

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

---

## ORDER MO-2675

Appeal MA10-227-2

Ottawa Police Services Board

November 30, 2011

**Summary:** The appellant requested the police report concerning the death of her daughter from the Ottawa Police Service. The police denied access to the records on the basis of section 38(b), with reference to the presumption in section 14(3)(b) of the *Act*. The police considered the exception in section 14(4)(c) but found that disclosure was not desirable for compassionate reasons in the circumstances. The police were ordered to disclose portions of the records to the appellant. Disclosure of the video and audio recordings was not desirable for compassionate reasons.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (definition of personal information), 14(3)(b), 14(4)(c), 38(b).

**Orders and Investigation Reports Considered:** Orders MO-2245, MO-2387.

### OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ottawa Police Service (the police) for access to the complete police report concerning the death of her daughter on a specified date.

[2] The police identified the responsive records as an occurrence report and police officer notebook entries. Prior to making their decision, the police gave notice to an individual whose interest would be affected by the outcome of the appeal (affected

person). The affected person objected to the disclosure of the records. The police issued a decision denying access to the records in full, citing the mandatory and discretionary personal privacy exemptions in sections 14(1) and 38(b), with reference to the presumptions in sections 14(3)(a) and (b) of the *Act*.

[3] The appellant appealed this decision and clarified in mediation that she was only interested in the events leading up to her daughter's death. This included statements made to the police about the last hours of her daughter's life. The appellant identified three individuals she believed were interviewed by the police as part of their investigation. The appellant was not interested in information recorded about the accident which resulted in her daughter's death.

[4] Given that the responsive records did not relate to the events surrounding the accident itself, the appellant advised the mediator that she is not pursuing access to any records that describe those events. The police subsequently did a further search and located additional records. The police notified the affected persons identified in the records to seek their consent to the disclosure of their information.

[5] The police issued a supplementary decision denying access to the 97-page occurrence summary, two video statements and one audio statement, citing the personal privacy exemptions in sections 14(1) and 38(b), with reference to the presumption in section 14(3)(b). The police explained that one affected person did not consent to the disclosure and they were not able to contact the other affected persons, as they no longer reside at the addresses on file. In their decision, the police also note that they considered the application of the compassionate reasons exception in section 14(4)(c), but exercised their discretion to deny access to the records to the appellant.

[6] As the appellant no longer pursued access to the records originally identified by the police, appeal file MA10-227 was closed. The appellant confirmed that she was appealing the police's supplementary decision and the current appeal file, MA10-227-2 was opened.

[7] During my inquiry into this appeal, I sought representations from the police, the appellant and three affected persons. I only received representations from one affected person who did not provide consent to the disclosure of her information to the appellant.

[8] In this decision, I order the police to disclose portions of the record.

## **RECORDS:**

[9] The records remaining at issue consist of the following:

- General Occurrence Summary – pages 1 – 11, 13, 16, 18 – 20, 26 – 39, 41 – 44, 47 – 52, 54 – 68, 70 – 97
- Three compact discs containing two video and one audio statement

## **ISSUES:**

- A. Do the records contain personal information?
- B. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the records?
- C. Did the police properly exercise their discretion to withhold records under section 38(b)?

## **DISCUSSION:**

### **A. Do the records contain personal information?**

[10] 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 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;

[11] 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].

[12] 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.)].

[13] I have reviewed the records remaining at issue and find that they contain the personal information of the appellant's daughter, as defined in section 2(1). The information in the records includes the daughter's name, contact information and description, her activities on the day of her death, the circumstances surrounding her death, as related by the affected persons. Thus, I find that the records contain the personal information of the deceased within the meaning of paragraphs (a), (b), (c), (d), (g) and (h) of the definition of that term in section 2(1) of the *Act*.

[14] The records also contain the personal information of the affected persons who were with or came into contact with the appellant's daughter before she died, including information relating to their names, contact information, race, sex and occupations. Much of this personal information relates only to the affected persons and does not include any information of the appellant's daughter. However, some of the affected person's personal information also includes information relating to their observations and views of the circumstances surrounding the appellant's daughter's death. Accordingly, I find that the records contain the personal information of the affected persons within the meaning of paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition of that term in section 2(1).

[15] Some of the records also contain the personal information of the appellant; specifically her name, address, phone number and other information relating to her relationship with her daughter. I find that this information is the personal information of the appellant only within the meaning of paragraphs (a), (c), (d) and (g) of the definition of that term in section 2(1). This information has not been disclosed to the appellant. As disclosure of personal information to the individual to whom it relates cannot be an unjustified invasion of personal privacy, I will order this information be disclosed to the appellant.

