



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2245

Appeal MA07-4

Halton Regional Police Services Board



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NATURE OF THE APPEAL:

The Halton Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the investigation of a death. The requester is the mother of the deceased individual. Initially, the requester indicated that she was seeking access to police officers' notes, videotapes and photographs of the scene where her son's body was discovered, along with any other information that the Police have regarding the investigation of the son's death.

The requester (now the appellant) was granted partial access to the police officer's notes. Access to the remaining portions of the notes was denied pursuant to section 38(b) (personal privacy), with reference to sections 14(2)(f) and 14(2)(i) and the presumptions in sections 14(3)(a), 14(3)(b) and 14(3)(h). The Police also relied on section 38(a) in conjunction with the law enforcement exemptions in sections 8(1)(e) and 8(1)(l) of the *Act*. The requester was denied access to the videotape and photographs pursuant to the discretionary exemptions in sections 38(a) and 38(b) of the *Act*. The appellant appealed the decision of the Police to this office.

During the course of mediation, the appellant advised the mediator that she was not pursuing access to police patrol zone information and statistical codes. As a result, sections 8(1)(e), 8(1)(l) and 38(a) of the *Act* are no longer in issue.

The Police advised the mediator that certain portions of the records were not disclosed as they were not responsive to the request. The appellant confirmed that she is not pursuing access to information in the police notes that does not respond to her request.

The appellant also advised that she was not seeking access to personal information of friends or family interviewed by the police, nor was she seeking access to the names of individuals from a taxi company, towing company, or the names of the staff of a specific rental car agency that appear in the notes. The appellant clarified that the only information of other individuals to which she seeks access relates to individuals who contacted the Police to report an abandoned car, along with any individuals who may have information relating to the possible location of compact discs that were inside the car.

The mediator contacted three individuals whose information appears in the records to determine if they would consent to the release of their personal information. This consent was not obtained.

Following her review of the records, the mediator advised the Police that one of the severances, while not evident from the records, included identifying information about investigating officers from another police force. The Police confirmed that this was the case and then released the information relating to those police officers to the appellant.

The parties were unable to resolve the remaining issues through mediation and the appeal was transferred to the adjudication stage for an inquiry.

I initiated this inquiry by sending a Notice of Inquiry to the Police, setting out the facts and issues and soliciting representations. The Police responded with representations, the non-confidential portions of which were shared with the appellant.

The appellant in turn also provided representations. In those representations, written by the appellant's daughter on her behalf, the focus of the appeal was furthered narrowed to only the videotape of the scene and a set of photographs in the possession of the Police.

RECORDS:

There are two records at issue. The first is a videotape which appears to have been made by the Police at the scene where the deceased individual's body was discovered. The videotape shows the body as it was discovered as well as the surrounding area.

The second record consists of a series of photographs. These photographs depict the scene where the deceased was found, including his body and items found in the vicinity of the body. Also included are photographs taken at the deceased's autopsy.

DISCUSSION:

PERSONAL INFORMATION

The Police rely on the personal privacy exemptions in sections 14 and 38(b) as the basis for denying access to all undisclosed records or portions of records. These exemptions can only apply to records containing "personal information", as defined in section 2(1) of the *Act*, so I will consider this requirement first.

"Personal information" is defined, in part, to mean recorded information about an identifiable individual, including information relating to the race, nationality, age, sex, or marital or family status of the individual (paragraph (a)) and information relating to the medical, psychiatric, psychological history of the individual (paragraph (b)).

I have examined the records at issue and find that they contain the personal information of the appellant's deceased son, as defined in section 2(1). The appellant's son is clearly identifiable in both the videotape and the photographs, along with his personal effects and items found at the location where his body was found. From the images on the videotape and photographs, information is clearly available relating to his race, sex and medical status.

The records at issue relate to the appellant's son and do not contain any personal information relating to the appellant herself. Accordingly, I find that they are appropriately dealt with under the invasion of privacy exemptions found in section 14(1) of the *Act*, rather than under section 38(b), which applies only to records containing a requester's own personal information.

PERSONAL PRIVACY

Having found that the videotape and photographs are the personal information of the appellant's deceased son as defined in section 2(1) of the *Act*, I will now consider whether this information is exempt from disclosure under section 14(1).

Once it has been determined that a record contains personal information, section 14(1) prohibits the disclosure of this information except in certain circumstances. Specifically, where a requester seeks the personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the six exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of the paragraphs of (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. In the circumstances of this appeal, section 14(1)(f) is relevant. That provision 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;

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If none of the presumptions in section 14(3) apply, 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).

Section 14(4) refers to certain types of information whose disclosure *does not* constitute an unjustified invasion of personal privacy. Of relevance to this appeal, this section was recently amended by the addition of section 14(4)(c) which states:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (c) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

Based on the wording of this provision, a finding that the exception in section 14(4)(c) applies to the personal information in this appeal means that the disclosure of that information would not be an unjustified invasion of personal privacy.

