

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3224

Appeal MA13-514

Hamilton Police Services Board

July 27, 2015

Summary: The appellant seeks access to all records concerning the death of his son. After locating responsive records, including occurrence reports, witness statements and interviews, coroner's reports and officer's notes, the police issued a decision to the appellant, denying him access to all of the records claiming that the information was exempt from disclosure under section 38(a), read with section 8(1)(a), as the investigation was ongoing. Further, the police claimed the application of the personal privacy exemption in section 38(b) to the records. The appellant appealed the police's decision, relying on compassionate reasons for disclosure.

In this order, the adjudicator upholds the police's decision to withhold the 10-codes, statistical codes and/or patrol zone information from disclosure under section 8(1)(l). However, the adjudicator finds that section 8(1)(a) of the *Act* does not apply, as the police did not provide sufficient evidence to demonstrate that the investigation into the death of the appellant's son was ongoing. Finally, the adjudicator upholds the police's decision to apply the personal privacy exemption in section 14(1)/38(b) to the remaining information at issue, but orders the police to disclose certain portions of the records to the appellant for compassionate reasons, as contemplated by section 14(4)(c).

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

Orders and Investigation Reports Considered: MO-2245, MO-2387, PO-1665, PO-3117

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access decision made by the Hamilton Police Services Board (the police) in response to an access request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of all records concerning the death of the requester's son (the deceased).

[2] The police issued a decision letter to the requester and denied access to all of the responsive records, claiming the discretionary exemptions in sections 38(a) and (b) of the *Act*. The police advised the requester that the information was denied because the case is currently under investigation.

[3] In addition, the police advised the requester that access was also denied as disclosure would constitute an unjustified invasion of another person's personal privacy and that they considered sections 14(2)(f) and 14(3)(b) of the *Act* in making this decision. The police also advised the requester that they withheld 10-codes, patrol zone information and/or statistical codes pursuant to sections 8(1)(a) and 8(1)(f) of the *Act*.

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

[5] During the mediation of the appeal, the appellant explained to the mediator that his son was hit by a truck and killed. Since that time, the appellant has been trying to understand what happened and why no arrests were made. The appellant has explained that for compassionate reasons, he wants access to the requested records in order to understand how and why his son died, thereby raising the possible application of section 14(4)(c) of the *Act*.

[6] The appellant also advised the mediator that he does not believe that the police are actively investigating his son's death and does not understand why the police have indicated in their decision letter that there is an ongoing investigation.

[7] The mediator discussed the appellant's concerns with the police, who advised the mediator that the matter remains open and unsolved. The police advised that the investigation is ongoing, with the most recent efforts being conducted in 2010.

[8] The appeal was then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator originally assigned to this appeal provided both parties with the opportunity to provide representations. Representations were received by both parties, and were shared in accordance with this office's *Practice Direction 7*.

[9] The appeal was then assigned to me for final disposition. After the inquiry, the police issued a revised decision letter confirming their decision to withhold the records

in their entirety and raising the possible application of sections 8(1)(e) and (l) of the *Act* to withhold the patrol zone information and/or statistical codes from the records. In this revised decision letter, it appears that the police no longer rely on section 8(1)(f) to withhold portions of the records. As a result, section 8(1)(f) is no longer at issue in this appeal.

[10] In addition, the police attached a detailed index of the records with its revised decision letter. I have reviewed the index and note that there are a number of records, such as the CFS-Centre of Forensic Science reports and post-mortem exam of the deceased, photographs of the deceased, newspaper clippings and the notes of a number of officers, that the police have identified as records it is willing to release. The police have not disclosed these records to the appellant. However, as they have indicated that they do not take issue with the disclosure of these records, I will not consider them in this decision and will order the police to disclose these records, in full, to the appellant. With regard to the records that the police are willing to disclose in part, I will consider the application of the exemptions to these records as a whole as the police did not provide me with a severed copy of the records, nor did they identify the portions of the records they are willing to disclose.

