

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2800

Appeal MA10-452

Waterloo Regional Police Services Board

October 15, 2012

Summary: The appellants sought access to records compiled by the Waterloo Regional Police Services Board during an investigation into the death of their son. The police granted partial access to the responsive records but denied access to the remaining portions under the exemptions in section 14(1), sections 8(1)(c), (d) and (l) [alone, or in conjunction with section 38(a)] and section 38(b). In this order the adjudicator finds that some of the withheld information does not qualify for exemption. Applying section 14(4)(c) (compassionate circumstances) and finding that sections 8(1)(c), (d) and (l) (law enforcement) are not applicable, he orders the police to provide the appellants with access to some of the withheld information pertaining to their son.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1), 2.1, 2.2, 8(1)(c), 8(1)(d), 8(1)(l) 14(1), 14(3)(b), 14(4)(c), 38(a) and 38(b)

Orders and Investigation Reports Considered: M-4, MO-2237 and MO-2245

OVERVIEW:

[1] The Waterloo Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) from the parents of a deceased individual for information relating to the death of their son. The requesters sought all reports relating to the incident which resulted in

the death of their son along with witness statements and any officers' notes. The request provided that they were particularly interested in reports of what their son "said, did and how he acted, as well as any information about where he was during the previous evening, overnight and that day."

[2] The police granted partial access to the responsive records for a fee of \$15.40. Portions of the responsive records were withheld pursuant to the following sections of the *Act*: section 38(a) (discretion to refuse requester's information), in conjunction with sections 8(1)(c) (reveal investigative techniques), 8(1)(d) (disclose identity of confidential source of information) and 8(1)(l) (hamper the control of crime); as well as section 38(b) (personal privacy) with particular emphasis on the factors in sections 14(2)(f) (personal information is highly sensitive) and 14(2)(h) (personal information supplied in confidence) as well as the presumption in 14(3)(b) (compiled as part of investigation into possible violation of law).

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

[4] During mediation, the police clarified that some portions of the records were deemed to be not responsive to the request. In response, the appellants advised the mediator that they sought access to all of the withheld information contained within the records, including the non-responsive portions. The mediator notified a number of affected parties for the purpose of obtaining their consent to the disclosure of additional information to the appellants. The mediator obtained the full or partial consents from four of the affected parties and forwarded them to the Police.

[5] The police subsequently issued a revised decision granting access to some additional information. The appellants reiterated that they wished to pursue access to all of the withheld information contained within the records, including the portions that were identified as non-responsive. However, the appellants clarified that they are not pursuing access to the severed portions of page 53 of the records. As a result, that information is no longer at issue in the appeal.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. In response to an inquiry from this office, and prior to my issuing a Notice of Inquiry, the Police advised that they were content to release the name of an identified individual on page 22 of the records because they were of the view that the individual was acting in a professional capacity.

[7] During my inquiry into this appeal, I sought representations from the police, the appellants and five affected persons. Furthermore, on my review of the records and the circumstances of this appeal, I decided to add the possible application of section 14(4)(c) of the *Act* (disclosure is desirable for compassionate reasons) as an issue in the appeal.

[8] Only the police and one of the affected persons provided responding submissions. In their submissions, the police advised that they had decided to disclose additional information contained in page 22 of the records at issue. As a result, that information is no longer at issue in the appeal. I then sent a Notice of Inquiry to the appellants along with the non-confidential representations of the police and of the affected person who provided submissions. The appellants provided responding representations.

[9] In the course of the adjudication of the appeal the appellants confirmed with an Adjudication Review Officer that their desire is to obtain substantive information about the circumstances surrounding their son's death, and that they are not seeking access to withheld detailed internal police reference information such as Internal Police Event Chronology Reports,¹ operational police codes including "ten" codes, location codes, area codes, duty location codes, zone identifiers, patrol area codes, patrol car numbers or gun, baton and handcuff serial numbers, and similar information. Accordingly, this information is also no longer at issue in the appeal.

