



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2270

Appeal MA06-349

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) for access to information relating to the death of a named individual, including all occurrence reports, investigation reports and photographs. The requester is the father of the deceased individual.

The Police located the responsive records and issued a decision providing partial access, withholding information under the exemptions in sections 8(1)(l) (facilitate commission of unlawful act), and section 14(1) (personal privacy). The Police identified the presumption in section 14(3)(b) and the factors in sections 14(2)(f) and (g) in support of the section 14(1) claim. Additionally, the Police advised that access to photographs is not possible as such records do not exist. The Police also indicated that some of the information contained in the records had not been disclosed as it was not responsive to the request.

The requester, now the appellant, appealed the decision.

During the course of mediation, the Police advised that it would not disclose any additional information to the appellant.

The appellant advised the mediator that he believes additional records exist, including police officer notes, photographs and other reports. Accordingly, reasonable search has been added as an issue in dispute.

The appellant clarified that he is pursuing access to all of the withheld information of the deceased individual, but not the personal information of other individuals whose information may be contained in the records. The appellant also does not wish to pursue access to the non-responsive portions of the records.

Mediation did not resolve the appeal, and this file was referred to adjudication. I sent a Notice of Inquiry to the Police, setting out the facts and issues, and inviting their representations. I asked the Police to comment on whether they considered disclosure under section 14(4)(c) (compassionate grounds). The Police submitted representations in response.

I sent the Notice of Inquiry to the appellant along with the non-confidential portions of the Police's representations. The appellant provided representations.

I sent a Reply Notice of Inquiry to the Police along with a copy of the non-confidential portions of the appellant's representations. The Police were asked to comment further on the application of section 14(4)(c) with regard to the appellant's representations. The Police provided additional representations.

RECORDS:

The records at issue consist of the withheld portions of a Sudden Death Report (3 pages) and police officer notes (30 pages).

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 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].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

The Police submit that the records contain the name, address and date of birth of the friend of the deceased who found her body and the superintendent of the building where the deceased lived. The Police also refer to the ICAD (computer assisted dispatch) Event number as personal information of the deceased.

The Police provided confidential representations explaining that the records contain highly personal information relating to the appellant’s deceased daughter. Due to their nature, I cannot provide further detail in this order about the nature of these submissions.

Based upon my review of the records, I find that all of them contain the personal information of the deceased as defined paragraph (a), (g) and (h) of the section 2(1) definition of “personal information.” The records also contain recorded information about the superintendent, the friend of the deceased, and another individual, and this information constitutes personal information as that term is defined in section 2(1).

The records at issue do not contain any personal information of the appellant.

The appellant submits that he is not interested in the personal information of anyone besides his daughter. As a result, the personal information relating to the superintendent, the friend of the deceased individual and another individual are not at issue. I will, accordingly, only address the issue of access to information of the appellant’s deceased daughter in the rest of this order.

PERSONAL 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 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,

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].

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

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

discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and 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)

Assistant Commissioner Brian Beamish applied section 14(4)(c) for the first time in Order MO-2237. In determining the scope of the section, he reviewed the relevant legislative history. Having considered the legislative history, he came to the following conclusion regarding its application:

...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 agree with the Assistant Commissioner's approach and I will adopt it in determining whether the information remaining at issue should be disclosed to the father of the deceased individual.

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

In Order MO-2237 and since followed in Order MO-2245, the Assistant Commissioner 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

As stated above, I have found that the information in all of the records at issue 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 he 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 Police's argument focuses on the fact that disclosure of the information relating to the deceased would be a presumed unjustified invasion of the deceased's privacy under section 14(3)(b). The Police disclosed some information to the appellant and provided the following in support of its position that it had severed the record to disclose as much as possible for compassionate reasons.

The current request was made following the passage of Bill 190 and partial release of information was provided *only* on compassionate grounds. The records were severed to provide the appellant with as much information as possible for compassionate reasons and – just as importantly – out of compassion for the deceased, to protect her privacy.

Although Bill 190 has allowed the release of certain information to a requester on the basis of their personal relationship to a deceased person (rather than their legal obligations), subsection 2(2) was not amended. It must therefore be construed that one of the intentions of the *Act* remains the protection of the sensitive personal information of a deceased individual until 30 years after their death.

