

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2864

Appeal MA12-156

Ottawa Police Services Board

April 4, 2013

Summary: The appellants sought access to records relating to the police investigation of a motor vehicle accident in which their daughter was killed. Access to portions of some of the responsive records was denied under sections 14(1) and 38(b). In this order, the police decision to deny access to some personal information relating only to other identifiable individuals was upheld under sections 14(1) and 38(b). Other personal information about the circumstances surrounding the accident were found to fall within the ambit of the compassionate grounds exception in section 14(4)(c).

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

Orders and Investigation Reports Considered: MO-2245.

Cases Considered: *Grant v. Copley* [2001] O.J. 749.

OVERVIEW:

[1] The Ottawa Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to all records related to a fatal motor vehicle accident investigation involving the requesters' daughter. The requesters specified that they were seeking access to

complete copies of the accident investigation report and the reconstruction report relating to the accident.

[2] The police notified six affected persons (individuals who were witnesses or were those involved in the motor vehicle accident) of the request for records and, in accordance with section 21 of the *Act*, provided them with an opportunity to make representations concerning disclosure of the records. Of the six affected persons notified, two consented to the disclosure of their personal information, two did not provide consent to disclose their personal information and the remaining two did not respond to the police's notice of the request.

[3] Subsequently the police issued a decision granting partial access to the records. Access was denied to the withheld portions of the records in accordance with the mandatory personal privacy exemption in section 14(1), with reference to the presumptions in sections 14(3)(a) and (b); as well as the discretionary personal privacy exemption in section 38(b) of the *Act*.

[4] The requesters (now the appellants) appealed the police decision to deny access to the withheld portions of the records on the basis that they are of the view that they had not been provided with all the records that are responsive to their request. This gave rise to the issue of whether the police conducted a reasonable search for all of the responsive records.

[5] During mediation, the appellants explained that they are the parents of the young woman who perished in the motor vehicle accident. They requested information about the accident as they wished to understand all of the circumstances surrounding their daughter's death. The police granted additional partial access to a General Occurrence Report and withheld information that related to individuals other than the appellants' daughter, including two witness statements and two statements taken from individuals involved in the accident. The appellants advised the mediator that they wished to pursue access to the withheld portions of all of the records, and believed that more records exist. Specifically, the appellants believed that there should be records relating to the inspection of the vehicle that struck their daughter, as well as records about the scene of the accident, and details regarding the collision.

[6] The mediator discussed the appellants' concerns with the police and was able to determine that they were seeking access to a Collision Reconstruction Report, which the police had not included as part of the records responsive to the request, as they misunderstood the appellants' intentions.

[7] The police then issued a subsequent decision to the appellants granting partial access to the Collision Reconstruction Report. Access was denied to the withheld portions of the record pursuant to the personal privacy exemptions in sections 14(1)

and 38(b). The appellants advised the mediator that they wished to pursue access to the withheld portions of the Collision Reconstruction Report.

[8] As a result of the police's further searches for records and their subsequent access decision regarding the Collision Reconstruction Report, the appellants advised that the adequacy of the police search is no longer at issue.

[9] No further mediation was possible. Accordingly, this file was moved to the inquiry stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought the representations of the police and the four affected persons who declined to consent to the disclosure of their personal information or did not respond to the notification by the police, initially. Only one affected person provided me with representations in response to the notice. I then sought and received representations from the appellants on the application of the mandatory exemption in section 14(1) to the records.

[10] In this order, I find that certain portions of the records qualify for exemption under the mandatory personal privacy exemption in section 14(1). Additional information relating to the circumstances surrounding the accident are to be disclosed pursuant to the exception to the section 14(1) exemption in section 14(4)(c).

RECORDS:

[11] The records that remain at issue consist of a Collision Reconstruction Report, a General Occurrence Report and statements taken from the affected persons that were withheld, in whole or in part.

ISSUES:

A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

DISCUSSION:

A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[12] 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;

[13] 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].

[14] 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.)].

