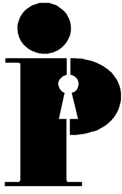

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2015

Appeal MA-040395-1

Toronto Police Services Board

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NATURE OF THE APPEAL

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a requester seeking information relating to an investigation conducted into the death of her daughter (the deceased). The request read as follows:

> I [named requester], wish to obtain a complete copy of all records pertaining to the investigation of the death of my daughter, [name of deceased], [address of deceased], [birth date and date of death of deceased]. I, her mother, wish a complete copy of all records in the investigation file, including, but not limited to:
>
> - All photographs of her and her apartment
> - Copies of interviews with witnesses, whether transcript or video tape
> - Descriptions and photographs of all evidence seized
> - The notes of the investigating detectives, [named detectives], including any conclusions they may have reached at this time regarding what happened to my daughter.
>
> In summary, I wish a complete copy of the entire investigation file pertaining to the death of my daughter.

The Police issued a decision granting partial access to responsive records and denying access to the withheld portions pursuant to sections 14(1) (personal privacy), 38(a) read in conjunction with 8(2)(a) (right of access to one's own personal information/law enforcement report) and 38(b) (unjustified invasion of another individual's personal privacy) read in conjunction with section 14(1). With respect to the application of section 14(1), the Police indicated that the exception listed in section 14(1)(f) did not apply because disclosure would result in a presumed unjustified invasion of privacy as contemplated in sections 14(3)(a) (medical evaluation) and 14(3)(b) (investigation into violation of law). In the decision letter, the Police also stated that, to their knowledge, the requester does not meet the criteria imposed by section 54(a), which allow a deceased individual's personal representative to exercise that individual's rights under the *Act* in certain circumstances.

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

During the mediation stage of the appeal, the Police clarified that section 8(2)(a) had been raised in error and that they had intended to raise the application of section 8(1)(l) (facilitate commission of unlawful act). Also during mediation, the appellant agreed to remove the portions of the records the Police had identified as non-responsive, as well as the portions withheld under sections 38(a)/8(1)(l), from the scope of the appeal. Accordingly, these portions of the records and the application of sections 38(a), 8(2)(a) and 8(1)(l) are no longer at issue.

No further issues were resolved during mediation and the file was transferred to the adjudication stage of the process for an inquiry.

Representations were first sought from the Police on the application of section 54(a), section 38(b) read in conjunction with section 14(1), and section 14(1) alone. The Police submitted representations. The appellant was then invited to submit representations and was provided with a copy of the Police's representations. The appellant provided representations in response.

RECORDS

The following seventeen records remain at issue:

Record #	Description	Withheld or Severed	Sections of the *Act*
1	Police officer's notes (3 pages)	Severed	14, 54(a)
2	Police officer's notes (2 pages)	Withheld	14, 54(a)
3	Police officer's notes (8 pages)	Severed	38(b)/14, 54(a)
4	Police officer's notes (6 pages)	Severed	38(b)/14, 54(a)
5	Police officer's notes (3 pages)	Severed	14, 54(a)
6	Police officer's notes (10 pages)	Severed	38(b)/14, 54(a)
7	Police officer's notes (4 pages)	Severed	14, 54(a)
8	Police officer's notes (2 pages)	Severed	14, 54(a)
9	Police officer's notes (4 pages)	Withheld	14, 54(a)
10	Police officer's notes (2 pages)	Severed	14, 54(a)
11	Police officer's notes (2 pages)	Severed	14, 54(a)
12	Police officer's notes (6 pages)	Severed	14, 54(a)
13	Police officer's notes (4 pages)	Severed	14, 54(a)
14	Police officer's notes (3 pages)	Severed	14, 54(a)
15	Police officer's notes (3 pages)	Withheld	14, 54(a)
16	Police Occurrence Report (8 pages)	Severed	38(b)/14, 54(a)
17	Photos (30) (1 page contact sheet)	Withheld	14, 54(a)

DISCUSSION

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

General principles

Section 54(a) states:

> 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;

Under this section, the appellant can exercise the deceased's right of access under the *Act* if she can demonstrate that:

- she is the personal representative of the deceased, and
- the right she wishes to exercise relates to the administration of the deceased's estate.

If the appellant meets the requirements of this section, then she is entitled to have the same degree of access to the personal information of the deceased as the deceased would have had when alive. The request for access to the personal information will be treated as though it came from the deceased herself [Orders M-927; M-1315].

Personal Representative

The term "personal representative" means an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate [*Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.)]. The term "estate trustee" is also used to describe such an individual [Order MO-1449; Rule 74 of the Rules of Civil Procedure made under the *Courts of Justice Act*].

