



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2387

Appeal MA07-358

Peel Regional Police Services Board



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NATURE OF THE APPEAL:

The Peel Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the police report relating to the death of the requesters' son.

The Police identified an Occurrence Report and three witness statements that were digitally recorded in DVD format as responsive to the request. After contacting the affected parties, the Police issued a decision granting partial access to the Occurrence Report and one of the witness statements "on a compassionate basis." The Police denied access to the severed portions of the Occurrence Report and the partially disclosed witness statement, and to the other two witness statements in full, pursuant to section 14(1) (personal privacy), relying on the application of the presumption of unjustified invasion of personal privacy in section 14(3)(b) of the *Act*.

The requesters, now the appellants, appealed the decision of the Police. In their notice of appeal to this office, the appellants stated:

Very little has been provided to us so far, and we would appreciate your reviewing the decision in order that more information is released to us by way of the witness statements from the 2 persons that were in the house when this tragedy occurred.

During mediation, the appellants confirmed that they are not pursuing access to the information that was severed from the witness statement that was partially disclosed to them. They are, however, pursuing access to the digital recordings of the other two witness statements that were withheld in their entirety. The witnesses who provided these statements will be referred to as the affected parties in this order.

With respect to the Occurrence Report, the appellants confirmed that they are not seeking access to information relating to any individuals identified in this record other than their son and the two affected parties, who were in the house at the time of their son's death. The appellants agreed that information relating to any other individuals can be severed from this record. As a result, the appellants advised that they are not pursuing access to the severances made on pages 2, 3, 4, 5 and at the top of page 6 of the Occurrence Report. The other undisclosed parts of this record remain at issue in this appeal.

No further mediation was possible and this file was moved to the adjudication stage of the appeal process.

I began my inquiry into this appeal by issuing a Notice of Inquiry to the Police and the affected parties, inviting them to submit representations. I received representations from one of the affected parties only, in which the affected party stated that consent to the disclosure would not be provided. These representations were not shared with the Police or with the appellants. The other affected party communicated with staff in this office by telephone and advised that he/she did not consent to disclosure of the witness statement. Subsequently, I received representations from the Police.

I then provided a copy of the non-confidential portions of the representations submitted by the Police to the appellants and issued a Notice of Inquiry inviting them to submit representations in response. The appellants submitted representations that I shared in their entirety with the Police and I invited the Police to submit representations in reply. I received reply representations from the Police.

RECORDS:

The records remaining at issue in this appeal are: (1) the severed portions of the Occurrence Report (except severed portions containing personal information of individuals other than the affected parties, as noted above), namely, pages 1, 6 (in part), 7 and 8, and (2) the two witness statements, provided by the affected parties, that were digitally recorded in DVD format. For the purposes of this order, I will refer to the two witness statements as witness statement 1 and witness statement 2.

Before I turn to the issues in this appeal, I note that at one point in their representations the appellants state that they seek access to information relating to two individuals other than the affected parties that were present in the affected parties' residence prior to their son's death. However, given that the appellants narrowed the scope of their request at mediation to the information described above, they should make another request to the Police for any additional information they seek at this time and I encourage the Police to respond to this request in a timely manner.

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.

Representations

The Police submit that the records contain the personal information of the affected parties and the appellants' son including their names, addresses and telephone numbers, health information and other personal information including statements provided during the investigation conducted by the Police following the death of the appellants' son.

The appellants deny that the records contain any personal information. In reply, the Police dispute this and state that all of the records, including the witness statements, contain personal information.

Analysis and Findings

I have carefully reviewed all of the records and find that they contain the personal information of the appellants' son, as defined in section 2(1). The information in the records includes information relating to the son's name, his phone number and address, occupation and the activities on the day of his death and the circumstances surrounding his death. The records also contain the "personal information" of the two affected parties who were present at the time of the

son's death, including information relating to their names, addresses, phone numbers, health, occupations and information relating to the affected parties' relationship with the appellants' son and their observations of the circumstances surrounding the appellants' son's death. Finally, as detailed above, the Occurrence Report also contains the personal information of individuals that has been removed from the scope of this inquiry.