[15] I have carefully examined each of the records at issue and make the following findings with respect to them:

- All of the records relate the police investigation of the motor vehicle accident in which the appellants' daughter was killed. Accordingly, I find that all of the records, including the Collision Reconstruction Report identified as pages 66 to 158, contain her personal information for the purposes of section 2(1);
- Pages 1-2, 35 and 44-47 contain the personal information of the appellants, including their names and other personal information about them in accordance with paragraph (h) of the definition in section 2(1);
- Pages 128-133 consist of the CV of the individual who conducted the Collision Reconstruction Investigation. I find that this information qualifies as the personal information of this individual under paragraphs (b) and (h) of the definition;
- Pages 1-2, 3, 4-5, 6-7, 8, 9-23, 24, 32, 35, 37, 44-47 and 75 contain the personal information of other affected persons, those involved in the accident or those who witnessed it, as contemplated by paragraphs (a), (b), (d), (e) and (h) of the definition of that term in section 2(1); and
- Page 35 also contains the date of birth of an individual whose involvement in the aftermath of the accident was strictly in her professional capacity. I find that reference to her date of birth qualifies as her personal information under paragraph (a) of the definition. However, the other references to this individual do not satisfy the requirements of the definition of "personal information" in section 2(1).

B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

[16] In this appeal, the police rely on the discretionary exemption in section 38(b) to refuse to disclose certain portions of records that contain the personal information of the appellants, as well as that of other identifiable individuals. The police rely on the mandatory personal privacy exemption in section 14(1) with respect to those records, and parts of records, to which access was denied that contain only the personal information of individuals other than the appellants. As noted above, the police did not provide me with representations in response to the Notice of Inquiry. Instead, I must rely on the submissions received from one affected party, who is concerned only with the protection of her own privacy, and from the appellants, as well as my own review of the contents of the records.

[17] 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. 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.

[18] 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.

[19] Under section 14, where a record contains personal information only 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”.

[20] In both these situations, sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of the exceptions to the section 14(1) exemption in paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 14 or 38(b). I find that none of these exceptions apply in the circumstances of this appeal.

[21] Section 14(2) provides some criteria for the police to consider when determining whether the disclosure of the personal information in the records would result in an unjustified invasion of another individual’s personal privacy. Based on the contents of the records, I find that section 14(2)(f) (highly sensitive information) may apply. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The records themselves give rise to the possible application of the presumptions in sections 14(3)(a) (medical history, condition or diagnosis), (b) (information compiled as part of a law enforcement investigation) and (d) (employment history) to the personal information in them. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. I will examine the possible application of section 14(4)(c) to the records, below. These sections read:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive;

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) relates to employment or educational history;

(4) 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 a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

Analysis and findings

Section 14(2)(f)

[22] I find that the character and quality of some of the personal information, particularly as it relates to one of the affected persons, is "highly sensitive" within the meaning of section 14(2)(f) and I would assign this factor high weight in favour of non-disclosure. This information describes in detail the impact which the accident had on him emotionally and psychologically and I find that its disclosure would cause this individual significant personal distress [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

Section 14(3)(a), (b) and (d)

[23] In determining whether information was exempt under the provincial equivalent of section 38(b), in *Grant v. Cropley* [2001] O.J. 749, the Divisional Court said the IPC could:

. . . consider the criteria mentioned in s.21(3)(b) [the provincial equivalent of section 14(3)(b) in determining, under s.49(b) [the provincial equivalent of section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[24] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy. In my view, the only possible presumptions that could apply to the personal information in the records at issue are sections 14(3)(b) or (d). 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.¹

[25] I have reviewed the records and it is clear from the circumstances that the personal information in them was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely the *Criminal Code of Canada* or the *Highway Traffic Act*. Accordingly, I find that the personal information in the records, with the exception of the CV of the officer who prepared the Collision Reconstruction Report, was compiled and is identifiable as part of an investigation into a possible violation of law, and falls within the presumption in section 14(3)(b).

[26] In my view, however, the personal information contained in the CV of the officer falls within the ambit of the presumption in section 14(3)(d) as it describes in detail this individual's employment and educational history.

[27] Two of the records also describe the injuries sustained by one of the other affected persons involved in the accident that resulted in the death of the appellants' daughter. I find that this personal information, which is included in pages 32 and 35, satisfies the requirements of the presumption in section 14(3)(a).