[10] In this decision, I order the police to disclose withheld portions of the records at issue.

RECORDS:

[11] At issue in this appeal are the remaining withheld portions of police officers' hand-written notes, witness statements and police reports contained within 77 pages of records, as well as the digitally recorded interviews of two witnesses.

ISSUES:

- A. What information in the records at issue is responsive to the request?
- B. Do the records contain personal information?
- C. Do the exemptions at section 14(1) or 38(b) apply to the records?
- D. Do the exemptions at sections 8(1)(c), (d) or (l) alone or in conjunction with section 38(a) apply to the records?
- E. Did the police properly exercise their discretion to withhold information under section 38(b)?

¹ These records at pages ages 2-5 (duplicated at pages 37 to 39) contain police codes, response times, numbers of units dispatched, when a command post was established and other logistical information about responding to an emergency.

DISCUSSION:

A. What information in the records at issue is responsive to the request?

[12] To be considered responsive to the request, records must “reasonably relate” to the request.²

[13] The police submit that in mediation they clarified that the portions of the records marked as “NA” were not responsive to the request. They explain:

Officers are required to note their activities in the notebook in the order they happen. This can result with notes involving one investigation interwoven with notes from another investigation, if, for example, the investigator receives information during a phone call about another investigation. The areas marked “NA” refer to activities which occurred during the officer’s shift which does not relate to the records the appellant requested. The areas marked “NA” therefore should not be released as part of this appeal.

[14] The police explain that they have since changed their practice to use the term non-responsive rather than “NA” in their decision letters.

[15] The appellants make no specific representations on this issue, but state that except for the information discussed in the Overview above, they seek access to all of the records at issue in the appeal.

[16] The most significant portions of the information the police identified as non-responsive can be found in the copies of the police officers’ notes. The police officers’ notes describe in detail all tasks undertaken and the incidents referred to in the course of an officers’ day, including in this appeal, those that describe other occurrences which do not involve the subject matter of the request.

[17] My review of these records confirms that the portions of the records marked as “NA” are not responsive to the request because they deal with unrelated matters or tasks or contain other information that is otherwise unrelated to the investigation into the appellants’ son’s death. Accordingly, I uphold the decision of the police to deny access to this information as being not responsive to the request.

² Orders P-880 and PO-2661.

B. Do the records contain personal information?

[18] 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 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;

[19] 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.³

[20] Sections (2.1) and (2.2) of the *Act* also relate to the definition of personal information. These sections state:

(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 (2.1) 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.

[21] 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.⁴ To that end, I find that the highlighted contact information at pages 41 and 66 of the records should be disclosed to the appellants.

[22] 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.⁵

[23] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶

[24] Although I find that some witnesses who provided statements had supervisory roles in relation to the appellants' son's residence, there is nothing in the records at issue to indicate that the information was provided, or relates to, them or other identified individuals only in a professional, official or business capacity. Rather, it is clear from the records that these individuals appear as witnesses who provided background to the police in the course of their investigation, and the information provided to the police reveals something of a personal nature about them.

³ Order 11.

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[25] Having carefully reviewed the records which consist of occurrence reports, witness statements, the digital recordings of two witnesses⁷ and police officer's notes, I conclude that they contain the personal information of the appellants, the appellant's son and other individuals (including the affected persons) who were interviewed as part of the police investigation or whose personal information was otherwise collected as part of the police investigation. Specifically, the personal information includes information relating to age, sex, and marital or family status [paragraph (a)], any identifying number, symbol or other particular assigned to the individual [paragraph (c)], addresses and telephone numbers [paragraph (d)], personal opinions or views of individuals [paragraph (e)], the views or opinions of other individuals about the appellants' son [paragraph (g)], and the names of individuals together with other personal information about them [paragraph (h)].

[26] In circumstances where the appellants' son's personal information is mixed with that of the appellants, Part III of the *Act* applies and I will consider whether the information is exempt from disclosure under the discretionary exemption at section 38(b). In circumstances where the appellants' son's personal information appears on its own, or where it is mixed with that of individuals other than the appellants, Part II of the *Act* applies and I will consider whether the information is exempt from disclosure under the mandatory exemption at section 14(1) of the *Act*.

