

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2894

Appeal MA12-31

Ottawa Police Services Board

June 4, 2013

Summary: The appellant made a request to the Ottawa Police Services Board (the police) for access to records relating to his deceased brother's homicide. The police granted access to the responsive records, in part. The police denied access to other records, claiming the application of the discretionary exemptions in 38(a), in conjunction with section 8(1)(l) (facilitate commission of an unlawful act) and 38(b), in conjunction with section 14(1) (personal privacy). In this order, the adjudicator finds that: section 54(a) does not apply; the records contain the personal information of a number of individuals, including the appellant's deceased brother and this information is exempt under section 14(1). Finally, the exception in section 14(4)(c) does not apply to the information found to be exempt under section 14(1).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 14(1), 14(3)(b), 14(4)(c) and 54(a).

Orders Considered: MO-1563, MO-2237 and MO-2245.

OVERVIEW:

[1] This order disposes of the issues raised as a result of a decision made by the Ottawa Police Services Board (the police) in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to the requester's brother's homicide. The requester provided the police

with a statutory declaration that he was authorized to act on behalf of his deceased brother.

[2] The police identified responsive records and notified 39 individuals who might be affected by their disclosure (the affected parties), and subsequently issued a decision letter granting access, in part to them. The police withheld the remaining portions of the records, claiming the discretionary exemptions in section 38(a), in conjunction with section 8(1)(l) (facilitate commission of an unlawful act), and section 38(b), in conjunction with section 14(1) (personal privacy), read with the presumptions in sections 14(3)(a) (medical history) and 14(3)(b) (investigation into a violation of law) of the *Act*.

[3] The police noted in their decision letter that the records included statements made to the police by individuals, and that these statements contained the mixed personal information of the individuals who made them and the requester's deceased brother. The police went on to explain that section 36 of the *Act* allows individuals or their representatives the right of access to their personal information. However, section 38 lists certain exemptions to this right of access.

[4] The requester (now the appellant) appealed the police's decision to this office.

[5] During the mediation of the appeal, the police provided this office with an index identifying the exemptions that it applied to each of the records. In that index, they indicated that they were also applying section 8(1)(i) (security) to the withheld portions of some of the records. The index also identified portions of the withheld records as "N/A (not applicable)."

[6] Also during mediation, the appellant advised that he wanted access to the names and business information of the affected parties whose information appears in the records because they were working in their professional capacity. The police subsequently issued a revised decision, disclosing this additional information to the appellant.

[7] Upon a further review of the records, the police issued a second revised decision, disclosing additional information to the appellant and providing him with a revised index of the records, setting out which exemptions applied. In that decision, the police stated that in the original decision letter section 8(1)(l) was claimed in error, but that sections 8(1)(e) (endanger life or safety) and 13 (danger to safety or health) applied to some of the withheld portions of the records.

[8] The police also advised that they considered the application of section 14(4)(c) (compassionate circumstances) to the withheld portions of the records, but took the position that it did not apply.

[9] The appellant advised that he did not wish to pursue access to the following information:

- the driver vehicle plate numbers recorded by the police;
- the criminal histories of any of the affected parties; and
- personal information of the affected parties, such as their names, contact information and date of birth.

[10] The above information is, therefore, no longer at issue in this appeal.

[11] The appellant advised that he is seeking access to more information about the circumstances of his brother's death, including the information that the witnesses provided to the police in relation to the investigation.

[12] In turn, the police advised that even with the affected parties' names and contact information severed, the individuals would be identifiable. As a result, the police were not prepared to disclose any additional information.

[13] Upon conclusion of mediation, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[14] On the adjudicator's review of the file, she noted that the revised index identified portions of six of the withheld records as not applicable. She reviewed these records and confirmed that the identified portions are subject to the doctrine of federal legislative paramountcy. The doctrine of federal legislative paramountcy dictates that where there is a federal law and a provincial law which are inconsistent, it is the federal law which prevails. As a result of the application of this doctrine, the identified portions of six of the responsive records are excluded from the scope of the *Act* and are, therefore, not subject to its access provisions. Accordingly, these portions will not be disclosed to the appellant and will not be referred to again in this order.

[15] The police provided representations which were shared with the appellant in accordance with this office's *Practice Direction 7*. The appellant did not provide representations.

[16] The appeal was then transferred to me to complete the inquiry. For the reasons that follow, I dismiss the appeal.

RECORDS:

[17] There are 768 pages of records at issue, consisting of general occurrence reports, witness statements, and investigative summaries.

ISSUES:

- Issue A: Can the requester exercise a right of access on behalf of the deceased?
- Issue B: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- Issue C: Does the mandatory exemption at section 14(1) apply to the information at issue because disclosure of the information would constitute and unjustified invasion of an individual's personal privacy?

DISCUSSION:

Issue A: Can the requester exercise a right of access on behalf of the deceased?