[28] In conclusion, I find that some of the personal information relating to the affected persons is subject to the presumptions in sections 14(3)(a), (b) and (d) and that the factor favouring disclosure in section 14(2)(f) also applies to a portion of the personal information relating to one of the affected persons. As a result, pages 1-2, 35 and 44-47, which contain the personal information of the appellants, are exempt from disclosure under the discretionary personal privacy exemption in section 38(b) while the remaining records, which contain only the personal information of other individuals, qualify for exemption under the mandatory personal privacy exemption in section 14(1), subject to my discussion of the possible application of section 14(4)(c), below.

Section 14(4)(c)

[29] The terms "close relative" is 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");

¹ Orders P-242 and MO-2235.

[30] 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]

[31] 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].

[32] 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 is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons" [Order MO-2245].

1. Do the records contain the personal information of a deceased individual?

[33] I have found above that all of the records at issue contain the personal information of the deceased as they relate to the motor vehicle accident which caused her death.

2. Is the requester a spouse or "close relative" of the deceased individual?

[34] The appellants are the parents of the deceased person and clearly meet the criteria required to be her "close relative".

3. *Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?*

[35] In their representations, the appellants describe how they wish to obtain as much information as possible about the circumstances surrounding the accident which resulted in the death of their daughter. While they recognize that the privacy interests of the affected persons needs to be respected, they are interested in finding out more about how the accident occurred and the condition of the vehicle that struck their daughter.

[36] In Order MO-2245, Assistant Commissioner Brian Beamish provided the following guidance to assist in making a determination about the application of section 14(4)(c), stating that:

I noted above that, in interpreting section 14(4)(c), a broad and all encompassing approach should be taken in determining whether or not disclosure is 'desirable for compassionate purposes.'

[37] In the present appeal, and in the absence of representations from the police or any of the affected persons except one who objected to the disclosure of her identity, I find that the disclosure of much of the remaining personal information in the records is desirable for compassionate reasons, as contemplated by section 14(4)(c). The remaining records, particularly the Collision Reconstruction Report, describe in great detail every aspect of the accident, including information about the condition of the vehicle that struck the appellants' daughter and what the witnesses observed. In my view, the disclosure of much of the personal information contained in the records will assist the appellants in understanding better all of the circumstances surrounding their daughter's death. I find that on compassionate grounds, this information ought to be made available to them because that its disclosure would not result in an unjustified invasion of personal privacy under section 14(1).

[38] Conversely, much of the information contained in the witness statement at page 9 to 23 of the records is intensely personal to that individual. I have found above that it is "highly sensitive" within the meaning of section 14(2)(f), as well as being subject to the presumption in section 14(3)(b). In my view, the disclosure of much of the personal information that relates solely to this particular affected person will not assist the appellants in their grieving process and would result in an unjustified invasion of the personal privacy of this affected person, as contemplated by section 14(1). For this reason, I will order that those portions of pages 9 to 23 which are highlighted on a copy that I have provided to the police are **not** to be disclosed to the appellants.

[39] I note that one of the affected persons declined to consent to the disclosure of her personal information to the appellants. Accordingly, I will order the police to

withhold this individual's name and other personal information that is contained in pages 4, 8, 46, 47 and 75 on the basis that its disclosure would result in an unjustified invasion of this affected person's personal privacy and qualifies for exemption in section 14(1).

[40] In addition, the appellants have also indicated that they are not seeking the names or other personal identifiers of the affected persons who were witnesses to the accident. Accordingly, I find that the disclosure of this information would result in an unjustified invasion of the personal privacy of these individuals under section 14(1). I have highlighted those portions of pages 1, 2, 3, 4, 5, 24, 32, 35, 44-47, 72 and 75 which are exempt from disclosure under section 14(1) and are **not** to be disclosed to the appellants.

ORDER:

1. I order the police to disclose all of the records to the appellants by providing them with copies by **May 13, 2013** but not before **May 6, 2013** with the exception of those portions of pages 1, 2, 3, 4, 5, 8, 9-23, 24, 32, 35, 44-47, 72 and 75 which I have highlighted on the copy of the records which I have provided to the police.
2. I uphold the decision of the police to deny access to those portions of pages 1, 2, 3, 4, 5, 8, 9-23, 24, 32, 35, 44-47, 72 and 75 which I have highlighted on the copy of the records which I have provided to the police.
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 that are disclosed to the appellants.

Original signed by: _____
Donald Hale
Adjudicator

_____ April 4, 2013