C. Do the exemptions at section 14(1) or 38(b) apply to the records?

[27] The personal privacy exemptions under the *Act* are *mandatory* under section 14(1) under Part II and *discretionary* under Part III. Put another way, where a record contains the personal information of both the appellants and another individual (their son for example), section 38(b) in Part III permits an institution to disclose information that it could not disclose if the exemption at section 14(1) in Part II was applied.⁸

[28] The mandatory personal privacy exemption at section 14(1) of the *Act* provides, in part:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

If the disclosure does not constitute an unjustified invasion of personal privacy.

⁷ Because these are digital recordings they included the witnesses' personal information including their voice, image and mannerisms, as well as information about their activities as they relate to the appellants' son.

⁸ Order MO-1757-I.

[29] Where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure *does not* constitute an “unjustified invasion of personal privacy.”

[30] 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, including section 38(b). That section reads:

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.

[31] Under section 38(b), where a record contains personal information of both the requester and another individual, and if 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.

[32] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester’s right of access to his or her own personal information against the other individual’s right to protection of their privacy.

[33] For section 38(b) to apply, on appeal I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual’s personal privacy.

[34] In determining whether the exemptions in sections 14(1) or 38(b) apply, 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 sections 14(1) or 38(b).

Section 14(3)(b)

[35] 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;

[36] The police submit that the information was compiled and is identifiable as part of an investigation into a possible violation of law and, therefore, its disclosure would constitute a presumed unjustified invasion of privacy within the meaning of the presumption at section 14(3)(b).⁹

[37] I agree with the police that section 14(3)(b) applies to the information at issue in the records because it was compiled and is identifiable as part of an investigation into a possible violation of law, in particular, a violation of law under the *Criminal Code of Canada*. Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.¹⁰ I also conclude that, in the case of the information that is subject to the section 38(b) analysis discussed below, there are no factors or circumstances in section 14(2) that favour disclosure.

[38] Therefore, I conclude that the remaining undisclosed information is subject to the presumption at section 14(3)(b). Accordingly, I find that section 14(1) of the *Act* applies to the information that is subject to analysis pursuant to Part II of the *Act*, specifically, the appellants' son's personal information where it is mixed with that of identifiable individuals other than the appellants. Section 38(b) of the *Act* applies to the information that is subject to analysis pursuant to Part II of the *Act*, specifically, the appellants personal information where it is mixed with the personal information of other identifiable individual's, including their son.

[39] I will now consider the application of the exception in section 14(4)(c) to the information that I have found to be subject to section 14(1) or 38(b), as the case may be. As the section 14(4)(c) 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

⁹ Orders P-223, P-237 and P-1225.

¹⁰ Orders P-242 and MO-2235.

relates to the affected persons consists of their names, contact information, descriptions, dates of birth and other information not relating to the deceased. I find therefore that the disclosure of this information would constitute an unjustified invasion of the personal privacy of these individuals and is exempt under sections 14(1) or 38(b), as the case may be.

Section 14(4)(c)

[40] 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.

[41] In Order MO-2237, in the course of discussing the history of the amendment to include section 14(4)(c) in the *Act*, Assistant Commissioner Brian Beamish wrote:

In 1999, this office advocated an amendment to the *Act* to enable relatives of deceased persons to obtain access to information regarding the circumstances of the death of their family members. In the 1999 IPC Annual Report, statutory changes were recommended. The report stated:

Of the various types of appeals processed by the IPC, those involving a request for information about a deceased family member are among the most sensitive. Requests of this type are submitted to institutions (most often to local police forces or the Ontario Provincial Police) by immediate family members, or their representatives, in order to obtain information surrounding the circumstances of the relative's death.

Except in certain limited circumstances, institutions must deny relatives access to this information because disclosure is presumed to be an unjustified invasion of the deceased's personal privacy under the provincial and municipal Acts.