Generally, to establish that she is the deceased's personal representative, the requester should provide written evidence of her authority to deal with the estate of the deceased, including a certificate of appointment of estate trustee [Order MO-1449]. A will alone may not be sufficient [Order MO-1365].

The Police submit that section 54(a) does not apply in the circumstances of this appeal. They address this issue in their representations as follows:

> It is the position of the [Police] that the appellant has failed to demonstrate [her] right to access the deceased's personal information.
>
> The appellant has not provided the required documents, certified by a Court (i.e., a Certificate of Appointment of Estate Trustee With/Without a Will) to establish her position as the personal representative of the deceased.

In her representations the appellant makes the following comments that could be considered relevant to the application of section 54(a):

> As her mother, I should not be denied access to any information in the police records that pertains only to my daughter, including the coroner's report.
>
> In the first place, the fact that she is no longer alive to waive any right of privacy in the circumstances of her death does not justify any presumption that she

> intended these records remain private. I am not convinced that she intended to die. Therefore, she had no reason even to consider the issue of such privacy, and any presumption of privacy is unwarranted. Furthermore, protection personal safety demands that circumstances of unforeseen death not be suppressed by the government. The issue, of protecting the public, including me, her friends, her acquaintances, and even the public at large, against the arising of similar and thus lethal circumstances, outweighs any presumption of privacy…

While I acknowledge that the appellant has experienced great frustration in her attempt to obtain access to information relating to her daughter, I must apply the provisions of the *Act,* which governs the release of information by, among others, the Police. While the death of an individual may have an impact on his or her privacy rights (e.g. section 2(3) of the *Act* indicates that personal information only includes information about an individual who has been dead for less than 30 years), the privacy of deceased individuals is generally subject to protection in a similar fashion to the way it would be if the individual were alive. Where section 54(a) applies, the situation is different. In the circumstances of the current appeal the appellant has not taken the position that section 54(a) applies, nor has she provided either the Police or this office with evidence that she is the "executor, administrator, or administrator with the will annexed with the power and authority to administer the deceased's estate".

Accordingly, I have not been provided with sufficient information to find that the appellant is the deceased's personal representative. I therefore find that section 54(a) does not apply in this appeal. Because of this finding, it is not necessary for me to determine whether the exercise of the right of the personal representative relates to the administration of the deceased's estate.

PERSONAL INFORMATION

For the invasion of privacy provisions in section 14(1) or section 38(b) to apply, it is necessary to first determine 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 where 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:

> The records contain the personal information of the deceased, affected parties, and the appellant.

The appellant does not make specific representations on this issue.

Following my review of the records, I find that all of the records contain the personal information of the deceased, including her age, sex and family status (paragraph (a)), medical history (paragraph (b)), address and telephone numbers (paragraph (c)), views of other individuals about the deceased person (paragraph (g)), and the deceased's name along with other personal information relating to her (paragraph (h)).

In addition, some of the records also contain the personal information of other identifiable individuals, specifically, those who were present during the events involving the deceased or those who spoke to the police following the incident. This information qualifies as the personal information of these individuals as it includes information about their age, sex and marital or family status (paragraph (a)), their addresses and telephone numbers (paragraph (c)) and their

names along with other personal information about their activities on the night in question (paragraph (h)).

Finally, I find that portions of Records 3, 4, 6 and 16 contain the personal information of the appellant in addition to the personal information of the deceased. These records contain information such as the appellant's marital or family status (paragraph (a)), address and telephone numbers (paragraph (c)), her personal views and opinions (paragraph (e)) and her name, along with other personal information relating to her (paragraph (h)), including statements she made to the Police. I note that the appellant has been granted access to those portions of the records that contain her own personal information.

Previous orders have established that if a record contains the personal information of individuals other than the requester (in this case, the appellant), but does not contain the requester's personal information, a decision regarding access must be made in accordance with the exemption at section 14(1) of Part II of the *Act* [Orders M-352 and MO-1757-I]. However, in circumstances where a record contains both the personal information of the requester and another individual, the request falls under Part III of the *Act* and the relevant personal privacy exemption is the exemption at section 38(b) [Order M-353]. Some exemptions, including the invasion of privacy exemption at section 14(1), are mandatory under Part II but discretionary under Part III, and thus in the latter case an institution may disclose information that it could not disclose if Part II is applied [Order MO-1757-I].