[11] For the reasons that follow, I find that section 8(1)(a) of the *Act* does not apply to the records, as the police did not provide me with sufficiently detailed and convincing evidence to demonstrate that the investigation is ongoing or active. However, I uphold the police's decision to withhold the 10-codes, patrol zone information and similar information from disclosure under section 8(1)(l) of the *Act*. With regard to the remainder of the information, I find that the personal privacy exemption in section 14(1)/38(b) applies to the records at issue. However, I find that the appellant is entitled to access the information that relates only the deceased for compassionate reasons. Further, I find that certain records should be disclosed to the appellant on the basis of the absurd result principle. With regard to the information that I have found to be exempt under sections 8(1)(l) and 38(b) of the *Act*, I find that the police properly exercised their discretion to withhold this information.

RECORDS:

[12] The records consist of various types of reports, transcripts, search warrants, correspondence, plans, officers' notes, photographs, polygraph reports, video recorded statements, cassette tapes and press releases.

ISSUES:

- A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B: Does the discretionary exemption at section 38(a) in conjunction with the

section 8(1) exemption apply to the information at issue?

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

D: Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[13] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain “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;

[14] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

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

(3) 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.

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

[15] 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.¹

[16] 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.² To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[17] The police submit that the records contain personal information, which was compiled and is identifiable as part of a law enforcement investigation into a possible violation of a *Criminal Code* offence. In particular, the police state the records contain the personal information of the appellant, the deceased, various family members, witnesses, suspects, persons of interest and known associates of the deceased.

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[18] According to the police, the type of personal information relating to these individuals includes: their names and addresses; birth dates; telephone numbers; their personal views and opinions; criminal backgrounds; CPIC checks; and statements made to the police, falling within paragraphs (a), (b), (c), (e), (f), (g) and (h) of the definition of personal information in section 2(1) of the *Act*.

[19] In addition, the police submit that only a small number of records contain the appellant's personal information. They also state that the vast majority of the records relate to other affected individuals and that severing their personal identifiers would not necessarily mean that the information would remain anonymous because of the appellant's familiarity with the circumstances surrounding his son's death.

[20] The appellant does not dispute that the records contain personal information of identifiable individuals.

[21] Based on my review of the records, I find that they contain the personal information of numerous individuals, including the appellant, the deceased⁴, family members, friends, witnesses, persons of interest and other identifiable individuals. A small number of records contain the personal information of the appellant. On my review of the records, I find that the personal information includes the named individuals' race, national or ethnic origin, colour, age, sex, marital or family status [paragraph (a)], their criminal, employment and/or medical histories [paragraph (b)], their address and telephone number [paragraph (d)], their personal opinions or views [paragraph (e)], the views or opinions of another individual about them [paragraph (g)] and their names, along with other personal information related to them [paragraph (h)].

[22] Some records contain the names, job titles and professional contact information of various police officers, lawyers, personal investigators, medical professionals and other individuals. I find that this information identifies these individuals in a professional or official capacity. In accordance with the exclusion from the definition of "personal information" in section 2(3), I find that this information does not qualify as their personal information.

[23] Before assessing whether the records have been properly withheld under the exemptions claimed by the police, I note that the legislative scheme established by the *Act* contains different procedures for addressing the application of exemptions to records. Requests for general records (including those containing the personal information of individuals other than the requester) must be addressed under Part I of the *Act*, which includes the discretionary exemption in section 8 and the mandatory exemption in section 14(1). Requests for one's own personal information must be

⁴ The information relating to the appellant's deceased son is not excluded from the definition of "personal information" under section 2(2), because he has been dead for less than 30 years.

addressed under Part II of the *Act*, which includes the exemptions in sections 38(a) and (b).

[24] As noted above, most of the records are general records that do not contain the appellant's personal information, although many include the personal information of other individuals. For those records, I must determine whether they qualify for exemption under sections 8 or 14(1). However, a small number of records contain the appellant's personal information, including some of the occurrence reports, officers' notes and witness statements as well as a number of audio tapes that were sent to the police by the appellant. For those records, I must determine whether they qualify for exemption under sections 38(a) or (b).

Issue B: Does the discretionary exemption at section 38(a) in conjunction with the section 8(1) exemption apply to the information at issue?

[25] Most of the records do not contain the appellant's personal information. The police withheld these records under the discretionary exemption in section 8 of the *Act*.

