



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2401

Appeal MA08-168

Peel Regional Police Services Board



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NATURE OF THE APPEAL:

The Peel Regional Police Services Board (the Police) received a request for access to information related to a fatal motor vehicle collision, identified by incident number. The request was submitted by a lawyer, on behalf of his clients, relatives of the deceased. The request read:

Please provide us with a copy of the reconstruction report in this matter together with any and all photographs, witness statements and any other material that the Peel Regional Police has in their possession. Be advised that the trial in this matter was completed on October 16, 2007.

The Police located 194 pages of responsive records and issued a decision letter granting partial access to them. The Police severed portions of the records pursuant to the exemption at section 38(b) (personal privacy), read in conjunction with section 14(3)(b) (investigation into a possible violation of law) of the *Act*.

In their decision letter, the Police advised the requesters of the requirements of section 54(a) of the *Act* which states:

Any right or power conferred on an individual by this Act may be exercised,
if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the estate;

The Police, in their decision letter, also advised the requesters that section 14(4)(c) of the *Act* allows for the disclosure of "personal information about a deceased individual to the spouse or a close relative of the deceased" if the "head is satisfied that, in the circumstances the disclosure is desirable for compassionate reasons." They also advised that although the request did not specify compassionate reasons, given that the mother and brother of the deceased both qualify as close relatives under that provision, they considered section 14(4)(c) in the processing of the request.

Finally, the Police advised the requesters that in making their decision regarding access, they also considered the factors at sections 14(2)(e) (pecuniary or other harm), 14(2)(f) (highly sensitive), 14(2)(i) (damage to reputation), the presumption at section 14(3)(a) (medical, psychiatric or psychological information), as well as the public interest override provision at section 16 of the *Act*.

The requesters, now the appellants, appealed the Police's decision.

During mediation, the Police confirmed that a reconstruction report does not exist because one was not completed by the Major Collision Bureau.

Also during mediation, the mediator attempted to notify several affected parties for the purpose of obtaining their consent to disclose their information to the appellants. The mediator obtained the consent of one affected party. The Police agreed to disclose additional information relating to this consent.

As no further issues were resolved through mediation, the appellants advised that they would like to continue to pursue access to the information at issue. The appellants did not take the position that section 54(a) might apply or raise the possible application of the public interest override at section 16 of the *Act*. The file was transferred to the adjudication stage of the appeal process with section 38(b), read in conjunction with section 14(3)(b), identified as the sole issue on appeal.

Before the file was assigned to my attention, the Police issued a supplementary decision letter advising the appellants that it was now prepared to grant them full access to pages 1, 35, 87, 88, 89, 113 and 119. This additional disclosure was a result of consent obtained from an affected party contacted during mediation. Accordingly, these pages are no longer at issue in this appeal.

I decided to begin my inquiry into this appeal by sending a Notice of Inquiry, setting out the facts and issues, to the Police. The Police provided representations in response. I then sent a copy of the Notice of Inquiry to the appellants along with a copy of the complete representations submitted by the Police. The appellants responded with brief representations stating:

Charges were laid in this matter, yet a reconstruction report was not prepared by the police. Accordingly, we look forward to receiving the balance of the material that was withheld by the police in this matter.

RECORDS:

The records that remain at issue consist of 187 pages of police records such as occurrence reports, witness statements, and police officer memorandum book notes. The information that remains at issue are the portions that have been severed pursuant to section 38(b), read in conjunction with section 14(3)(b).

DISCUSSION:

PERSONAL INFORMATION

Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester [see Order M-352]. Where records contain the personal information of both the requester and another individual, access to the records is addressed under Part II of the *Act* and the discretionary exemption at section 38(b) may apply. Where the records contain the personal information belonging to individuals other than the requester, access to the records is addressed under Part I of the *Act* and the mandatory exemption found at section 14(1) may apply.