In 1999, the IPC undertook a study on the impact of the legislation on individuals seeking access to information about deceased loved ones. We surveyed Appellants for their experience and view of the legislation; contacted professionals with expertise in the field of bereavement

counseling; looked at the legislative history, including reports of the provincial and municipal three-year review committees; and reviewed freedom of information and privacy legislation across Canada. We also consulted broadly with freedom of information professionals in the police community, since they are most frequently the point of first public contact by grieving family members.

A broad consensus emerged from our discussions: the Acts do not serve the interests of relatives of deceased family members in these circumstances".

...

A statutory amendment to address this sensitive and compelling issue is clearly required, and would be supported by a broad cross section of stakeholders: requesters and Appellants; Freedom of Information and Privacy Co-ordinators in both the provincial and municipal sectors, including the police community; professionals in the field of grief counseling; and [the Commissioner's Office].

In preparing the 1999 report, this office consulted with two professional psychologists practising in the area of bereavement counselling, Dr. Stephen Fleming and Dr. Leslie Balmer. Drs. Fleming and Balmer provided this office with a report which included the following statement:

For bereaved adults and children alike, understanding the full details and circumstances surrounding a loved one's death is an integral part of the grief process. As psychologists working with bereaved individuals, we are all too aware of the critical role that access to information plays in either helping or hindering the process.

Particularly, in the case of trauma, denial of factual information surrounding a loved one's death often tortures the survivor as they struggle to derive some sense of purpose and meaning in such a horrific experience. Understanding the nature and extent of the deceased injuries, how the death occurred, and the level of consciousness and pain felt has the potential to palliate the survivor's anguish.

[42] In Order MO-2237 Assistant Commissioner Beamish ordered the disclosure of a digital recording of a witness interview.¹¹

[43] 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).¹²

[44] 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.¹³

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?

[45] 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).¹⁴

Step 1 - Personal information of the deceased

[46] The records contain the affected persons' statements about the appellants' son and the circumstances surrounding his death, including a period of time leading up to these events. 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 appellants' son only. Accordingly, this requirement for the

¹¹ But see Order MO-2387 discussed below.

¹² Orders MO-2237 and MO-2245.

¹³ See Orders MO-2237 and MO-2245.

¹⁴ Order MO-2237.

application of section 14(4)(c) is satisfied, with respect to that personal information only.

Step 2 - Spouse or "Close Relative"

[47] "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;

[48] I am satisfied that the appellants are the parents of the deceased individual whose personal information is contained in the records at issue, and therefore qualify as a "close relative" for the purposes of section 14(4)(c).

Step 3 - Desirable for Compassionate Reasons

[49] The police acknowledge that section 14(4)(c) of the *Act* is applicable in the circumstances of this appeal and state that:

The vast majority of the records were released in consideration of this section for compassionate reasons. The institution released a considerable amount of [information] for compassionate reasons and only withheld portions provided by other parties where consent was not provided.

[50] The affected party who provided representations submitted that the records include information relating to his personal relationship with the deceased, and that:

The records include a digital recording (DVD) of an interview with [the police]. In this DVD I am specifically identified by name and am also seen. I am clearly identified in the DVD, as well as the statement provided to [the police] and will be identified if the records are disclosed. The DVD includes my visual image, voice and mannerisms as well as personal information such as my opinions and views, and my interactions with [the deceased].

...

Disclosure of the records would constitute an unjustified invasion of my personal privacy. The records include information about me and the personal relationship I shared with [the deceased] The records contain highly sensitive information about me, [the deceased] and circumstances relating to the incident. The statement and interview I provided to [the police] were provided following the incident which led to [the deceased's] death. I was extremely upset and distraught at a time

the information was provided due to the circumstances of the incident. As such, disclosure of the written statement and DVD's would cause me significant personal distress. ...