The Occurrence Report also contains the personal information of one of the appellants; namely her name, address, phone number and other information relating to the identification of her son following his death. This information has been disclosed to the appellants. The witness statements do not contain any personal information relating to the appellants.

Further, witness statements 1 and 2 contain the recorded images of the affected parties such as their physical characteristics and emotional state. I find that this is the personal information of the affected parties only. As a result, the witness statements contain information that qualifies as both the personal information of the son and of the affected parties.

PERSONAL PRIVACY

Under section 38(b), where a record contains personal information of both the requester and another individual, and the disclosure of the information would constitute an "unjustified invasion" of another individual's personal privacy, the institution may refuse to disclose that information to the requester. Section 38(b) may apply to a record even in circumstances where the portions of the record relating to the requester have been disclosed.

Based on its wording, the discretionary section 38(b) exemption will apply if I am satisfied that disclosure *would* constitute an unjustified invasion of personal privacy. The Police did not refer to section 38(b) in their decision letter, however, for the purposes of this order, I will make a determination under section 38(b) in relation to the Occurrence Report, which is the only record that contains the personal information of the appellants.

As I have found that the witness statements do not contain the personal information of the appellants, I must consider whether the mandatory personal privacy exemption in section 14(1) applies to these records. Section 14(1) prohibits an institution from releasing the personal information of an individual other than the requester unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14.

The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception is relevant to this appeal and it is more complex. Section 14(1)(f) requires a determination of whether disclosure of the personal information *does not* constitute an unjustified invasion of personal privacy and it requires a consideration of additional parts of section 14. The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f). 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. If the presumptions in 14(3) do not apply, then a consideration of the factors in section 14(2) is necessary.

A presumed unjustified invasion of personal privacy under section 14(3) cannot be rebutted by 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 [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. Section 14(4) creates an exception to the exemption in section 14(1) and if it applies, disclosure is *not an unjustified invasion of personal privacy* and the information is not exempt under section 14. Section 14(4)(c) has potential relevance to this appeal.

Section 14(3)(b)

Before I turn to consider the possible application of section 14(4)(c), I will consider whether the presumptions of an unjustified invasion in section 14(3) apply. Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (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 state that section 14(3)(b) applies to all of the records at issue as they were created and compiled as part of the investigation into the death of the appellants' son. The appellants do not address the application of this section in their representations.

Having carefully reviewed the records and the representations, I find that section 14(3)(b) applies to the personal information of the affected parties and the appellants' son found in all the records as the records were compiled and are identifiable as part of an investigation into a possible violation of law. Section 14(3)(b) applies whether or not charges were laid [See Order PO-1849]. Accordingly, the disclosure of the information at issue in the Occurrence Report and in the witness statements is presumed to constitute an unjustified invasion of personal privacy. I now turn to consider whether the exception in section 14(4)(c) applies to this information.

14(4)(c) – compassionate reasons

Section 14(4)(c) reads:

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.

In Orders MO-2237 and MO-2245, I considered the interpretation of this section. After reviewing the legislative history, I came to the following conclusion:

...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]

In these previous orders, I also found that a determination regarding the application of section 14(4)(c) requires a consideration of the following questions, all of which must be answered in the affirmative 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 desirable for compassionate reasons, in the circumstances of the request?

In Order MO-2237, I also considered how to treat information that qualifies as the personal information of both the deceased and another individual or individuals, which has potential relevance in the circumstances of this appeal. I stated:

The first question to address here is whether the reference to “personal information about a deceased individual” can include information that also qualifies as that of another individual. In my view, this question should be answered in the affirmative. The circumstances of an individual’s death, particularly one that is followed by a police or coroner’s investigation, are likely to involve discussions with other individuals that will entail, to a greater or lesser extent, the collection and recording of those individuals’ personal information. In my view, an interpretation of this section that excludes any information of a deceased individual on the basis that it also qualifies as the personal information of another individual would be inconsistent with the definition of “personal information”, set out above, since the information would clearly qualify as recorded information “about” the deceased individual. It would also frustrate the obvious legislative intent behind section 14(4)(c), of assisting relatives in coming to terms with the death of a loved one.