Furthermore, the correct approach is to review the entire record, not only the portions remaining at issue, to determine whether it contains the requester's personal information. This record-by-record analysis is significant because it determines whether the record as a whole (rather than only certain portions of it) must be reviewed under Part II or Part III of the *Act* [Order M-352].

Accordingly, for Records 3, 4, 6, and 16 which I find contain the personal information of the deceased and/or other individuals as well as the personal information of the appellant, I will review whether they qualify for exemption under the discretionary exemption at section 38(b) of Part III of the *Act*.

Records 1, 2, 5, 7 through 15, and 17, contain the personal information of the deceased but do not contain the personal information of the appellant. Therefore, I will review whether they qualify for exemption under the mandatory exemption at section 14(1) of Part II of the *Act*.

DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION/INVASION OF PRIVACY

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) is one of those exceptions to that right. That section reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information, if the disclosure would constitute and unjustified invasion of other individual's personal privacy.

Under section 38(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution has the discretion refuse to disclose that information to the requester. In my discussion on personal information I found that some of the records at issue contained both the information of the appellant (the requester) and other individuals including the deceased. I will therefore consider whether the disclosure of the personal information in Records 3, 4, 6, and 16, would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under section 38(b).

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

In this appeal, under section 14(1), where a record contains the personal information of an individual other than the appellant and no personal information belonging to the appellant, the institution must refuse to disclose the information unless disclosure would not constitute an "unjustified invasion of privacy". As I found that none of Records 1, 2, 5, 7 through 15, and 17, contained the personal information of the appellant, I will consider whether the disclosure of personal information in these records would be an unjustified invasion of the personal privacy of the individuals to whom the information relates and is exempt from disclosure under section 14(1).

Unlike section 38(b), section 14(1) is a mandatory exemption, and if it is found that disclosure would result in an unjustified invasion of the personal privacy of the individual to whom the information relates that ends the matter. The institution does not balance competing interests and does not have the discretion to disclose the information to the requester.

Accordingly, analyses under both sections 38(b) or 14(1) require that I determine whether disclosure of the remaining information would result in an unjustified invasion of the personal privacy of the individuals to whom the information relates. In both these situations sections 14(2), (3) and (4) provide guidance in determining whether "unjustified invasion of privacy" threshold is met.

Section 14(2) lists criteria for the institution to consider in making a determination as to 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(3) lists the types of information the disclosure of which is *presumed* to constitute an unjustified invasion of personal privacy.

Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as other considerations that are relevant in the circumstances of the case.

If a presumption listed in section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A presumption can, however, be overcome if the personal information is found to fall under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record that clearly outweighs the purpose of the section 14 exemption [*John Doe v. Ontario (Information and Privacy Commissioner)*(1993), 13 O.R. (3d) 767].

Representations

In the present appeal, the Police rely on the presumptions in sections 14(3)(a) and (b) to withhold portions of all the records under consideration in this appeal. Those sections read:

> 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;
>
> (b) 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 take the position that the presumption at section 14(3)(a) applies because "a number of the records contain the medical information of the deceased".

The Police also take the position that the presumption at section 14(3)(b) applies because the personal information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law. Specifically, the Police submit:

> While not all investigations into sudden deaths result in a law enforcement proceeding, the intent of the investigation is to determine whether a possible violation of law has been committed; i.e., whether the deceased died as a result of the infliction of intentional harm or criminal negligence.

The appellant does not disagree specifically with the Police's position that the presumptions at sections 14(3)(a) and/or (b) apply but submits that there is a compelling public interest that overrides any presumption of privacy. I will address the application of the section 16, the "public interest override", later in this order.

Findings

I have examined the records at issue and agree that the information was compiled and is identifiable as part of an investigation by the Police into a possible violation of law, specifically, the *Criminal Code*. The fact that no criminal proceedings were subsequently undertaken has no bearing on the issue, since section 14(3)(b) only requires that there be an investigation into a possible violation of law [Order PO-1849]. Accordingly, I find that the undisclosed personal information contained in the records falls within the presumption in section 14(3)(b) of the *Act*.

In addition, I find that the records also contain information which falls under the presumption in section 14(3)(a) of the *Act* as it relates to the post mortem examinations of the body of the deceased. Portions of the records reveal the evaluations of the coroner who attended at the scene. Others (specifically Record 16, the occurrence report) provide a brief summary of conclusions made by the pathologist during a subsequent autopsy. In my view, disclosure of this information would constitute a presumed unjustified invasion of the deceased's personal privacy under section 14(3)(a).