... while I am sympathetic to the requesters, ... it is my understanding that they have received significant information about the incident and circumstances giving rise to the death of their son and I do not believe that an invasion of my privacy through disclosure of my personal information is justified for compassionate reasons. In particular, the digital recording of my interview with [the police] provides intensely personal information by revealing my image and emotions and disclosure would be a significant invasion of my privacy.

...

I provided my personal information to [the police] in confidence and with an expectation of confidentiality. I willingly participated in the investigation by [the police] and offered highly sensitive information about myself and my relationship with [the deceased]. Disclosure of a digital recording that includes my image and my thought and opinions while I was in a highly emotional state will cause me personal distress. It was never my understanding that this information provided for a police investigation would be disclosed and subject to viewing by any number of unknown individuals. Once the records are disclosed I have no control over who may read my statement or view my image on the recording or the uses to which the records may be put, which I find deeply upsetting.

[51] The appellants submit that they are particularly interested in reports containing information about what their son "said, did and how he acted, as well as any information about where he was the previous evening, overnight and that day".

[52] They explain:

We are searching for information that would help us gain more understanding about, and make some sense of, what happened to our son throughout the events that took place We feel that we owe it to him to try to do this as thoroughly as we can. And there always remain some nagging, lingering thoughts that we might find clues to help us. Therefore, any statement, no matter how brief, could be of help in this quest.

We are appealing to you to grant us access to information for compassionate reasons.

It is important to emphasize, also, that during the course of conversations we have had with the police, the coroner's office and the fire marshall over the past two-and-a-half years we have at various stages discovered new pieces of information, about which we were previously completely unaware, that have been important and material to us in trying to understand what happened to our son.

Personal information of the deceased

[53] In Order MO-2245, Assistant Commissioner Brian Beamish ordered the disclosure of highly sensitive personal information about the circumstances surrounding the death of an 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.

[54] I adopt the Assistant Commissioner's approach in this appeal and accept that the appellants require the information about the events surrounding their son's death for closure.

[55] Having reviewed the records, I find that, in the circumstances, disclosure of the personal information which relates to the appellants' son only is desirable for compassionate reasons and that the requirements of section 14(4)(c) has been satisfied.

Personal information of other individuals

[56] As stated above, I received representations from one notified affected person only, who did not consent to the disclosure of his personal information.

[57] The records remaining at issue contain the personal information of the appellants' son and 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 leading up to and including the appellants' son's death.

[58] The relevant circumstances in this case include the appellants' need to receive the information for closure and to better understand the circumstances around their sons' 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 him prior to his death and is, therefore, his personal information under paragraph (g) of the definition of section 2(1).

[59] I also give some weight to the police's concerns about the privacy interests of the affected persons, as well as the extensive and thoughtful representations filed by one of the affected parties. That being said, some of the personal information of the affected persons, particularly their address, contact information and other information relating only to them, does not include, and is severable from, the personal information of the deceased, and is properly exempt under section 38(b).

[60] Each of these records contains narrative descriptions of the events that led to the death of the appellants' son, including the events involving the affected parties. Details are also provided about the police investigation into the death. In fact, these records were created specifically to investigate the circumstances surrounding the death of the appellants' son and, therefore, contain a great deal of detail, including personal information relating primarily to him, but also to the affected parties. While some of the information is comprised of the personal information of the affected parties, intertwined with that of the deceased, I find that the need to ensure that the appellants are well-informed about the circumstances surrounding the death of their son outweighs the affected parties' concerns about privacy, at least with respect to this type of information.

[61] Having considered all the circumstances around this appeal, I find that disclosure of much of the remaining information in the records that relates to the deceased, particularly information about the circumstances leading up to his death, is desirable for compassionate reasons under the exception in section 14(4)(c). The disclosure of this information will provide the appellants with a great deal of information about their son's death which may be helpful to them in achieving some degree of closure about these tragic circumstances, as contemplated by section 14(4)(c).

[62] 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 sections 14(1) or 38(b), as the case may be. I have provided the police with a highlighted version of the

records which sets out the information whose disclosure is desirable for compassionate reasons. It must also be noted that this includes some information provided by the affected parties' who consented to disclosure but which was withheld by the police.