The dissemination of the withheld information would constitute such an unwarranted invasion of the personal privacy of the deceased, that it would not be released even to the next-of-kin of a deceased who *was* the executor/administrator and who *was* identified in the documents.

...

As noted in our original representations, the record contains extremely personal and sensitive information of the deceased...

Upon weighing the *Act's* general right of access to institutional records against the specific privacy protections pertaining to individuals' personal information, I feel compelled to protect the privacy of the individual in this situation; in short, the conclusion of one's life should not automatically be the commencement of a violation of one's privacy.

In considering the severances to be made the Police sought to balance the interests of the appellant for compassionate reasons and the privacy interests of the deceased. The Police stated the following about their determination on severing the record:

With reference to this record, there is a certain financial, lifestyle and interpersonal relationship information which warranted greater consideration regarding privacy and disclosure. In balancing all of the factors, it was deemed to be an unjustified invasion of the personal privacy of the deceased.

The Police also referred to the factors in section 14(2) which favour non-disclosure of the personal information and in particular the factors at 14(2)(f) (highly sensitive) and 14(2)(g) (inaccurate or unreliable information). Because of its nature, the Police's representations regarding section 14(2)(g) were not shared with the appellant. However, essentially the Police argue that the personal information as described in the records may be inaccurate or unreliable.

The appellant submits that he is concerned about the investigation into his daughter's death and that he wishes to know everything about the circumstances of her death. The appellant states:

Since the time of my Daughter[']s death, it will be shortly five years..., I do whatever is in my capacity to get the proof of the official version of the Police who excluded the homicide and/or involvements of any persons whose action could [have] resulted in my Daughter[']s death.

With respect to the Toronto Police, I have the reasonable concern from the beginning of time, that in this particular case, the investigation into the circumstances of the death of my Daughter was not conducted at all, or was only formally opened and in the same manner closed with the omission of collecting and examining the evidence...

The appellant goes on to state he only is seeking to aid the Police in their investigation into his daughter's death.

Finding

As noted above, in interpreting section 14(4)(c), this office has taken a broad and all encompassing approach in the determination of whether or not disclosure of the information at issue is "desirable for compassionate purposes." I agree with this approach and will apply it here.

The Police's primary concern is that the personal information at issue is of such an extreme personal and sensitive nature that it ought not to be disclosed. The Police also submit that in light of the appellant's concern over the investigation into the deceased's death, that the information at issue may be inaccurate or unreliable.

I give little weight to the Police's submission that the withheld information would not be released even to the next-of-kin of a deceased who was the executor/administrator and who was identified in the documents. I assume the Police are referring to a case where a request is made under section 54(a) and the records contain information about the deceased and the requester. In that case, the Police state they would exercise their discretion under Part II of the *Act* (section 38) not to disclose the information. I find this is an argument without merit. Under section 54(a), the analysis examines whether the requester is the personal representative of the deceased, and the right he/she wishes to exercise relates to the administration of the deceased's estate. As the Assistant Commissioner sets out in Order MO-2237, the *Act* was amended to address the narrow interpretation that was given to section 54(a) to provide information to family members who had a legitimate interest in obtaining access to the personal information of the deceased, which did not necessarily relate to the administration of the estate.

In the case of section 14(4)(c), the determination that must be made is whether the requester is a spouse or close relative of the deceased individual and whether the disclosure is desirable for

compassionate reasons. There is no stipulation on the use to which the information is to be put, and this is a broader right of access than that derived under section 54(a).

I also give little weight to the Police's argument that the deceased's personal information is highly sensitive and as such cannot be disclosed. In Order MO-2245, the Assistant Commissioner addresses a similar position by the Halton Region Police Services Board on the disclosure of sensitive information when he states:

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 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 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.*** [emphasis added]

Later, in that order, the Assistant Commissioner further addresses the Police's position that it must protect this "sensitive" information on behalf of the deceased individual and states:

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.*** [emphasis added]

I agree with the Assistant Commissioner's reasoning and apply it here.

