



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

ORDER MO-2615

Appeal MA10-188

Windsor Police Services Board



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NATURE OF THE APPEAL:

This order disposes of the issues raised by a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Windsor Police Services Board (the Police) for access to records relating to the death of the requester's husband. The requester specified that she is seeking these records in order to obtain closure regarding her husband's untimely and tragic death.

After notifying two affected parties, the Police responded to the request by granting access to one responsive record, a general occurrence report, in part. The Police denied access to the remaining information pursuant to sections 8 and 38(b), in conjunction with section 14(3)(b) of the *Act*. The Police advised that the affected parties "adamantly refuse to give further consent to the release of their personal information contained in the records."

The requester, now the appellant, appealed the decision of the Police to this office.

During mediation of the appeal, the Police confirmed that, in addition to the general occurrence report, they also have a witness statement relating to the incident. The appellant confirmed that she is seeking access to both records, but was not interested in pursuing access to the names of the witnesses. Accordingly, the names of the affected parties are not at issue in this appeal.

The Police agreed to include the witness statement as a record at issue in this appeal. The Police advised that they are denying access to this record in its entirety pursuant to section 38(b) in conjunction with section 14(3)(b).

The Police also advised that they were no longer relying on section 8, which was previously applied to withhold portions of the general occurrence report. Therefore, section 8 is no longer at issue.

During mediation, the mediator attempted to notify the two affected parties. Neither party responded to the notification. The appeal then moved to the adjudication stage of the process in which an adjudicator conducts an inquiry. I initially sought representations from the Police and the two affected parties, but did not receive representations from the affected parties or the Police. When contacted by this office, the Police advised that they would not be submitting representations in this appeal. I then sought, and received, representations from the appellant.

For the reasons that follow, I am ordering the Police to disclose the remainder of the Occurrence Report and the Witness Statement, with the exception of the affected parties' names and dates of birth.

RECORDS:

There are two records at issue in this appeal. The first is a general occurrence report, of which some portions have been withheld. The second is a witness statement that has been withheld in its entirety.

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether sections 38(b) and 14(3)(b) 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 if 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 where 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].

Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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 and PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

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.)].

The appellant indicates in her representations that she is not interested in knowing the identity or the contact information of the two affected parties, although she is already aware of the full name of one of the affected parties and the first name of the other. The appellant further submits that she seeks information about the parties’ actions at the time of the incident described in the records but not the name, address, telephone number or date of birth of the affected parties.

The appellant also submits that, although the records contain personal information about the two affected parties, they relate to the appellant’s deceased husband. In addition, the appellant’s position is that since the two affected parties were working in their respective fields of employment, section 2(2.1) applies, and that the information does not reveal something of a personal nature about the parties since it relates to the actions they took regarding the appellant’s deceased husband.

Having reviewed the records at issue in this appeal, I find that they contain information about the deceased that satisfies the definition of “personal information” in section 2(1) of the *Act*. Specifically, I find that there is personal information about the deceased in both records that falls within the ambit of the following paragraphs of the definition of personal information: (a) age, sex, and marital status, (b) medical history, (g) views and opinions held by another individual

about the deceased, and (h) the deceased's name along with other personal information relating to him.

The records also contain the personal information of the two affected parties. This information qualifies as the personal information of these individuals under the following paragraphs from the definition set out above: (a) age and sex (e) personal opinions or views, and (h) names along with other personal information relating to these individuals. I find that section (2.1) under the definition of personal information in section 2 of the *Act* is not applicable in this appeal as I am of the view that, due to the nature of the information at issue, it does reveal something of a personal nature about the individuals.

Lastly, the occurrence report contains the personal information of the appellant. This information qualifies as her personal information under the following paragraphs from the definition set out above: (a) marital status and (h) name along with other personal information relating to her. I note that the portion of the record containing the appellant's personal information has already been disclosed to her.

PERSONAL PRIVACY

General principles

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

In the decision letter and during mediation, the Police advised that they are relying on section 38(b) of the *Act* in conjunction with section 14(3)(b) in denying access to the withheld portions of the Occurrence Report and the Witness Statement in its entirety. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

However, given that all of the appellant's personal information contained in the occurrence report has already been disclosed to her and is not present in the other record, the remaining personal information at issue of the deceased and of other identifiable individuals should be properly considered under section 14 alone, rather than in conjunction with section 38(b).

Under section 14, where a record contains only the personal information of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy."

Section 14(3) lists the type of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. If a presumption listed in section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2). In the decision letter and during mediation, the Police advised that the personal information contained in the records was collected as part of an investigation into a possible violation of law and that the presumption in section 14(3)(b) applies.

If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy despite section 14(3) and the information is not exempt under section 14.

For the reasons that follow, I find that section 14(4)(c) applies to the records at issue and, therefore, their disclosure would not constitute an “unjustified invasion of personal privacy.” The information is therefore not exempt under either section 14(1) or 38(b).

14(4)(c) – compassionate reasons

Section 14(4)(c) of the *Act* permits the disclosure of personal information about a deceased individual to the spouse or close relative of the individual where it is desirable for compassionate reasons.