I have found that the presumptions in sections 14(3)(a) and (b) apply to the information at issue in this appeal. In the circumstances, none of the provisions of section 14(4) apply. The appellant has, however, in her representations raised the possible application of the public interest override at section 16 of the *Act*. Accordingly, based on the application of sections 14(3)(a) and (b) and subject to the possible application of the public interest override at section 16 which I will discuss below, I make the following findings:

- Disclosure of the severed portions of Records 1, 2, 5, 7 through 15, and 17 (records which do not contain the personal information of the appellant), would constitute a presumed unjustified invasion of the privacy of the appellant's deceased daughter and/or the other individuals whose personal information is contained in these records. Therefore, the mandatory section 14(1) exemption applies and, subject to my discussion of section 16, the Police are precluded from disclosing the portions that have been severed from these records to the appellant.

- Disclosure of the severed portions of Records 3, 4, 6, and 16 (records which contain the personal information of the appellant as well as that of the deceased and other individuals), would also constitute a presumed unjustified invasion of the privacy of the appellant's deceased daughter and/or the other individuals whose personal information is contained therein. Accordingly, the information at issue in Records 3, 4, 6 and 16 qualifies for exemption under discretionary exemption under section 38(b) of the *Act*. As noted

> above, the appellant has been granted access to all of the information that relates directly to her.

Absurd Result

The absurd result principle applies in instances, where the requester originally supplied the information or is otherwise aware of it. In such instances the information may be found not to be exempt because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323]. With respect to the absurd result principle, the Police submit:

> The information contained in the occurrence report and in the officers' memorandum book notes is recorded in both specific and general format. Occurrence reports are written in such a manner as to provide a general synopsis of the information gathered. The information that is gathered from various sources is combined to create a more well-rounded description of the information.
>
> A release of records to an individual who provided information, or to whom information was shared, should be based on clear identification of which information they provided, or were being provided, in order to protect the privacy of personal information which was obtained from or about other individuals. It should not be based on a "presumption" that the appellant is aware of this information.
>
> While it is clear that the appellant was provided with some information concerning this investigation, it is unclear from the records how much or which portions of information were provided to the appellant.
>
> Given the manner in which the information is recorded, it is difficult, if not impossible, to separate specific information provided by or to the appellant with the information provided by other affected parties which was not shared with the appellant.
>
> Therefore, the principle of absurd result should not attach to information which the appellant "may" know, or is "presumed" to know, but rather should only be based on clear evidence that such information has been provided to or by the appellant.

Findings

I have carefully considered the circumstances of this appeal including the representations of the Police on the absurd result principle and have carefully reviewed the contents of the records in light of this principle. In previous orders, the absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]

- the requester was present when the information was provided to the institution [Order P-1414]

- the information was clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755].

None of these situations are present in the current appeal and I agree with the position taken by the Police. On the face of the records and based on the evidence before me, other than the appellant's own personal information to which she has already been granted access, it is difficult to discern what information would have clearly been within the appellant's knowledge or otherwise known to her. Accordingly, I find that the absurd result principle has no application in the circumstances of this appeal.

PUBLIC INTEREST OVERRIDE

General principles

In her representations, the appellant takes the position there exists a compelling public interest, within the meaning of section 16 of the *Act,* in the disclosure of the personal information contained in the records.

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].

Under section 16 of the *Act,* an exemption from disclosure under section 14 [and by extension section 38(b)] does not apply where 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, 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 measure 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 requester. 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].

Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that "[a]s the personal information subject to the request becomes more sensitive in nature ... the effect of the proposed exemption is to tip the scale in favour of non-disclosure" [Order MO-1254].

Representations

The appellant makes the following comments to explain her position that section 16 applies in the circumstances of this case to override the personal privacy exemption in section 14(1):

> The privacy act says that public safety must be weighed when considering whether to grant access to records (14.2.b), and it offers compelling public interest as a criterion that overrides any presumption of privacy altogether (16). Privacy is to be recognized out of respect for individuals, and not to facilitate their demise or the demise of others. Is there no longer any interest in making certain that the causes of [the deceased's] death are known, in not helping my daughter to her grave, merely because she is dead? Is there nothing that can be learned from how [the deceased] died that could save others? The government cannot presume [the deceased] intended privacy over any of these issues, not only especially because I do not believe that she intended to die in the first place, but also because if it does do so, it evidently does not wish to help anyone avoid falling victim to the same circumstances that took my daughter's life, and evidently it has other issues more important, whatever they may be, than making certain the reasons for my daughter's death have been correctly identified.