The Police's representations, which were shared with the appellant, refer to the sensitive nature of the information at issue. I accept that the information at issue is sensitive information relating to the deceased's employment, medical history and the condition of her body at the time of her death. I give some weight to the Police's assertion that this is the type of information that would normally be protected under section 14(1) of the *Act*, if a requester did not fall within the close relative category of requester described in section 14(4)(c).

However, despite the Police's statement as to the nature of the information, the appellant has not expressed any reluctance in receiving the information about his daughter. The appellant notes in his representations that he saw both his daughter's body and her apartment following her death. The appellant's representations also reveal the fact that the appellant was aware or has become aware (due to disclosure of other information) of the details surrounding his daughter's lifestyle. Considering the appellant's representations and the information at issue, I give significant weight to the appellant's assertion that he needs such information to inform himself of the circumstances surrounding his daughter's death and the Police's subsequent investigation into the cause of her death.

Finally, I give little weight to the Police's submission that the personal information in the records may be inaccurate or unreliable. The Police are concerned that the appellant will draw the wrong conclusion based on inaccurate information in one of the officer's notes. From my review of all of the officers' notes, I see that this information was referred to a number of times with different observations on the part of each of the officers. While I understand that the appellant suspects that his daughter's death was a homicide, I am not convinced that the appellant will draw an inaccurate conclusion solely based on the information provided by this one officer.

Accordingly, having considered the representations of the Police and the appellant and the information of the deceased at issue, I find that, in the circumstances, 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.

LAW ENFORCEMENT

The Police rely on the discretionary exemption under section 8(1)(l) to exempt the police "10" codes from the police officer memorandum books. Section 8(1)(l) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

Where section 8(1)(l) uses the words "could reasonably be expected to," the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on

judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Police submit that the "ten code" is a method by which certain information is passed from one police source to another in encoded form. The Police state:

The term 'code' by itself indicates that the information is being conveyed in such a manner that anyone intercepting the message will be unable to determine the content or import of the message. Typically, an officer may be querying the criminal record or status of an individual who is within earshot of the message. An unencoded message that the person is wanted or, for example, associated to criminal activity, may preclude the officer exercising certain options with respect to the individual.

The Police also submit that some of the codes refer to officer and/or patrol vehicle availability status. The Police explain that this information is exempted from disclosure because, "some criminal elements go to great lengths to try and monitor police communications." If these ten codes were disclosed then individuals who wish to engage in criminal activities would be able to monitor the status of police personnel and equipment.

As such, the Police submit that should the "10" codes become common knowledge, then such knowledge could reasonably be expected to facilitate the commission of an unlawful act or hamper crime control."

This office has issued many orders regarding the release of police codes and has consistently found that section 8(1)(l) applies to 10 codes (for example, see Orders M-93, M-757, MO-1715 and PO-1665) as well as other coded information such as 900 codes (see Order MO-2014). These orders adopted the reasoning stated in Order PO-1665 by Adjudicator Laurel Cropley:

In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

I too would adopt Adjudicator Cropley's reasoning and apply it here. I find that disclosure of the "10" codes in the police officer's notes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime and as such are exempt from disclosure under section 8(1)(l) of the *Act*.

EXERCISE OF DISCRETION

The section 8(1)(l) exemption is discretionary, and permits the Police to disclose information, despite the fact that it could withhold it. The Police must exercise its discretion. On appeal, the Commissioner may determine whether the Police failed to do so.

In addition, the Commissioner may find that the Police erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The Police did not provide representations specifically addressing the exercise of discretion. However, its submissions in support of the application of the section 8(1)(l) exemption reflect the manner in which discretion was exercised. Having reviewed the Police's representations and the considerations it made in the application of section 8(1)(l), I find that the Police took into account all relevant considerations and its exercise of discretion was proper.

SEARCH FOR RESPONSIVE RECORDS

I will now determine whether the Police conducted a reasonable search for responsive records.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The Police were asked to provide a written summary of all steps taken in response to the request. Furthermore, the Police were asked to make specific reference to the appellant's request for photographs and to explain why the following records were absent from the responsive records: Emergency Medical Service (EMS) report, Coroner's Report and photographs. In his appeal letter the appellant notes that he did not receive notes from the Memorandum Books of two officers. The Police were asked to provide information about whether these officers were involved in the investigation and if they were contacted regarding this request.