[26] However, a small number of records contain the appellant's personal information. For those records, I must determine whether they qualify for exemption under section 38(a), in conjunction with section 8. Section 38(a) reads:

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.

[27] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information⁵.

[28] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[29] In this case, the institution relies on section 38(a) in conjunction with sections 8(1)(a), (e) and (l), which state:

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

⁵ Order M-352.

- (a) interfere with a law enforcement matter;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

[30] 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)

[31] The term "law enforcement" has been found to apply to a police investigation into a possible violation of the *Criminal Code*.⁶ Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁷

[32] Except in the case of section 8(1)(e), 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.⁸ 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* fulfilment of the requirements of the exemption.⁹

⁶ Orders M-202 and PO-2085.

⁷ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

⁸ 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.).

⁹ Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

Section 8(1)(a) – interfere with a law enforcement matter

[33] For section 8(1)(a) to apply to the records at issue, the law enforcement matter in question must be ongoing or in existence.¹⁰ The exemption does not apply where the matter is completed, or where the alleged interference is with “potential” law enforcement matters.¹¹

[34] The police submit that the investigation into the death of the appellant’s son is an “unsolved or open investigation,” and that the most recent review of the case took place in 2010. During mediation, the police provided this office with copies of documents that show the most recent work that was conducted on this file. Since 2010, the police state, there has been no notable information or evidence uncovered, or further developments. Consequently, the police state, the case remains in an unsolved but open status.

[35] The police state:

These records relate to a fatal fail to remain collision that occurred approximately 16 years ago. They contain information which relates to the investigation that was never solved due to lack of evidence and the file remains open pending further information.

This institution feels that any premature release of this information would interfere with a law enforcement matter. This investigation was undertaken with a view to bringing charges under the *Criminal Code* and proceedings in court where a penalty or sanction, such as imprisonment, could be imposed against the individual(s) who were involved in the fatal fail to remain collision that took the life of the appellant’s son.

[36] Lastly, the police state that any further sharing of information with the appellant would be detrimental to any future evidence or investigative processes, as disclosure to him is deemed to be disclosure to the world.¹² The police submit that putting the records into the public domain would allow anyone to be aware of the evidence that the police have collected, possibly tainting future evidence.

[37] In his representations, the appellant states that he has not received a convincing explanation as to how and why his son died in the 17 years since the fatal collision. The appellant states that he “has had no contact of any kind from the [police] or any of its officers in at least nine (9) years.” The appellant submits that he has written to the police on a number of occasions seeking information about the status of the investigation into his son’s death, but has not received a satisfactory reply. The

¹⁰ Order PO-2657.

¹¹ Orders PO-2085, MO-1578.

¹² The police refer to Order PO-3117.

appellant submits that the police advised him that the case was under active investigation, but when he asked for the name of the officer conducting the investigation, the police did not identify an officer. The appellant thus submits that he believes that no actual investigation into his son's death is currently taking place.

[38] I have reviewed the IPC's jurisprudence with regard to section 8(1)(a), the records at issue and the parties' representations and for the reasons that follow, I find that the records are not exempt from disclosure under section 8(1)(a) of the *Act* for the following reasons.

[39] The first requirement, that the records form part of a "law enforcement matter", has been met, as the records consist of occurrence reports, witness statements, interviews between the police and various individuals as part of the police's investigation into the death of the appellant's son.

[40] The second requirement of section 8(1)(a) is that the law enforcement matter in question be ongoing or in existence. Based on my review of the records, I am not satisfied that the records at issue are being used as part of ongoing law enforcement matters in relation to the death of the appellant's son. I am mindful of the fact that a law enforcement matter may extend beyond any one particular investigation. However, in the circumstances of this case, the police have not provided me with sufficient information to demonstrate that the investigation into the death of the appellant's son is ongoing.

[41] During mediation, the police sent this office a copy of documents that reveal the most recent work done by the police on this case. The most recent document is dated May 20, 2010. I have reviewed these documents and find that they do not demonstrate that the investigation is ongoing. Rather, these documents from 2010 show that while the file is not resolved, there is no active investigation taking place. The death of the appellant's son took place in 1998, over 17 years ago. From my review of the records and supplementary documentation provided, it appears that the investigation has not been active since 2007, nearly eight years ago. The police have not provided me with any other information that would demonstrate that the investigation into the appellant's son's death is ongoing other than to state that it was "never solved due to lack of evidence and the file remains open pending further information." In the absence of any other information that would demonstrate otherwise, I find that the law enforcement matter is not active or ongoing. Accordingly, I find that section 8(1)(a) does not apply to the information at issue.