[18] Section 54(a) of the *Act* states:

Any right or power conferred on an individual by this *Act* may be exercised,

if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

[19] Under this section, a requester can exercise the deceased's right of access under the *Act* if he can demonstrate that:

- he is the personal representative of the deceased, and
- the right he wishes to exercise relates to the administration of the deceased's estate.

[20] If the requester meets the requirements of this section, then he is entitled to have the same access to the personal information of the deceased as the deceased would have had. The request for access to the personal information of the deceased will be treated as though the request came from the deceased himself.¹

[21] The term "personal representative" means an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the

¹ Orders M-927 and MO-1315.

deceased's estate.² The term "estate trustee" is also used to describe such an individual.³

[22] Generally, to establish that he is the deceased's personal representative, the requester should provide written evidence of his authority to deal with the estate of the deceased, including a certificate of appointment of estate trustee.⁴

[23] In Order M-919, former Adjudicator Anita Fineberg reviewed the law with respect to section 54(a) and came to the following conclusions:

The meaning of the term "personal representative" as it appears in section 66(a) of the *Freedom of Information and Protection of Privacy Act*, the equivalent of section 54(a) of the *Act*, was considered by the Divisional Court in a judicial review of Order P-1027 of this office. In *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-19, the court stated:

Although there is no definition of "personal representative" in the *Act*, when that phrase is used in connection with a deceased and the administration of a deceased's estate, it can have only one meaning, which is the meaning set out in the definition contained in the *Estates Administration Act*, R.S.O. 1990, c. E.22, s.1, the *Trustee Act*, R.S.O. 1990, c. T.23, s.1; and in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.1:

1(1) "personal representative" means an executor, an administrator, or an administrator with the will annexed.

...

... I am of the view that a person, in this case the appellant, would qualify as a "personal representative" under section 54(a) of the *Act* if he or she is "an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate".

[24] The appellant provided the police with a notarized statutory declaration, which authorizing him to wind up the deceased's estate, including closing the deceased's bank account. The police, in turn, provided this office with a copy of that document. Based on the Divisional Court's decision in the *Adams* case, I am not satisfied that a statutory

² *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.) (*Adams*).

³ Order MO-1449 and Rule 74 of the Rules of Civil Procedure under the *Courts of Justice Act*.

⁴ Order MO-1449.

declaration meets the criteria of an executor, an administrator, or an administrator with the will annexed. On this basis, I am not satisfied that the appellant is a "personal representative" of his deceased brother within the meaning of section 54(a) of the *Act*.

[25] Having found that section 54(a) does not apply, the appellant does not have the right of access to the records on behalf of his deceased brother. However, I will consider whether the records contain "personal information" as defined in the *Act* and the application of the mandatory exemption in section 14(1), including whether the compassionate grounds exception set out in section 14(4)(c) applies to permit further disclosure to him.

Issue B: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[26] 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;

[27] 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.⁵

[28] 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.⁶

[29] The police submit that the records contain the personal information of individuals who were interviewed by them as part of a homicide investigation. In particular, the police state that the records contain names, dates of birth, race, origin, contact information, employment histories, criminal histories and information about vehicle ownership. The police also note that the incident that forms the subject matter of this request resulted in a criminal trial and that the appellant indicated that he was present at the trial and heard the testimony given.

[30] I have reviewed the records, consisting of occurrence reports, witness statements and investigative summaries. I find that the records contain the personal information of a number of individuals, including witnesses, suspects, the appellant's deceased brother, and a second individual who was also a homicide victim as a result of the same incident.

[31] In particular, the withheld portions of the records relate to various investigating police officers' actions in contacting and interviewing named individuals in the context of conducting the investigation. Most of these portions include statements made by these individuals, or other information recorded by the officers about these named individuals, including suspects, as well as the victims. On my review of this withheld information, I find that the personal information includes the named individuals' marital or family status [paragraph (a)], their criminal histories [paragraph (b)], their telephone number [paragraph (d)], their personal opinions or views [paragraph (e)], the views or

⁵ Order 11.

⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

opinion of another individual about them [paragraph (g)] and their names, along with other personal information relating to them [paragraph (h)].

[32] The records at issue do not include the appellant's personal information.

[33] As previously stated, the appellant indicated during mediation that he was no longer seeking access to the affected parties' criminal histories or their names, contact information and date of birth. To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁷

[34] I find on my review of the records that the witnesses' personal information is co-mingled with that of the appellant's brother, the other deceased individual, and the suspects. Even if the witnesses' identities and contact information was severed, the other personal information in the records relates to the appellant's deceased brother, the other deceased individual and the suspects, who would be easily identifiable, given that the trial in this matter has concluded, and received media attention with the names of the two deceased, one witness and the accused identified by various news agencies.⁸

[35] I acknowledge that some of this information may be known to the appellant and/or in the public domain. However, the issue for me to decide is whether the records contain the affected parties' personal information and the extent to which some of the affected parties' personal information may be known to the appellant and/or in the public domain is irrelevant to a determination of that issue.

[36] Therefore, I find that the records contain the personal information of identifiable individuals, as described above.