In order to determine which exemptions 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, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Having reviewed the records at issue, I find that all of them (including the occurrence reports, the witness statements, and the police officer memorandum book notes) contain the personal information of the deceased including his address and telephone number (paragraph (d)), his age (paragraph (a)), and medical information (paragraph (b)) as well as his name and other personal information relating to him (paragraph (h)). These records also contain the personal information of other identifiable individuals including their addresses and telephone numbers (paragraph (d)), their age and family or marital status (paragraph (a)), as well as their personal views and opinions (paragraph (e)) and their names along with other personal information relating to them (paragraph (h)), including statements made to the Police. Some of the records also contain the personal information of the appellants, in particular, the deceased's mother. These records contain her name, address, telephone number (paragraph (d)) as well as her age (paragraph (a)). In all of the records where the appellant's personal information is found, it is together with that of the deceased and other individuals.

As noted above, previous orders have established that where a record contains both the personal information of the requester and another individual, the request falls under Part II of the *Act* and the decision regarding access must be made in accordance with the discretionary exemption at section 38(b). Where a record does not contain the personal information of the requester but contains the personal information of individuals other than the requester, the request falls under Part I of the *Act* and a decision regarding access must be made in accordance with the discretionary exemption at section 14(1).

In the circumstances of this appeal, although I have found that all of the records contain the personal information of the deceased together with that of other identifiable individuals, the appellants are not making this request in the capacity of the deceased's personal representative as contemplated by section 54(a). As a result, the appellants do not stand in the shoes of the deceased. Therefore, the records containing the personal information of the deceased and other individuals cannot be said to contain the personal information of the appellants, and the decision regarding access to that information must be made in accordance with Part I of the *Act*, in accordance with the exemption at section 14(1).

However, I have found that some of the records contain the personal information of one of the appellants (specifically, the deceased's mother), as well as the personal information of the deceased and other individuals. The decision regarding access to this information must be determined under Part II of the *Act*, in accordance with the exemption at section 38(b).

PERSONAL PRIVACY

Section 38(b) of the *Act* is the relevant personal privacy exemption under Part II of the *Act*. It provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

The personal privacy exemptions under the *Act* are *mandatory* at section 14(1) under Part I and *discretionary* at section 38(b) under Part II. Put another way, where a record contains the personal information of both the appellant and another individual, section 38(b) in Part II of the *Act* permits an institution to disclose information that it could not disclose if the exemption at section 14(1) in Part I was applied [Order MO-1757].

Section 38(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. The institution retains the discretion to deny the appellant access to information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy [Order M-1146].

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy" under either the discretionary exemption at section 38(b) or the mandatory exemption at section 14(1), the information in question must contain the personal information of an individual or individuals other than the person requesting it.

The factors and presumptions in sections 14(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met. Section 14(2) provides some criteria for the institution to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In this case the Police rely on section 14(3)(b).

The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption [See Order PO-1764].

I will now review whether the records which contain the personal information of one of the appellants as well as that of the deceased and other individuals qualifies for exemption under the discretionary exemption at section 38(b) and whether the information in the remaining records, which contain the personal information of the deceased and other individuals but not that of the appellants, qualifies for exemption under the mandatory exemption at section 14(1).

Section 14(3)(b): identifiable as part of an investigation into a possible violation of law

The Police submit that the presumption at section 14(3)(b) applies to all of the information at issue in this appeal. Section 14(3)(b) states:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The Police submit that section 14(3)(b) applies because all of the information at issue was compiled as part of an investigation into a fatal motor vehicle collision that resulted in charges being laid. They submit that charges of Dangerous Operation of a Motor Vehicle Causing Death contrary to section 249(4) of the *Criminal Code* of Canada and Dangerous Operation of a Motor Vehicle Causing Bodily Harm contrary to section 249(3) of the *Criminal Code* of Canada and two offences under the *Compulsory Automobile Insurance Act* were laid against the accused. They submit:

The records were completed as part of the investigation into a violation of law.
None of the records at issue were created after the completion of the investigation.

I have reviewed the records at issue closely as well as the representations submitted by the Police. I find that the nature and content of all of the records demonstrate that they were compiled and are identifiable as part of a police investigation into a fatal motor vehicle collision. As a result, I find that the records were compiled and are identifiable as part of their investigation, the purpose of which is, in part, to determine whether there has been a possible violation of law under the *Criminal Code* and the *Compulsory Automobile Insurance Act*. Accordingly, I find that the presumption at section 14(3)(b) applies.