Digitally recorded witness statements

[63] The records at issue also include digitally recorded witness statements taken from two affected persons. I note that a great deal of the substance of one of the digitally recorded statements is included in a police officer's notes of one of the witness interviews and the substance of both of the witness statements is contained in the Occurrence Details Report.

[64] 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 in that appeal 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.

[65] 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.

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

- I have ordered the disclosure of the information about the appellants' son that was provided by the affected persons who consented to the disclosure of their personal information,
- the affected party who provided representations emphasised how distraught he was at the time he provided the statement and how the recording reflects his personal state and the impact that the disclosure of the digitally recorded statement would have upon him,
- The affected persons who provided the digitally recorded statements did not consent to the disclosure of their information,
- a great deal of one of the digitally recorded statements is included in a police officer's notes of one of the witness interviews and the substance of both of the witness statements is contained in the Occurrence Details Report.

[67] Having considered these factors and having reviewed the records at issue, I find that, in the circumstances, it is not desirable for compassionate reasons to disclose the digital video recordings of the witness statements because the information which they contain is substantially similar to that in the records, or portions thereof, that I have ordered disclosed. I find that section 14(4)(c) does not apply and the section 14(1) or 38(b) exemption, as the case may be, applies to this information.

[68] I will now consider whether any of the information that I have ordered disclosed otherwise qualifies for exemption under sections 8(1)(c), (d) or (l) alone or in conjunction with section 38(a).

D. Do the exemptions at sections 8(1)(c), (d) or (l) alone or in conjunction with section 38(a) apply to the records?

[69] As set out above, section 36(1) of MFIPPA gives individuals a general right of access to their own personal information held by an institution. Section 38(a) of *MFIPPA* also provides an exemption to this general right of access. Section 38(a) states:

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

if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information [emphasis added];

[70] As set out above, the appellants advised this office that they do not seek access to the withheld detailed internal police reference information such as Internal Police Event Chronology Reports, operational police codes including "ten" codes, location codes, area codes, duty location codes, zone identifiers, patrol area codes, patrol car numbers or gun, baton and handcuff serial numbers, and similar information. However, they do seek access to information which the police have claimed to qualify for exemption under sections 8(1)(c), (d) and (l) alone, or in conjunction with section 38(a), in the event that the records also contains the appellants' personal information.

[71] Sections 8(1)(c), (d) and (l) state:

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

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

[72] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[73] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁵

¹⁵ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[74] Where section 8 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.¹⁶

[75] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption.¹⁷

Section 8(1)(c): investigative techniques and procedures

[76] With respect to the application of section 8(1)(c), the police submit that:

Section 8(1)(c) is used throughout the records to exempt investigative techniques such as; when search warrants are required, investigation with the Ontario Fire Marshall, collection of evidence and several pages containing the Computer Aided Dispatch (CAD) log. ...

The availability of this information can hamper investigations by showing the steps police take when investigating this type of activity. This institution is not overly concerned with the [appellants] viewing this information in our office but is more concerned with the release of this in hard copy to the [appellants], which may in turn cause it to show up in the public domain. As we know, once the institution releases the information it can be published or distributed as the [appellants’ choose]. The investigative techniques [contained] within the records would allow an individual to plan for the criminal offence of arson with a higher probability of going undetected or covering up their activity.

[77] In order to meet the “investigative technique or procedure” test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.¹⁸

[78] The police’s argument that this information should be withheld is undermined by its statement that they are not overly concerned if the appellants view the information in their office. If the disclosure of the investigative techniques or procedures could reasonably be expected to hinder or compromise their effective utilization, I would have

¹⁶ Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

¹⁷ Order PO-2040; *Ontario (Attorney General) v. Fineberg*, cited above.

¹⁸ Orders P-1487, MO-2347-I and PO-2751.

expected the police to state that they cannot be disclosed to anyone under any circumstances. Furthermore, I have reviewed the information withheld under this exemption and I find that even if this information qualifies as a technique or procedure, it is generally known to the public.