Section 14(4)(c)

In Order MO-2237, the application of section 14(4)(c) was considered for the first time. In determining the scope of the section, I reviewed the relevant legislative history, which I believe is worth repeating in this appeal.

Prior to the enactment of this provision, denial of access to information to family members regarding the circumstances of their loved ones' death was often forced upon institutions by the operation of section 14(3). Examples of the kind of information previously withheld include records such as those at issue here and include police occurrence reports, ambulance call reports and 911 call reports [see Orders PO-2473, PO-1757]. This information was previously determined to be exempt from disclosure as an unjustified invasion of the privacy of the deceased because the presumptions of unjustified invasion in section 14(3)(a) (relates to medical history) and/or 14(3)(b) (compiled and identifiable as part of an investigation into a possible violation of law) applied to much of the personal information in these types of records.

As noted previously, grieving relatives who have been appointed administrators of the estates of their deceased family members, also have the option of seeking access to the deceased's personal information by exercising the rights of the deceased pursuant to section 54(a) of the *Act*. Section 54(a) states:

Any right or power conferred on an individual by this Act may be exercised,

- (a) 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;

However, the rights of requesters to seek access to personal information under this section were limited because previous orders of this office gave this section a narrow interpretation (and as stated above, the provision does not apply here.) In Order M-1075 former Assistant Commissioner Tom Mitchinson stated:

The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the Act, where "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.

In order to give effect to these rights, I believe that the phrase “relates to the administration of the individual’s estate” in section 54(a) should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate.

The effect of this was that the deceased’s personal representatives who sought access to personal information surrounding the circumstances of the death were not able to get access to records such as those at issue here because they were usually found to fall outside the scope of section 54(a). [For further discussion of the limited scope of this provision, see also *Adams v. Ontario (Information and Privacy Commission, Inquiry Officer)* (1966), 136 D.L.R. (4th) 12 (Div. Ct.)]

The *Act* was the subject of a three year review by the Standing Committee of the Legislative Assembly in 1994. In the “Report on the Municipal Freedom of Information and Protection of Privacy Act” presented to the Legislature in December of 1994, the Standing Committee stated:

Secondly, even where a “personal representative” has been appointed, but the reason for the request for access to personal information is not the administration of the deceased’s estate, subsection 54(a) cannot be relied upon. Where for example, the family of a deceased person is concerned about the health care their family member received or the medical history of the deceased person because of the genetic predisposition to certain illnesses, section 54(a) cannot be used.

In all of these situations a family member, like any unrelated person, is considered to be a third party seeking access to another person’s personal information and under the Act such information will only be disclosed if the disclosure does not constitute an unjustified invasion of personal privacy under section 14.

After reviewing the history of the *John Doe* decision (cited above), this report continues:

The Committee is concerned about this apparent gap in the legislation and believes that the Act should be amended to ensure wider access by family members and others who have a legitimate interest in the information.

The Committee proposed the following:

61. that subsection 54(a) be amended to ensure that family members and others with a legitimate interest are given greater access to the deceased person’s personal information in a way that does not require the formality of court appointment and that is not limited to situations involving administration of the deceased person’s estate.

In 1999, this office advocated an amendment to the *Act* to enable relatives of deceased persons to obtain access to information regarding the circumstances of the death of their family members. In the 1999 IPC Annual Report, statutory changes were recommended. The report stated:

Of the various types of appeals processed by the IPC, those involving a request for information about a deceased family member are among the most sensitive. Requests of this type are submitted to institutions (most often to local police forces or the Ontario Provincial Police) by immediate family members, or their representatives, in order to obtain information surrounding the circumstances of the relative's death.

Except in certain limited circumstances, institutions must deny relatives access to this information because disclosure is presumed to be an unjustified invasion of the deceased's personal privacy under the provincial and municipal Acts.

In 1999, the IPC undertook a study on the impact of the legislation on individuals seeking access to information about deceased loved ones. We surveyed Appellants for their experience and view of the legislation; contacted professionals with expertise in the field of bereavement counseling; looked at the legislative history, including 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.

...

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].

In preparing the 1999 report, this office consulted with two professional psychologists practising in the area of bereavement counselling, Dr. Stephen Fleming and Dr. Leslie Balmer. Drs. Fleming and Balmer provided this office with a report which included the following statement:

For bereaved adults and children alike, understanding the full details and circumstances surrounding a loved one's death is an integral part of the grief process. As psychologists working with bereaved individuals, we are all too aware of the critical role that access to information plays in either helping or hindering the process.