> However, to me, the real issue is even more important, that I am not an unrelated member of the public at large. I am her mother, and I must achieve some sense of closure…Not only must I achieve a sense of closure in order to go on with my life, I have the right to be certain that my government has done everything in its power to find out how my daughter met her death. This especially is a compelling public interest (16) that overrides any presumption of privacy, and it is public because anyone in the same situation would feel the same way. This is the need to be certain that everything has been done in the loss of a loved one and child. If there were drugs in her system that may have distorted her judgement to the point she no longer understood the consequences of her actions, I need to know that. On the other hand, I especially need to make certain that her case is not closed until the true cause of her death is discovered. I am her mother, her only surviving relative who has expressed any interest in her. I seem to be alone as the only person in the world who wants to discover the cause of my daughter's death. I need assurance that this is not the case because my government has done everything possible to investigate her death. The only way this can happen is if I can know what it knows about how my daughter died.

Findings

Without lessening the seriousness of the emotional impact that her daughter's death may have had on the appellant, in my view, the purposes behind the appellant's request for access are to assist her in dealing with the emotional trauma of her daughter's death. As worthy and deserving of support the appellant's request may be, it is essentially a private matter. There is nothing in the material before me demonstrating a compelling **public** interest in the disclosure of the portions of the records at issue. Based on my review of the records, and having considered the representations provided by the appellant as well as all other related circumstances in this appeal, I therefore find that the requirements of section 16 are not present in this appeal and the exemptions at 14(1) and 38(b) apply.

EXERCISE OF DISCRETION UNDER SECTION 38(b)

For Records 3, 4, 6, and 16 which contain the personal information of the appellant, I must now determine whether the Police properly exercised their discretion under section 38(b) to withhold the portions of information at issue in those records.

Turning to the balancing of interests under section 38(b), as discussed above, the section 38(b) exemption is discretionary and permits the Police to disclose information despite the fact that it could be withheld. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. On appeal, this office may review the Police's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so [Orders PO-2129-F and MO-1629].

The Police included their submissions on "absurd result" in the part of their representations dealing with the exercise of discretion. I have dealt with this in my discussion of section 38(b), above, and agreed with the approach taken by the Police.

In support of their decision not to exercise its discretion in favour of disclosing the contents of the records to the appellant, the Police submit:

> In weighing the appellant's right of access pursuant to 38(b), the [Police] considered the following factors:
>
> (a) The appellant seeks access to information
> (b) As a family member, there are compassionate circumstances
>
> In weighing the institution's right to deny access to information pursuant to section 38(b), the [Police] considered the following factors:
>
> (a) One of the purposes of the Act is to protect the privacy of individuals with respect to their personal information.
> (b) The Act specifically provides for the protection of personal information for a deceased for 30 years except as necessary for the personal representative in order to administer the deceased's estate.
> (c) The public's expectation that the [Police] will protect their personal information from disclosure for a purpose other than its original collection; i.e., for the purpose of a law enforcement investigation.
> (d) Loss of trust could result in an individual being guarded in providing information to Police for fear of its routine disclosure.
> (e) Should a member of the public fail to provide details to police, the lack of this information could hinder the conduct of an investigation.
> (f) Information showing an individual having contact with police is highly sensitive, section 14(2)(f) is relevant to an individual's right to protect information that is highly sensitive.
> (g) This institution has not been provided with any information which would suggest that there is any public interest which would override an affected party's right to privacy.
>
> Having weighed the factors listed above […], the [Police] determined that the balance weighed in favour of the non-disclosure in order to protect the privacy rights of affected parties, as permitted in section 38(b).

I have carefully considered the representations of the Police and the appellant's reasons for seeking access, as well as the contents of the records. I find that the Police have properly exercised their discretion under section 38(b) not to disclose the remaining portions of the records to the appellant in accordance with the requirements of the *Act*. I find nothing in the

manner which the Police exercised their discretion that would warrant my sending the matter back to them for re-exercise. I therefore uphold their exercise of discretion in this case.

In summary, I have found that all of the withheld information is exempt under sections 14(1) or 38(b) of the *Act* and I am not in a position to order any further disclosure.

CONCLUSION

I understand the appellant's desire to know more details surrounding her daughter's death, and realize that she will be disappointed that she is not entitled to access to her daughter'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, Assistant Commissioner Tom Mitchinson 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 *Act*s.
> >
> > 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.

Pending the implementation of proposed changes to the *Act* found in Bill 190, currently before the Ontario legislature, I too am bound to interpret the provisions as they now stand.

ORDER

I uphold the decision of the Police.

Original signed by: January 31, 2006
Catherine Corban
Adjudicator