[42] I note that in their representations, the police refer to Order PO-3117, in which Adjudicator Colin Bhattacharjee made a determination regarding records relating to a murder that took place in a federal penitentiary. In deciding whether the disclosure of the records would interfere with the investigation, he took into account a number of factors. He stated:

The IPC has found in previous orders that disclosing records to a requester under the access scheme in Part II of [the *Act*] is deemed to be disclosure to the world.¹³ [The *Act*] does not impose any restrictions or limits on what a requester can do with records disclosed to him or her. Consequently, disclosing the OPP, Coroner's office and CFS records would move them into the public domain where they can be freely disseminated.

[43] In their representations, the police submit that the disclosure of the records at issue would move them into the public domain and would allow "anyone that may be suspect to be aware of the evidence that the police have collected. It could also taint future evidence."

[44] While I agree that disclosure of records amounts to disclosure to the world, the police did not provide me with sufficiently detailed and convincing evidence to demonstrate that the investigation into the appellant's son's death is ongoing or active. As a result, section 8(1)(a) does not apply. However, I remain cognizant of the sensitivity of the records at issue and the information contained therein and will carefully consider the effects of potential disclosure in my review of the application of the personal privacy exemption in section 38(b)/14(1) of the *Act* and the police's exercise of discretion.

[45] Therefore, I find that section 8(1)(a) of the *Act* does not apply to the records at issue.

Patrol Zone and Statistical Code information

[46] In their original decision letter, the police withheld the 10-codes, patrol zone information and/or statistical codes contained in the records under sections 8(1)(a) and 8(1)(f) of the *Act*. However, in their revised decision letter dated February 18, 2015, the police advised the appellant that they have withheld the patrol zone information and/or statistical code information from disclosure under the exemptions in sections 8(1)(e) and (l).

[47] This office has issued many orders regarding the release of police codes, patrol zone and certain other types of internal communications and has consistently found that section 8(1)(l) applies to this type of information.¹⁴ I have reviewed the records at issue and find that they contain numerical codes identifying 10-codes, patrol zone information and/or statistical codes. A number of these orders have adopted the following reasoning stated in order PO-1665 by Adjudicator Laurel Cropley:

In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing

¹³ See Orders M-96, P-169, P-697, MO-1719 and MO-1721-F.

¹⁴ See Orders M-93, M-757, MO-1715, PO-1665 and MO-2607.

services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

[48] I adopt this finding for the purposes of this analysis. As the 10-codes, patrol zone information and statistical code information has been consistently found to be exempt under section 8(1)(l), I did not seek the appellant's representations on the application of the exemption to this information or the issue of late-raising with regard to discretionary exemptions. Given the difficulty of predicting future events in the law enforcement context and the nature of the information withheld under sections 8(1)(e) and (l), I find that this information qualifies for exemption under section 8(1)(l) or 38(a) in conjunction with section 8(1)(l) of the *Act*.

[49] As I have found that section 8(1)(l) applies to all the information for which the police claimed sections 8(1)(e) and (l), namely the 10-codes, patrol-zone information and statistical codes, it is not necessary for me to consider the applicability of section 8(1)(e) to it. I will continue to consider whether the police properly exercised their discretion in applying section 8(1)(l)/38(a) to the records after I determine whether the personal privacy provision of the *Act* apply to other portions of the records.

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

[50] As discussed above, some of the records at issue contain the appellant's personal information. This information includes his date of birth, his contact information, his personal views and opinions, the views and opinions of other individuals about him and his name as it appears with other personal information relating to him. The personal privacy exemption in section 14(1)/38(b) exempts the personal information of an individual *other* than the requester from disclosure. As a result, the police cannot apply section 14(1)/38(b) to withhold the appellant's own personal information from him. I will order the police to disclose the personal information that relates only to the appellant to him and will not consider it further in this order. However, I will consider the application of the exemption in section 38(b) to the personal information relating to the appellant that is intermingled with that of other identifiable individuals.