[16] 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 relevant personal privacy exemption is at section 38(b) [Order M-352]. Some exemptions, including the invasion of privacy exemption at section 14(1), are mandatory under Part I but discretionary under Part II, and thus in the latter case an institution may disclose information that it could not disclose if Part I applied [Order MO-1757-I].

[17] Accordingly, I will consider whether the records qualify for exemption under the discretionary exemption at section 38(b).

**B. Is the information in the record exempt under the discretionary personal privacy exemption in section 38(b)?**

[18] 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 general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the police must look at the information and weigh the appellant's right to the protection of their personal information against the affected persons' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information.

[19] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 14(2) provides some criteria for the police 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 addition, if the information fits within any of

paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

***Section 14(3)(b)***

[20] In this appeal, I find that the presumption in section 14(3)(b) and the exception in section 14(4)(c) are particularly relevant. 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;

[21] Having reviewed the records, I find that the personal information of the appellant, the affected persons and the appellant's daughter in the records was compiled and is identifiable as part of an investigation into a possible violation of law, specifically an assault and whether criminal charges were warranted in connection with the appellant's daughter's death. Section 14(3)(b) applies whether or not charges were laid [Order PO-1849]. Accordingly, I find that disclosure of the personal information at issue is presumed to constitute an unjustified invasion of personal privacy. Subject to my consideration of the police's exercise of discretion, disclosure of the information in the records would constitute an unjustified invasion of the personal privacy of identifiable individuals under section 38(b).

[22] I will now consider the application of the exception in section 14(4)(c) to the information at issue. As the exception can only apply to the personal information of the deceased, I will not be considering its application to the personal information that relates solely to the affected persons. I find that the personal information that solely relates to the affected persons consists of their names, contact information, descriptions, dates of birth and other information not relating to the deceased. As I have found that the presumption in section 14(3)(b) applies to this information, the disclosure of this information would constitute an unjustified invasion of the personal privacy of these individuals under section 38(b).

***Section 14(4)(c)***

[23] Section 14(4)(c) reads:

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.

[24] A finding that the exception in section 14(4)(c) applies to some or all of the personal information means that disclosure of that information would not be an unjustified invasion of personal privacy. Accordingly, where this provision applies, the information is not exempt under section 38(b) or 14(1)<sup>1</sup>.

[25] The application of section 14(4)(c) 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?

[Orders MO-2237 and MO-2245]

[26] 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. 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) [Order MO-2237].

*Step 1 – Personal information of the deceased*

[27] The records contain the affected persons' statements about the appellant's daughter and the circumstances surrounding her death. I find that the personal information of the deceased is inextricably comingled with the personal information of the affected persons and other identifiable individuals. Some portions of the records, however, also contain the personal information of the appellant's daughter only. Accordingly, this requirement for the application of section 14(4)(c) is satisfied.

---

<sup>1</sup> Orders MO-2237 and MO-2245.

*Step 2 – Spouse or "Close Relative"*

[28] "Close relative" is defined in section 2(1) of the *Act* as:

..a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption;

[29] 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 is a "close relative" for the purposes of section 14(4)(c).

*Step 3 – Desirable for Compassionate Reasons*

[30] As stated above, I did not receive representations from either the police or the appellant during my inquiry into this appeal. The police, in their supplementary decision, advised that they had considered the exception in section 14(4)(c), but had exercised their discretion to withhold the personal information in the record. The police placed particular weight on the fact that the affected persons did not provide their consent to the disclosure of their personal information to the appellant.

[31] I have reviewed the appeal file and note that the appellant had advised the mediator that she was having difficulty finding closure in her daughter's death. Further, the appellant indicated that she is particularly concerned about learning of the events surrounding her daughter's death, not the actual manner or details about the scene of her daughter's death.

Personal information of the deceased

[32] In Order MO-2245, Assistant Commissioner Brian Beamish ordered the disclosure of highly sensitive personal information of a deceased individual to a close relative. In doing so, the Assistant Commissioner stated the following:

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.

[33] I adopt the Assistant Commissioner's approach in this appeal and accept the appellant's comments to the mediator that she requires the information about the events surrounding her daughter's death for closure.

[34] Having reviewed the records, I find that, in the circumstances, disclosure of the personal information which relates to the appellant's daughter only is desirable for compassionate reasons and that the requirements of section 14(4)(c) has been satisfied. Accordingly, I will order disclosure to the appellant of the withheld information that pertains to only the deceased.