Particularly, in the case of trauma, denial of factual information surrounding a loved one's death often tortures the survivor as they struggle to derive some sense of purpose and meaning in such a horrific experience. Understanding the nature and extent of the deceased injuries, how the death occurred, and the level of consciousness and pain felt has the potential to palliate the survivor's anguish.

Section 14(4)(c) had its genesis in Bill 190, the *Good Government Act*, which was an omnibus bill designed to amend a number of different legislation. During second reading debates on the bill, Mr. Zimmerman MPP, made the following comment regarding the amendment to section 14(4)(c):

Proposed amendments to the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act would allow disclosure of personal information about a deceased person to a spouse or close relative in very limited compassionate circumstances.

Having considered the legislative history of section 14(4)(c), I came to the following conclusion regarding its application in Order 2237:

...by using the words "in the circumstances" the Legislature intended that a broad and all encompassing approach be taken to the consideration by this office of whether or not disclosure is "desirable for compassionate reasons." In my view, by enacting this amendment to the *Act*, the Legislature intended to address an identified gap in the access to information legislation and increase the amount of information being provided to bereaved family members. ***It is recognized that, for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate.*** [Emphasis added]

I will adopt this approach in determining whether the videotape and photographs should be disclosed to the mother of the deceased individual.

Steps to follow in applying section 14(4)(c)

In Order MO-2237, I determined that the application of that section requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?

Step 1 – Personal Information of the Deceased

I have already concluded that the videotape and photographs constitute the personal information of the deceased individual. I find that this requirement for the application of section 14(4)(c) is satisfied.

Step 2 – Spouse or “Close Relative”

“Close Relative” is defined in section 2(1) of the *Act*:

“close relative” means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption;

I am satisfied that the appellant is the parent of the deceased individual whose personal information is contained in the records at issue, and therefore she is a “close relative”. I find that this requirement for the application of section 14(4)(c) is satisfied.

Step 3– Desirable for Compassionate Reasons

Representations

The essence of the Police’s position is that, notwithstanding section 14(4)(c), disclosure of the videotape and photographs to the appellant would constitute an unjustified invasion of her son’s personal privacy. The Police take the position that the presumption set out in section 14(3)(a) is relevant as the personal information of the deceased individual relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation:

The personal information contains medical information pertaining to the deceased, including information relating to the body at the time of being located.

Taking into consideration the definitions of compassion, this institution did not feel that the release of the information with respect to the body, or the release of the photographs would reduce the suffering of the appellant. In contrast, we believe disclosure would certainly add more distress and sorrow to her suffering.

Clearly, since the records contain this type of information, disclosure of it is presumed to be an unjustified invasion of personal privacy under section 14(3)(a) of the *Act*...

The Police also provided representations on the applicability of section 14(3)(b) to the records:

The fact that this report was a sudden death means the police were called to investigate possible foul play, thereby a possible violation of law.

...

The personal information contained in this file contains information gathered from various sources, necessary to compile the investigative file. The information was compiled in order to investigate the circumstances surrounding the discovery of a body.

Therefore since the personal information relates to records compiled as part of an investigation into the incident, the disclosure of this personal information is presumed to be an invasion of an individual's personal privacy, except to the extent that it is necessary to prosecute a violation or satisfy the provision for 'compassion.'

Clearly none of the provisions of sections 14(4)(a),(b) and/or (c) of the *Act* apply in the circumstances of this appeal.

In further support of its position that disclosure of the records would constitute an unjustified invasion of the deceased individual's personal privacy, the Police relied on the factor set out in paragraph (f) (the personal information is highly sensitive) of section 14(2) of the *Act*:

It is this institution's opinion that the name of an individual in a police records implies sensitivity and dictates privacy, unless consent for disclosure is sought and obtained. It does not matter whether an individual is documented as a complainant, victim, suspect, witness, accused, etc. A name on a police records implies some type of police contact and, as such, by its very nature is highly sensitive. Since the deceased cannot consent to the disclosure of their personal information, the Police take on the role of having to act in their best interests. This rests true even when considering release for a compassionate reason.

Finally, the Police provided confidential representations on the application of the factor at paragraph (i) (disclosure may unfairly damage the reputation of any person referred to in the records) of section 14(2) of the *Act*. The essence of their position is that disclosing the means by which the deceased died would damage his reputation.

The appellant provided very brief representations, which were submitted on her behalf by her daughter. The representations state:

The only thing she wants is the videotape and photographs.

The reason she wants them are:

- From the time that [the appellant's son] was found, she was only able to see him at the funeral home one week later. No one asked us about identifying [his] body. She was not allowed the opportunity to see [her son] in his natural deceased state.

- We were not informed that we could visit him at the hospital before the autopsy.
- It is very important for her to see [her son] in his natural deceased state in order to help her with the grieving process.