Whether or not the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under either section 38(b) or section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

Having reviewed the information at issue as well as the information that has already been disclosed to the appellants, I find that the absurd result principle has no application in this appeal and does not disturb my finding with respect to the application of the presumption at section 14(3)(b).

As noted above, although a presumption at section 14(3) cannot be rebutted by factors in sections 14(2), it can be overcome if the personal information at issue falls under section 14(4) or if the public interest override at section 16 of the *Act* applies. The appellants have not raised the possible application of section 16, and I find that there is no evidence to demonstrate that it might apply. However, the Police have identified, and I agree, that the exception at section 14(4)(c) of the *Act* may be relevant in the circumstances.

Section 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, Assistant Commissioner Brian Beamish considered the interpretation of this section. After reviewing the legislative history, he 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, Assistant Commissioner Beamish 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, Assistant Commissioner Beamish 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. He 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 Assistant Commissioner Beamish's 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. Specifically, I will apply the three-part test outlined in those orders to the information that remains at issue.

Part 1: personal information of the deceased

I have found that the records at issue contain both the personal information of the deceased and other individuals who were either involved or were witnesses to the motor vehicle collision. This information is inextricably intertwined, particularly in the witness statements, and severing this information to avoid the disclosure of the affected parties' personal information is not practicable. I find that the first requirement for section 14(4)(c) is satisfied.

Part 2: 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;

The appellants in this appeal are the mother and brother of the deceased individual whose personal information is contained in the records at issue. I am satisfied, therefore, that they are both "close relatives" within the meaning of that term. I find that the second requirement for the application of section 14(4)(c) is satisfied.

Part 3: desirable for compassionate reasons

The Police submit that they were aware of the circumstances of the request and as there was a compassionate component to it, they processed the request with that in mind. They explain that as a result, the appellant was granted access to the bulk of the information contained in the record. They submit that although they disclosed some of the information at issue as a result of the application of section 14(4)(c), the information that was not disclosed to the appellants contains the personal information of the affected parties, disclosure of which would constitute an unjustified invasion of the affected parties' personal privacy.

I have reviewed and considered the representations of the Police. I have also carefully reviewed the records considering both the amount of information that has already been disclosed to the appellants by the Police and the nature of the information that has been withheld. In my view, a

significant amount of information relating to the deceased has already been disclosed to them and that which continues to be withheld does not shed light on his death. The majority of the remaining information consists of the names and personal information of the affected parties and does not specifically relate to the deceased. Therefore, on balance, in the circumstances of this appeal and taking into account the specific information that remains at issue, I am of the view that the intrusion on the personal privacy of the affected parties through disclosure of their information would constitute an “unjustified invasion” which outweighs the compassionate reasons contemplated in section 14(4)(c).

As I have found that none of the information that remains at issue should be disclosed under section 14(4)(c) of the *Act*, the presumption at section 14(3)(b) has not be rebutted. Accordingly, I find that all of the information is exempt from disclosure. Specifically, I find that the information which contains the appellant’s personal information is exempt under section 38(b) and the information which does not contain the appellant’s personal information is exempt under section 14(1) of the *Act*.

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 only to the records that contain the personal information of one of the appellants, my review of the Police's exercise of discretion relates to that information only.

The Police submit that in making their decision to withhold the information at issue under section 38(b), it considered the compassionate circumstances exception in section 14(4)(c) and also the privacy interests of the affected parties. The Police submit:

While reviewing the information in [these records] a balancing attempt was made to see if the requester's right to access took precedence over affected party rights to privacy. Generally it is the position of the police that disclosure should be provided wherever possible within both the letter and spirit of the *Act*. The circumstances of this particular request prevented full disclosure although the bulk of this information was disclosed.

...

It is the position of the police that the information not disclosed qualifies for exemption under section 38(b). It is also the institution's position that the institution's exercise of discretion has been made in full appreciation of the facts

of this particular request and upon proper application of the applicable principles of law.

In my view, the Police have exercised their discretion in relation to the information that is at issue in this appeal 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.

ORDER:

I uphold the Police's decision to deny access to the information at issue.

Original signed by: _____
Catherine Corban
Adjudicator

_____ March 18, 2009