...

Accordingly, in my view, it is consistent with both the definition of “personal information” in section 2(1) and the legislative purpose behind this section to interpret “personal information about a deceased individual” as including not only personal information solely relating to the deceased, but also information that qualifies as the personal information of not only the deceased, but another individual or individuals as well.

The conclusion that personal information about a deceased individual can include information about other individuals, raises the further question of how the information of those other individuals should be assessed in deciding what to disclose under section 14(4)(c). In my view, assistance is provided in that regard by the legislative text, which permits disclosure that is “in the circumstances, desirable for compassionate reasons.”

Where this is the case, the “circumstances” to be considered would, in my view, include the fact that the personal information of the deceased is also the personal information of another individual or individuals. The factors and circumstances referred to in section 14(2) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 14(4)(c).

As well, the fact that the protection of personal privacy is one of the Act’s purposes, articulated in section 1(b), must be considered in assessing whether to disclose information that, in addition to being personal information of the deceased, also qualifies as the personal information of another individual or individuals.

Another circumstance to consider is the privacy of the deceased individual. ...

I will adopt the approach in Orders MO-2237 and MO-2245 in determining whether section 14(4)(c) applies to the severed portions of the Occurrence Report and to the two witness statements.

Personal Information of the Deceased

I have already found that the records at issue contain the personal information of the appellants’ son, albeit at times intermingled with the personal information of the affected parties. This information is inextricably intertwined, particularly in the witness statements, and severing this information to avoid disclosure of the affected parties’ personal information is not practicable. In these circumstances, I find that the first requirement for the application of section 14(4)(c) has been met.

Spouse or “Close Relative”

The terms “close relative” and “spouse” are defined in section 2(1) of the *Act* as follows:

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

The Police do not dispute that the appellants meet the definition of a “close relative” above and I am also satisfied that the appellants are the parents of the deceased individual whose personal information is contained in the records at issue, and therefore they are both “close relative(s).” Accordingly, I find that this requirement for the application of section 14(4)(c) is also satisfied.

Desirable for Compassionate Reasons

Representations

The Police asked that portions of their representations be withheld from the appellants for confidentiality reasons and I am therefore unable to reveal those portions of the representations in this order. In the non-confidential portions of their representations, the Police argue that, in the circumstances of this appeal, it would not be desirable for compassionate reasons to disclose the information at issue to the appellants, in part, because all of the information that would reveal the circumstances surrounding the death of their son has already been disclosed to them. They state that one of the appellants spoke with the son, and an affected party, in the moments immediately prior to his death and, as a result, they are aware of their son’s state of mind and the circumstances in the affected parties’ residence at that time. They argue that the information that has been withheld from the appellants is information that is unrelated to the circumstances surrounding the death but relates to “the history of the relationship” between one of the affected parties and the deceased. They also state that they met with the appellants on “at least” 3 to 4 occasions when all of the facts in the case were described to them.

The Police distinguish the circumstances of this appeal from the circumstances of the appeal in Order MO-2237, where I found that information contained in a digital video recording of a witness statement should be disclosed for compassionate reasons to the parents of the deceased individual. The Police state that the information at issue in Order MO-2237 was information relating to the deceased’s health and circumstances prior to her death. They argue that information of this nature is not contained in these records and that the information at issue here relates to the “history of the relationship.” They argue that disclosure of this information, which is the personal information of the deceased and the affected party, would not assist the appellants in coming to terms with their son’s death and would not “bring to light any additional facts about the manner in which the deceased’s life came to an end.”