Analysis and Findings

I noted above that, in interpreting section 14(4)(c), a broad and all encompassing approach should be taken in determining whether or not disclosure is “desirable for compassionate purposes.” In adopting this approach and after considering the circumstances of this case, I am satisfied that disclosure of the videotape and photographs is desirable for compassionate purposes and does not constitute an unjustified invasion of the deceased individual’s privacy.

In assessing the relevant circumstances of this case, I give little weight to the factors set out in the representations submitted by the Police. Although the images on the videotape and in the photographs may be sensitive and could potentially damage the reputation of the deceased, disclosure in this case is to the mother of the deceased, not to the general public, a situation specifically contemplated by section 14(4)(c). Similarly, the images may disclose information about the deceased’s medical condition. However, disclosure is to a close relative who is attempting to get a better understanding of the circumstances surrounding this individual’s death.

On the other hand, I give significant weight to appellant’s submission that disclosure of the records will help her with the grieving process. As noted by the appellant, she did not have the opportunity to view her son in the state in which he was found. The videotape and photographs will provide her with this opportunity and bring closure to any questions she may still have regarding this part of his death. The videotape and photographs also show articles found at the site that may assist her understanding of her son’s death. If the appellant would like to see her son in his natural deceased state in order to help her with the grieving process, she should be allowed that opportunity. Losing a loved one is a sad and difficult process. Section 14(4)(c) of the *Act* was designed to allow families to have the records they feel they require in order to grieve in the way they choose.

The position of the Police that the release of the photographs would not reduce the suffering of the appellant, but rather would add more distress and sorrow to her suffering is, in my view, misguided. The appellant has clearly indicated a desire to view the photographs and the videotape in order to gain a better understanding of her son’s untimely death. She will be aware that these images are graphic. This is clearly spelled out in the representations submitted by the Police and shared with the appellant. Having been informed that disclosure of the videotape and photographs may be upsetting and disturbing, in my view the appellant is in the best position to determine whether disclosure is in her interests. In general, institutions may have an obligation to inform spouses and close family members of the nature of the information they have requested under section 14(4)(c); for example if it is particularly graphic or disturbing. However, having provided that advice, it does not then rest with an institution to make decisions on behalf of that

grieving spouse or relative as to whether disclosure is in *their* best interests. A well-informed adult can make that decision on their own behalf.

The Police have taken the position that disclosure under the *Act* is the equivalent to disclosure to the world and, as a result, they still have an obligation of protecting information deemed sensitive. With respect, this position misses the point of section 14(4)(c). With the enactment of this section, the Legislature has recognized a special group of requesters, namely the spouses and close relative of deceased individuals. Institutions have been directed to very specific criteria when considering disclosure to this group as compared to “disclosure to the world.” In this case, the Police have not recognized the clear intent of the Legislature.

Similarly, in their representations, the Police take the position that:

Since the deceased cannot consent to the disclosure of their personal information, the Police take on the role of having to act in their best interests. This rests true even when considering release for a compassionate reason.

Again, with respect, this approach is contrary to the clear intent of the Legislature in enacting section 14(4)(c). Where section 14(4)(c) applies, consent (dealt with in section 14(1)(a)) is irrelevant. By means of section 14(4)(c), the Legislature has recognized a group of individuals who have a special interest in gaining access to the personal interest of a deceased individual. The intent of the section is to allow for the disclosure of information to family members even though that information would not have been disclosable to them during the life of the individual. In my view, it is a tacit recognition by the Legislature that, after the death of an individual, it is that person’s spouse or close relatives who are best able to act in their “best interests” with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution, and this office on appeal, is to determine whether, “in the circumstances, disclosure is desirable for compassionate reasons.” This does not place the institution “*in loco parentis*” in the manner suggested by the Police when the disclosure is to adult relatives. Again, on the question of what is “compassionate”, I accept the evidence and representations of the appellant.

I am therefore satisfied that disclosure of the records is desirable for compassionate reasons and that all the requirements for the application of section 14(4)(c) have been satisfied.

Addendum - Police Officers’ Notes

In her representations, the appellant withdrew her request for the portions of the police officers’ notes withheld by the Police. However, during the course of this adjudication, I had the opportunity to review those notes, particularly the withheld portions. For example, portions of the officers’ notes relate to the discovery of the body of the appellant’s son, including the items that were found on his person or in the vicinity. Some details of notes made at the autopsy have also been withheld.

In my view, this is the very type of information that would assist a grieving family member in understanding the circumstances of the death of a loved one and help bring closure to the death. In withholding this vital information, the Police seem to be ignoring the very existence of section 14(4) and thus adopting a course of action that frustrates the intent of the Legislature.

I would urge the Police to consider re-exercising their discretion and releasing additional portions of the police officers' notes to the appellant.

ORDER:

I order the Police to disclose the videotapes and photographs to the appellant by December 14, 2007.

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ November 9, 2007