Issue C: Does the mandatory exemption at section 14(1) apply to the information at issue because disclosure of the information would constitute an unjustified invasion of an individual's personal privacy?

[37] Where a record contains personal information of an individual other than the appellant, it must be determined whether disclosure of the individual's personal information would result in an unjustified invasion of their privacy and the mandatory personal privacy exemption at section 14 applies.

[38] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

⁷ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe* [2002] O.J. No. 4300 (C.A.).

⁸ The Ottawa Citizen, CBC.ca, and The Ottawa Sun.

[39] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[40] If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. The only one of these paragraphs that could apply in this case is section 14(1)(f), which states that “[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.*” (Emphasis added.)

[41] The *Act* goes on to set out the circumstances under which there is a presumption that the disclosure of personal information would constitute an unjustified invasion of privacy. In particular, if any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[42] The police submit that disclosure of the records would be an unjustified invasion of the affected parties’ personal privacy and that section 14(3)(b) applies, as the information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law.

[43] The police state that the information was “compiled” and “identifiable” as part of an Ottawa Police investigation into possible and actual violations of the *Criminal Code of Canada*, including the crime for which one of the suspects was later convicted.

[44] Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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;

[45] I accept the police’s representations that the records, which consist of occurrence reports, witness statements and investigative summaries, were compiled and are identifiable as part of a police investigation into a possible violation of the *Criminal Code*. The interviews were conducted during the investigation, and an individual was eventually convicted of a serious offence. Therefore, I find that the presumption in section 21(3)(b) applies to all of the personal information in the records.

[46] The Divisional Court has stated that once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if any of the exceptions in section 14(4) or the “public interest override” at section 16 applies.⁹

[47] I find that the appellant’s interest in the disclosure of the records is essentially private in nature, and that he seeks the information requested for personal reasons arising out of his relationship with his brother. Accordingly, I am not satisfied that the public interest is triggered in this case and that section 16 has no application in this case.

[48] With regard to the application of the exceptions in section 14(4), the only paragraph that might apply in this case is paragraph (c), which despite the application of the exemption in section 14(1) permits the disclosure of the personal information of the affected party for “compassionate reasons.”

[49] In Orders MO-2237 and MO-2245, Assistant Commissioner Brian Beamish determined that 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?

[50] I agree with and adopt these three steps in determining the application of section 14(4)(c) in this appeal.

Step 1 – Personal Information of the Deceased

[51] I find that the majority of the personal information at issue constitutes the mixed personal information of the appellant’s brother, the other victim, the suspects and other witnesses. I find that this requirement for the application of section 14(4)(c) is satisfied.

⁹ *John Doe v. Ontario (Information and Privacy Commissioner) (1993)*, 13 O.R. (3d) 767 (Div.Ct.).

Step 2 – Spouse or "Close Relative"

[52] "Close Relative" is defined in section 2(1) of the *Act*:

"close relative" means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption.

[53] I accept that the appellant is the brother of one of the affected parties whose personal information is contained in the records at issue, and that he qualifies as a "close relative." I find that this requirement for the application of section 14(4)(c) is also satisfied.

Step 3– Desirable for Compassionate Reasons

[54] In Order MO-2237, Assistant Commissioner Beamish wrote:

... by using the words "in the circumstances" the Legislature intended that a broad and all encompassing approach be taken to the consideration by this office of whether or not disclosure is "desirable for compassionate reasons." In my view, by enacting this amendment to the *Act*, the Legislature intended to address an identified gap in the access to information legislation and increase the amount of information being provided to bereaved family members. It is recognition that, for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate.

[55] I agree with the Assistant Commissioner's reasoning and apply it the circumstances of this appeal.

[56] I also note that 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).¹⁰

[57] 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

¹⁰ Order MO-2237.

institution is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons".¹¹

[58] As previously noted, the appellant did not provide representations in this appeal. The police submit that it is not in their professional capacity to determine what information can provide "closure," but that it is their duty to protect the privacy of the deceased, as well as that of other affected parties. Further, the police submit that there was information released surrounding the death of the appellant's brother during the accused's criminal trial, in addition to the partial disclosure provided in response to the request.

[59] I have reviewed the records at issue carefully and note that the majority of the appellant's deceased brother's personal information has already been disclosed to the appellant by the police, and that much of the remaining personal information is that of the other affected parties exclusively, or is co-mingled with the personal information of the appellant's deceased brother to such an extent that it cannot be severed. I also acknowledge the police's statement that the criminal trial resulting from the incident has already taken place, where information surrounding the appellant's brother's death was publicly disclosed. Taking these factors into consideration, I find that, in these circumstances, disclosure of the withheld personal information about the affected parties is not desirable for compassionate reasons. Accordingly, I find that the exception in section 14(4)(c) does not apply in this case, and the withheld information is exempt from disclosure under section 14(1).

[60] Given my findings with respect to the application of section 14(1), it is not necessary to review the application of sections 8 and 13 of the *Act*.

ORDER:

The appeal is dismissed.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ June 4, 2013

¹¹ Order MO-2245.