The appellants argue that disclosure is required for compassionate reasons. They state:

I have explained above that we know very little of [our son's] final hour or hours and we need to know what transpired during his final hours in order for us to have closure in dealing with the unexpected loss of a cherished child and brother for compassionate reasons and so that we can come to terms with [our son's] tragic death.

We, therefore rely on section 14(4)(c) to request the release of all personal information about our son to us on the basis that such disclosure is desirable and fair on compassionate grounds.

If such disclosure of our son's personal information would also result in disclosure of personal information relating to the Affected Parties, because severance is not possible in a logical manner, or because it is co-mingled, then we, the Appellants suggest that the introductions of section 14(4)(c) allows for the release of such information to us for compassionate reasons.

Furthermore if there is an overlap between the personal information of the deceased and that of the Affected Parties, balancing the interests of both parties and the fact that the cause of death of [the deceased] remains very much an open question until it is known what the hours prior to his death were like, it is submitted that the information should be released to us, his parents and brother and sister.

The absence of information of what transpired in the final hour or hours have undermined our family's ability to grieve. For compassionate reasons therefore, the disclosure of these digital statements is sought insofar as they relate to our son's death.

Elsewhere the appellants state:

My family believes there is more to this incident than what the police have concluded. All this has broken down our family. We are of the opinion that the release of the statements would put some of our fears and doubts to rest and help us with our grieving. It is too painful for us to live without knowing what happened to [our son] that drove him to death and how it happened.

Per the Peel Police Representation, the digital statement to which access has been denied consists of the History of the relationship between my son and his girlfriend. This is personal information regarding my deceased son and we have every right to have access to it. At this time there are so many questions surrounding this incident. Moreover, the police have failed to question the couple who were present during the hour before the incident. Per the police this couple left the premises before the incident. We are unclear if the police interrogated this

couple, their names are [...] as we believe they had a part to play in the scene preceding the incident. If there is a statement given by this couple we would like access to it as well.

Having access to the digital statements would put our minds at rest and put an end to the many questions we have unlike what the police have said that “they do not see having access to this information would help us come to terms with her son's death.” Besides, I was not aware of any events on the evening of Aug. 12 as stated by the police. I was told that he was at a picnic and then returned to his girlfriend's house. But what happened at the girlfriend's house we do not know.

How are we to have closure to this tragedy when we have no information at all regarding the incident?

On compassionate grounds, we are pleading that we get access to the digital statements of the 2 individuals so that we can get first hand knowledge about what really happened on the doomed night of the 12th of August 2007. Even if nothing happened and the statements contain only the history of my son's relationship with his girl friend, that would help to put our minds at rest and put an end of some of the doubts and questions we have.

In reply, the Police repeat that they met with the appellants on a number of occasions and that all of the facts of this incident were explained to them during those meetings. In addition, they state that large portions of the Occurrence Report were shared with the appellants on the basis of the application of section 14(4)(c). They state that in arriving at their decision to withhold the remaining portions of the Occurrence Report and the witness statements they took into account all of the circumstances of the request including the privacy interests of the affected parties, the compassionate basis for the request, the relationship between the appellants and the affected parties, the health of the affected parties and the affected parties' concerns regarding disclosure of the requested information.

Analysis and Findings

Occurrence Report

I have reviewed and considered the parties representations and I have also carefully reviewed the records. Having considered all the circumstances of this appeal, I find that the disclosure of the severed portions of the Occurrence Report relating to the appellants' son and the affected parties on pages 1, 6 and 7 is desirable for compassionate reasons in the circumstances of this request.

In reviewing the records and the representations, I considered the stated concerns of the appellants that “there is more to this incident than what the police have concluded” and their interest in receiving information about the “history of the relationship” between their son and an affected party. I have given significant weight to the fact that the appellants' request arises from

a need for the disclosure of all information surrounding the circumstances of the death of their son as part of their grieving process.