#### Personal information of other individuals

[35] As stated above, I gave notice to the affected persons whose personal information is included in the records at issue. I received representations from one affected person only, who did not consent to the disclosure of her personal information.

[36] I have found above that some of the records remaining at issue contain the personal information of the appellant's daughter and that this information is comingled with that of a number of other identifiable individuals. The remaining withheld information consists of the statements of witnesses about events prior to the deceased's death.

[37] The relevant circumstances in this case include the appellant's need to receive the information for closure and to better understand the circumstances around her daughter's death, the privacy interests of the affected persons and the privacy interests of the deceased. I give significant weight to the fact that much of the deceased's personal information in these records consists of the affected persons' observations and statements about the deceased prior to her death and is, therefore, her personal information under paragraph (g) of the definition of section 2(1).

[38] I also give some weight to the police's concerns about the privacy interests of the affected persons. That being said, I have found above that some of the personal information of the affected persons, particularly their address, contact information and other information relating only to them, did not include the personal information of the deceased and is properly exempt under section 38(b).

[39] Having considered all the circumstances around this appeal, I find that disclosure of the remaining information in the records that relates to the deceased, particularly information about the circumstances surrounding her death, is desirable for compassionate reasons under the exception in section 14(4)(c). Accordingly, I find that

the exception in section 14(4)(c) applies to much of the remaining information withheld in the records and that its disclosure would not result in an unjustified invasion of personal privacy, within the meaning of section 38(b). I have provided the police with a highlighted version of the records which sets out the information whose disclosure is desirable for compassionate reasons.

Video and Audio recording of the witness statements

[40] The records at issue also include two video recording of statements taken from two affected persons and an audio statement of one of the affected persons. I note that the substance of the statements is included in the General Occurrence report, on pages 33 – 39.

[41] In Order MO-2387, Assistant Commissioner Brian Beamish considered the application of the section 14(4)(c) exception to digital recordings of the affected persons taken during interviews conducted by the police. The Assistant Commissioner set out the approach to be taken in such considerations:

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 appellant's son.

[42] After considering all the circumstances, the Assistant Commissioner went on to find that disclosure of the digital recordings of the interviews was not desirable for compassionate reasons and stated the following:

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.

[43] I adopt this approach for the purposes of this appeal. In the present appeal, the relevant circumstances include the following:

- The affected persons did not provide consent to the disclosure of their personal information;
- It is not evident that the appellant is aware of the identities of the affected persons who provided the statements;
- The substance of the interviews is set out in the occurrence report.

[44] Having considered these factors and having reviewed the records at issue, I find that, in the circumstances, it is not desirable to disclose the video and audio recordings of the witness statements because the information which they contain is substantially similar to that in the records that I have ordered disclosed. I find that section 14(4)(c) does not apply and the section 38(b) exemption applies to these statements.

[45] I will now consider the police's exercise of discretion for the information I have found exempt under section 38(b).

**D. Was the police's exercise of discretion to withhold the records under section 38(b) proper?**

[46] 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.

[47] 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.

[48] 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)].

[49] I have found that the information relating solely to the affected persons and the audio and video recording witness statements are exempt under section 38(b). In

exercising its discretion to withhold the information at issue, the police submit that it considered the following factors:<sup>2</sup>

- No consent was obtained from the [affected persons] to release the information.
- The privacy rights of the individuals who supplied the information, as well as any other individual mentioned in the report.
- The exemption in section 14(1) of the *Act* that serves to protect the rights of those individuals.
- [The appellant's] right of access to this information.

[50] The police further submit that they considered the fact that if they routinely disclosed information given by witnesses then these witnesses may be hesitant, in the future, to assist the police, as they could not be ensured that their statements would be kept confidential.

[51] Based on my review of the police's submissions, I find that their exercise of discretion was proper. The police properly considered the appellant's right to her own information, the affected persons' right to privacy, the historical practice of the institution when dealing with similar records and the rights protected by the exemptions. I find the police took into consideration only relevant factors and I uphold their exercise of discretion.

### **ORDER:**

1. I order the police to disclose to the appellant a copy of the pages of the record by providing her a copy of those records by **January 9, 2012** but not before **January 4, 2012**. I have provided a highlighted copy of the records with this order identifying the information not to be disclosed. To be clear, the information highlighted is **not** to be disclosed.
2. I uphold the police's decision with respect to the remaining records.

---

<sup>2</sup> Taken from the police's Supplementary decision dated September 01, 2010.

3. In order to verify compliance with Order provision 1, I reserve the right to require the police to provide me with a copy of the records provided to the appellant.

Original signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ November 30, 2011