The Police explained that the current appeal is based on the appellant's second request for information. During the appellant's initial request, the Police state that he advised that he already had a copy of the Coroner's report. Furthermore, the appellant advised that he had attempted unsuccessfully to contact the investigating officer listed on the Sudden Death Report. In responding to the appellant's initial request, the Police gave the appellant the name of the Unit Commander for 51 Division. Regarding responsive photographs, the Police contacted the Toronto Police Forensic Identification Services Unit and confirmed that no photographs had been taken. Following mediated discussions between the Police and the appellant, the appellant decided to file another request for the information following the passage of Bill 190, instead of pursuing the appeal of his first request.

The appellant subsequently made a second request and the Sudden Death Report and the memorandum notes of all attending officers were located. The Police again informed the appellant that photographs were not taken.

In their representations, the Police reiterate that photographs were not taken. They also refer to Procedure 04-03 regarding sudden death which mentions photographs only in the context of fingerprinting and photographing those persons where outstanding criminal warrants exist, an active criminal record is found, or where identification of the deceased is in question. It would appear that as the deceased did not fit within these criteria no photographs were taken.

The Police further submit that the memorandum book of the investigating officer could not be located. The Police do not provide the details of their search for this officer's notes.

In addition to the above, the Police also provided in their representations, the address and contact information where the appellant could obtain copies of the EMS and Coroner's Report should such documents exist.

The appellant's only comment about the Police's search was that the appellant is concerned about the Police's investigation of his daughter's death in light of the fact that no photographs were taken.

From my review of the Police representations respecting the nature and extent of their search and their explanation as to why there was no Coroner's Report, EMS report or photographs in the responsive record, I am satisfied that their search for these records was reasonable. I have reviewed the records and concur with the Police that there is nothing in the record to indicate that

photographs were taken and I am also satisfied with the Police's explanation of their search for photographs. I also accept the Police's explanations as to the Coroner and EMS reports.

However, I am not satisfied with the Police's explanation of the named officer's notes and why these notes were not included in the responsive record. The Police did not provide me with an explanation as to where they looked for this record; and I was only provided with the statement that these notes could not be located. The Police submit that I should take it as a given that the institution and its experienced employees act professionally, competently and in good faith in conducting its search for records. While I accept this statement, I find that the Police's explanation respecting the search undertaken to locate the named officer's notes to be unhelpful. As noted above, the Police were asked to provide a written summary of all steps taken in response to the request. The Police's explanation of their search for the memorandum book notes and in particular the notes for investigating officer were not provided.

I find that the Police's search for the named officer's notes to be unreasonable and will order the Police to conduct a further search for these notes and to provide the details of their search to the appellant.

Accordingly, I uphold the Police's search for responsive records regarding the photographs, Coroner and EMS reports. I allow the appeal for the portion of the search dealing with the investigating officer's memorandum book notes and will order that further searches be undertaken.

ORDER:

1. I order the Police to disclose to the appellant those portions of the records that contain the appellant's daughter's personal information. For the sake of clarity, I have highlighted the portions of the records in the duplicate copy of the records enclosed with this order that should be disclosed. The information that is highlighted should be disclosed.
2. I order the Police to disclose the records in compliance with provision 1 of this order by March 13, 2008 but not before March 10, 2008.
3. The Police's search for the EMS report, Coroner's report and photographs was reasonable and this portion of the appeal is dismissed.
4. I order the Police to conduct a further search for the memorandum book notes of the investigating officer listed on the Sudden Death Report for the date of November 3, 2002 relating to the deceased and to communicate the results of their search to the appellant, in writing, on or before March 10, 2008.
5. If the Police identify additional records responsive to the appellant's request, I order the Police to provide the appellant with a decision letter regarding access to these records in

accordance with the provisions of the *Act*, treating the date of this order as the date of the request.

6. I order the Police to provide me with copies of the correspondence referred to in provisions 4 and 5, as applicable, by sending a copy to me when they send this correspondence to the appellant.
7. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the records that it discloses to the appellant.

Stephanie Haly
Adjudicator

February 7, 2008