I have considered the Police's claim that some of the severed information on pages 1 and 6 of the Occurrence Report is highly sensitive information relating to the appellants' son. In Order MO-2245, referred to above, I ordered the disclosure of highly sensitive personal information of a deceased individual to a close relative. I stated:

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 information 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 adopt the same approach in this appeal and accept the evidence and the representations of the appellants regarding their compassionate need for all of the information relating to their son's death.

I have taken into account the nature of the withheld information and the amount of information that has already been disclosed to the appellants. Contrary to what the appellants have suggested in their representations, in my view a significant amount of information relating to their son's death has already been disclosed to them. Two witnesses to the death of their son consented to the disclosure of their statements and the effect of this disclosure was that significant contextual information was provided to the appellants that would reveal the circumstances surrounding the death. I also give some weight to the position of the Police that the appellants were provided with information moments before the death of their son about his state of mind as a result of the telephone conversations that they had with an affected party and their son in the moments prior to his death.

However, the portions of the Occurrence Report referred to above on pages 1, 6 and 7 include information that is material to the circumstances surrounding the death of the appellants' son and sheds light on the circumstances in the affected parties' home on the date of the death. I give significant weight to the nature of this information and what its disclosure would reveal about the circumstances of the death.

The Police argue that the information severed on pages 1 and 6 describes the “history of the relationship” between the appellants’ son and one of the affected parties and that disclosure of this information will not shed light on the circumstances of the death. I disagree. This information provides important contextual details. Although some of this information is highly sensitive personal information of the appellants’ son, it may in my view be related to the circumstances surrounding his death and that factor deserves significant weight.

I acknowledge that disclosure of the severed portions of pages 6 and 7 will reveal personal information about both affected parties, including their relationship with the deceased and their actions on the day of his death. However, I have taken into account the fact that the appellants know the identities of the affected parties, their relationship with the deceased and other personal information about them. The affected parties are not strangers and much of their personal information, including information that is contained in the Occurrence Report, is already known to the appellants.

As a result, on balance, I am of the view that, in the circumstances, the intrusion on the personal privacy of the affected parties through the disclosure of their personal information on pages 1, 6 and 7 of the Occurrence Report is minimal, and that disclosure of this information, intermingled with the deceased’s personal information is, in these circumstances, desirable for compassionate reasons.

There is some limited information that is remaining which in my view does not shed light on the circumstances of the death of the appellants’ son. This includes a reference to one of the affected parties on page 8 of the report. I will not order this information disclosed to the appellants. I note that two other individuals are named on page 6 who were not witnesses to the deceased’s death and another individual who was interviewed by police is identified on page 7 of the report. This information was removed from the scope of the request by the appellants and I will therefore not order it disclosed.

In summary, I find that the exception in section 14(4)(c) does apply to portions of the information severed from the Occurrence Report on pages 1, 6 and 7 and I will order that it be disclosed in my order provisions below. With respect to the information of the affected parties on page 8 that does not shed light on the deceased’s death, I find it exempt pursuant to section 38(b) of the *Act* because disclosure of the information would constitute an “unjustified invasion” of the affected parties’ personal privacy. This information, together with the information removed from the scope of the request by the appellants, as noted in the preceding paragraph, is highlighted on a copy of the Occurrence Report to be sent to the Police with a copy of this order.

Witness Statements

As previously stated, witness statements 1 and 2 are digital recordings of the affected parties taken during an interview conducted by the Police in the course of their investigation into the death of the appellants’ son. In Order MO-2237, referred to above, I considered whether a similar digital recording should be disclosed to the appellants in that appeal for compassionate

reasons and I ordered disclosure. Although I adopt the principles set out in Order MO-2237, I arrive at a different conclusion in the circumstances of this appeal.

Consistent with the approach in Order MO-2237, where the personal information of the deceased is intermingled with the personal information of the affected parties, before I will order the disclosure of any personal information of the affected parties, I must take into account all of the circumstances of the request, including the privacy interests of the deceased and the affected parties. I have carefully reviewed the witness statements and I find that there is little information in these records that has not already been disclosed to the appellants previously or that will be disclosed as a result of this order. As a result, the disclosure of the witness statements would shed little additional light on the circumstances surrounding the death of the appellants' son.