[79] Accordingly, I am not satisfied that the police have established a reasonable expectation of harm if this information is disclosed. As a result, I find that the information that I have found should be disclosed for compassionate reasons, does not fit within the ambit of section 8(1)(c) of the *Act*.

Section 8(1)(d): confidential source

[80] In order to establish that the exemption in section 8(1)(d) applies, the police must establish a reasonable expectation that the identity of the source, or the information given by the source, would remain confidential in the circumstances.¹⁹ Further, the institution must provide evidence of the circumstances in which the informant provided the information to the institution in order to establish confidentiality.²⁰

[81] The police's submissions on this issue consist of the following:

Section 8(1)(d) is applied to protect a confidential source of information. Throughout the records this section was applied to witness information provided directly to the police during the course of an investigation.

[82] As set out above, the affected party who provided representations submitted:

I provided my personal information to [the police] in confidence and with an expectation of confidentiality. ... It was never my understanding that this information provided for a police investigation would be disclosed and subject to viewing by any number of unknown individuals.

[83] In my view, it is not sufficient for the police or the affected party who provided representations to simply state, without more, that information was provided in the course of an investigation in confidence with an expectation of confidentiality so as to engage the application of section 8(1)(d). Rather, some evidence in support of how that understanding arose is required. I have reviewed the remaining records, including the digitally recorded interviews, and I find no reference in them to a witness providing information on a confidential basis. There is also no indication, like in Order M-4, that it is a standard practice for the police that a witness be advised that their identity or the information they provided would be kept confidential. Although circumstances in which

¹⁹ Order MO-1416.

²⁰ See Order MO-1383.

such information is given may give rise to an expectation of confidentiality, I am not satisfied that those circumstances exist with respect to the information that I have found should be disclosed for compassionate reasons.

[84] Therefore, I find that section 8(1)(d) does not apply to the information that I have found should be disclosed for compassionate reasons.

Section 8(1)(l): commission of an unlawful act or control of crime

[85] The police originally claimed that section 8(1)(l) applied to the police codes and similar information in the records. As set out above, the appellants are no longer seeking access to this type of information. That said, on the copy of the redacted records that the police provided to this office, section 8(1)(l) may have also been claimed for other information. To the extent that it has been claimed, I find that the police have not provided sufficiently clear and convincing evidence that section 8(1)(l) of the *Act* applies to the information, that I have found should be disclosed for compassionate reasons.

[86] As I have found that none of sections 8(1)(c), (d) or (l) apply to the information that I have found should be disclosed for compassionate reasons, the information is not exempt under sections 8(1)(c), (d) or (l) alone or in conjunction with section 38(a), as the case may be.

[87] I will now consider whether the police properly exercised their discretion under section 38(b) to withhold the information that I have not ordered disclosed.

E. Did the police properly exercise their discretion to withhold information under section 38(b)?

[88] 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.

[89] 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.

[90] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ This office may not, however, substitute its own discretion for that of the institution.²²

[91] In exercising their discretion to withhold the information that I have not ordered disclosed, the police submit that they considered a number of factors, including the following:

- most of the records which might have been subject to discretionary exemptions were released for compassionate reasons
- the appellants were given access to their own personal information and much of the information of the affected parties' who consented to disclosure

[92] Based on my review of the police's submissions, I find that their exercise of discretion under section 38(b) was proper. The police properly considered the appellants right to their own information, the affected persons' right to privacy, and other valid factors. I find the police took into consideration only relevant factors to withhold the information that I have not ordered disclosed and I uphold their exercise of discretion.

ORDER:

1. I order the police to disclose to the appellants the information that I have highlighted on the pages of the records that I have provided to the police with this order. The information is to be disclosed to the appellants by **November 21, 2012** but not before **November 16, 2012**.
2. I uphold the police's decision with respect to the remaining portion of the records.
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 appellants.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ October 15, 2012

²¹ Order MO-1573

²² Section 43(2).