persons and a transcript of that interview, that information is now back in the possession of the Police and is again subject to the privacy protection provisions in the *Act*.

I agree with the position taken by the Police. Because the presumption in section 14(3)(b) applies to the personal information in the records, it is exempt from disclosure under section 14(1). The fact that some personal information may have been disclosed to the appellant through some means other than pursuant to the *Act* does not negate the fact that the privacy protection provisions in the legislation continue to apply to the personal information at issue.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there is a public interest in the disclosure of the records requested under section 16 which is sufficiently compelling that it outweighs the purpose of the invasion of privacy exemption in section 14(1). She argues that there has been media interest in the case and that if she were to receive access to the records:

> she could add to the debate about whether the Crown took the right action in this case. We do not argue with the fact that the Crown had the sole discretion to make the decision, just whether it was appropriate. Making this argument is a fundamental aspect of democracy.

The appellant also raises the argument that:

> the public, through its government, supports crime victims in attempting to access services and information to address their needs: the *Victims' Bill of Rights,* the *Criminal Injuries Compensation Act*, the *Police Services Act*, the variety of government funded victim services, the Victim Support Line, etc. The public supports crime victims and their desire for information. Society has an interest in victims being able to move past their pain and continue to health, and become contributing members of society.

The appellant also provided me with a copy of a column published in the local newspaper in which both the appellant and the writer describe in detail the efforts made by the appellant to obtain access to the requested information under the access provisions in the *Act*. The appellant also describes her frustration in not being able to obtain the personal information about her brother's murder. In the newspaper article, both the appellant and the columnist explain that the privacy protection provisions of the *Act* prevent her from obtaining her deceased brother's personal information and indicate that her cause has been taken up by a national lobbying group working on behalf of the victims of crime.

Responding to the column in a letter to the editor, Commissioner Ann Cavoukian agreed that amendments to the *Act* to address the issue of access to information by family members in circumstances similar to those of the appellant were long overdue. Proposed amendments were first recommended in the Commissioner's Annual Report for 1999. These amendments have not, to date, found their way into the legislation, however. As a result, I am left with applying the law as it currently stands to the appellant's situation.

The appellant argues that the "public interest override" provision in section 16 applies in this case. Section 16 states:

> 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.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the information contained in the records and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the 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 [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

In my view, the appellant has not provided me with sufficient evidence to demonstrate that there exists the requisite public interest in the disclosure of the personal information contained in the

records or that this interest in disclosure is sufficiently compelling. I accept that the appellant was deeply affected by her brother's murder and is committed to learning more about the circumstances surrounding his death. The appellant also indicates that she is seeking the information in order to satisfy herself that the arrangement entered into between the Crown and the individual accused and now convicted of the murder was not improper. While this indicates the existence of an interest in disclosure, I cannot agree with the appellant's characterization of that interest as being a public one.

Since the publication of the 1999 Annual Report, Commissioner Cavoukian has urged the introduction of amendments to the *Act* to allow for access to the personal information of deceased persons by close family members to assist them in the healing process. Those proposed amendments have not been promulgated, however. As a result, I must interpret the privacy protection provisions of the *Act* as they now exist and uphold the decision of the Police to deny access to the records under the mandatory exemption in section 14(1).

Because of the manner in which I have addressed the application of section 14(1) to the records, it is not necessary for me to consider whether they are also exempt under the discretionary exemptions in sections 8(1)(c), (e) and (l) or 8(2)(a) and (c). The appellant also made extensive representations on the manner in which the Police exercised their discretion to deny access to the records under section 8. However, because I have upheld the Police decision to deny access to the records under the mandatory exemption in section 14(1), I am unable to review the manner in which the Police decided to exercise their discretion to deny access to the records under section 8 of the *Act*.

ORDER:

I uphold the decision of the Police to deny access to the records under section 14(1).

Original Signed by: January 26, 2005
Donald Hale
Adjudicator