Further, one of the witness statements contains no audible information relating to the circumstances surrounding the death of the appellants' son, in part, because of the emotional state of the affected party at the time that the recording was made. I give significant weight to this fact. Disclosure of this recording would provide the appellants with no greater understanding of their son's death and could cause the affected party significant personal distress.

The other witness statement, although audible, contains little information relating to the circumstances of the death of the appellants' son. The information that it does contain has already been disclosed to the appellants in the context of the Occurrence Report or will be ordered disclosed in the order provisions below. I give significant weight to this fact. I also find that this witness statement contains highly sensitive personal health information relating to the affected party, the disclosure of which may cause personal distress to the affected party. I give this factor significant weight.

I also have been provided with confidential information relating to the health of both of the affected parties and the impact that disclosure of the withheld information in all of the records might have on their health. The information is highly sensitive and I will not disclose the details in this order. In these circumstances, I give the Police's argument about the impact of disclosure on the affected parties' health moderate weight.

While I am sensitive to the appellants' claim that "there is more to this than the Police have concluded", I am satisfied that if the severed portions of the Occurrence Report referred to above are disclosed then all material information relating to the circumstances of their son's death will have been disclosed to them. I note that the Police state that they have met with the appellants on a number of occasions to discuss the information gathered by them regarding their son's death and I commend the Police for the time and effort devoted to assisting the appellants.

Considering all the circumstances of this appeal, including the factors set out above in my discussion relating to the Occurrence Report, I find that the exception in section 14(4)(c) does not apply to the witness statements because disclosure is not desirable for compassionate reasons. As I have found that section 14(3)(b) applies to the statements, and section 14(4)(c)

does not apply to reverse the application of section 14(3)(b), disclosure is presumed to constitute an unjustified invasion of privacy under section 14(1). Accordingly, I find that these records are exempt and should not be disclosed to the appellants.

EXERCISE OF DISCRETION

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

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

As section 38(b) applied to the Occurrence Report only, my review of the Police's exercise of discretion relates to that record and only in relation to those portions that I found should not be disclosed as they are exempt. This amounts to only two sentences relating to one affected party on page 8 of the report.

In their reply representations, the Police submit that they have taken into account the interests of the appellants in seeking access to the records, and the privacy interests of the affected parties. In addition, they state that they have taken into account the profound grief that the appellants have experienced as a result of the death of their son. The Police state that they have met with the appellants on a number of occasions and conveyed to them "all of the facts in the case." The Police have also indicated that they are willing to meet with the appellants again if the appellants feel that they would benefit from further consultation and they have invited the appellants to contact them to arrange a further meeting.

In my view the Police have exercised their discretion in relation to this information based on proper considerations. In doing so, they have taken into account the purposes of the *Act* and the exception in section 14(4)(c), the appellants right of access and the compassionate nature of the request, as well as the privacy interests of the affected parties.

In the circumstances of this appeal, in relation to the information I have found exempt under section 38(b), I am satisfied that the Police exercised their discretion by taking into account relevant factors and principles, and I am satisfied that they exercised their discretion properly.

Consequently, I find that the disclosure of the highlighted portions of the Occurrence Report would constitute an unjustified invasion of one of the affected parties' personal privacy and that the information is exempt under section 38(b) of the *Act*.

ORDER:

1. I uphold the decision of the Police to withhold access to the two digitally recorded witness statements.

2. I order the Police to disclose the responsive portions of pages 1, 6 and 7 of the Occurrence Report that I have found are not exempt by **March 4, 2009** but not before **February 27, 2009**. For the sake of clarity, I have highlighted the portions of the Occurrence Report that are **not** to be disclosed on the duplicate copy of the record enclosed with this order.
3. 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 disclosed pursuant to order provision 2 above.

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ January 28, 2009