Section 14(4)(c) states:

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

...

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

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”); and

“spouse” means,

- (a) a spouse as defined in section 1 of the *Family Law Act*, or
- (b) either of two persons who live together in a conjugal relationship outside marriage. (“conjoint”)

Personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the “circumstances” to be considered would include the fact that the personal information of the deceased is also the personal information of another individual or individuals and the factors and circumstances referred to in section 14(2) may be relevant. In any event, the overall circumstances must be considered and weighed in any application of section 14(4)(c) [Orders MO-2237, MO-2270, MO-2290, MO-2306 and MO-2387]. This approach was first articulated in Order MO-2237, and is equally applicable in the case before me. Therefore, I will adopt it for purposes of this appeal.

In Order MO-2237, I also articulated a three part test, which must be considered in order for the section to apply. The application of section 14(4)(c) requires a consideration of the following questions, all of which must be answered in the affirmative:

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?

[Orders MO-2237 and MO-2245]

Step 1 – Personal Information of the Deceased

I have found, above, that the records contain the personal information of the appellant’s deceased husband and the two affected parties. I also note that the personal information of these affected parties is inextricably intertwined with that of the appellant’s husband. Accordingly, severing this information, other than names and birth dates which the appellant does not want, to avoid disclosure of other individuals’ personal information is not practicable. I am therefore satisfied that the first requirement for the application of section 14(4)(c) is satisfied.

Step 2 – Spouse or “Close Relative”

I am satisfied that the appellant is the spouse of the deceased individual whose personal information is contained in the records at issue and that the second requirement for the application of section 14(4)(c) is satisfied.

Step 3 – Desirable for Compassionate Reasons

Because section 14(4)(c) can override the presumed unjustified invasion of privacy as set out in section 14(3)(b), it raises an issue about the interpretation of the words “desirable for compassionate reasons.”

In Order MO-2237, I considered the definition of the word “compassionate” and the intent of the Legislature as follows:

The *Concise Oxford Dictionary, Eighth Edition*, defines “compassionate” as follows: “*adj.* sympathetic, pitying.” Compassion is defined in the *Concise Oxford Dictionary, Eighth Edition*, as follows: “*n.* pity inclining one to help or be merciful.”

I accept these definitions as evidence of the plain and ordinary meaning of the word “compassionate” and adopt it for the purposes of this appeal.

As discussed above, I have concluded that 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 recognition that, for surviving family members, greater knowledge of the circumstances of their loved one’s death is by its very nature compassionate.

I adopt this approach for the purposes of this appeal.

I have found above that the personal information in the records qualifies as the personal information of the appellant’s husband, closely intertwined with that of other individuals. Accordingly, any order that I make requiring the disclosure of the husband’s personal information will result in the disclosure of the personal information of the other individuals. In this situation, all of the relevant circumstances that must be considered include the nature of the request, the privacy interests of the appellant’s deceased husband and the other individuals.

The appellant submits that not having access to the records will negatively impact her emotional health. By way of background, the appellant and her husband were married for 25 years. The appellant’s husband suffered a cardiac arrest and died five days later, without regaining consciousness. The appellant was not with her husband at the time of the cardiac arrest. The appellant submits that the circumstances surrounding her husband’s death have been “quite traumatic,” such that she has had to seek treatment from a psychiatrist because of the unusual and unexplained circumstances of his death.

The appellant’s treating psychiatrist provided a written opinion that the appellant requires the information at issue in order to obtain closure, as she is having considerable difficulty in resolving her grief due to the “unusual and largely unexplained” circumstances of her husband’s death. In addition, the psychiatrist states that the lack of access to the available information presents an ongoing obstacle to the appellant in coming to peace with her husband’s death and that withholding this information would be “far more detrimental to her emotional health than any consequences of possessing the information.” In short, the psychiatrist strongly endorses her efforts to obtain access to the records at issue in this appeal.

I have carefully considered all the circumstances surrounding this request and appeal, particularly the privacy interests of the other individuals. I am satisfied that disclosure to the appellant of the personal information in these records is “desirable for compassionate reasons.” I have concluded that in the circumstances of this case, the other individuals’ privacy interests must yield to the compassionate reasons for disclosure. I note that, in terms of the two affected parties, their privacy interests are relatively minor, given the severance of their names and dates of birth from the records.

Because this information is subject to the exception to the exemption provided by section 14(4)(c), its disclosure would not result in an unjustified invasion of personal privacy and,

consequently, it is not exempt under sections 14(1) or 38(b). Accordingly, I will order disclosure of both records to the appellant as they fall within the ambit of the exception in section 14(4)(c) of the *Act*. As indicated above, I will not order the Police to disclose the affected parties' names and dates of birth.

As I have not upheld the exemption at section 38(b), it is not necessary for me to determine whether the Police properly exercised their discretion.

ORDER:

1. I order the Police to disclose both records to the appellant, with the exception of the highlighted areas, by June 1, 2011, but not before May 27, 2011. I have enclosed copies of the records, with portions highlighted. The highlighted areas are not to be disclosed to the appellant.
2. 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 to the appellant pursuant to order provision 2.

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ April 28, 2011