[51] 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.

[52] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an

“unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Section 38(b) of the *Act* 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 privacy.

[53] The section 38(b) exemption is discretionary. As such, the institution may also decide to disclose the information to the requester.

[54] Under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy.¹⁵ Section 14(1)(f) of the *Act* reads:

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.

[55] In applying either of the section 38(b) or 14(1) exemptions, sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[56] 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.

[57] For records claimed to be exempt under section 14(1) (i.e., records that do not contain the requester’s personal information), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the “public interest override” at section 16 applies.¹⁶

[58] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester’s personal information), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in

¹⁵ See section 14(1)(f) of the *Act*.

¹⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹⁷

Section 14(3)

[59] In their revised decision letter, the police advised the appellant that the presumptions in sections 14(3)(a) and (b) apply to the records. The police submit that the personal information contained in the records was compiled and is identifiable as part of a law enforcement investigation into a possible violation of an offence.

[60] The appellant does not specifically address the application of section 21(3)(b), but "cannot agree" to the withholding of the personal information on file relating to his deceased son.

[61] Section 14(3)(a) and (b) of the *Act* reads as follows:

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

[62] 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.¹⁸ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁹

[63] The records at issue in this appeal consist of police occurrence reports, supplementary reports, officers' notes, statements, photos, video and audio footage and similar information relating to the circumstances of the deceased's death. I have reviewed all of the records at issue and find that the presumption at section 14(3)(b) applies to all of the records. I am satisfied that the personal information contained in the records was compiled by the police during their investigation of the death of the deceased. Accordingly, I find that the personal information was compiled and is identifiable as part of the investigation by the police into a possible violation of law and that the presumption in section 14(3)(b) applies.

¹⁷ Order MO-2954.

¹⁸ Orders P-242 and MO-2235.

¹⁹ Orders MO-2213, PO-1849 and PO-2608.

[64] Further, I find that the presumption at section 14(3)(a) also applies to portions of the records. Certain portions of the records contain the deceased's personal information as it relates to his medical condition at the time of his death, as well as the diagnosis of the cause of his death. Accordingly, I find that the personal information in the records relates to the medical, psychiatric, or psychological history, diagnosis, condition, treatment or evaluation, as contemplated by the presumption in section 14(3)(a).

[65] Therefore, I find that the presumption at section 14(3)(b) applies to all of the records at issue and section 14(3)(a) also applies to certain portions. I will consider the application of the considerations listed in section 14(2) and whether there are any factors weighing for or against disclosure.

Section 14(2)

[66] In its representations and most recent revised decision letter, the police claim that the factor in section 14(2)(f) applies to the records at issue. In the confidential portions of their representations, the police identify a number of reasons for their belief that the disclosure of the records at issue, particularly the personal views and opinions of identifiable individuals, would result in significant personal distress for those individuals.

[67] The appellant does not address the application of the factor in section 14(2)(f) to the records.

[68] Section 14(2)(f) reads as follows:

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,

the personal information is highly sensitive.

[69] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.²⁰

[70] In my view, all of the records can be considered to be highly sensitive since the records contain the particulars of the deceased's death, the circumstances surrounding it, the nature of his personal relationships and information relating to witnesses and suspects. The records at issue are, by their very nature, highly sensitive and deeply private. Further, I am satisfied that there is a reasonable expectation that the

²⁰ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

identifiable individuals whose personal information is contained in the records, particularly witnesses and suspects, would experience significant personal distress²¹ if information relating to them was disclosed to the appellant. Therefore, I find that section 14(2)(f) weighs in favour of a finding that the disclosure of the records would constitute an unjustified invasion of personal privacy.

[71] Similarly, I find that the consideration listed in section 14(2)(i) of the *Act* is also applicable. Section 14(2)(i) reads as follows:

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,

the disclosure may unfairly damage the reputation of any person referred to in the record.

[72] I find that the disclosure of some portions of the information in the records may unfairly damage the reputation of the deceased and other identifiable individuals.²² As such, I give this factor moderate weight when balancing the factors favouring privacy protection against those favouring disclosure.

[73] With regard to the other factors weighing against disclosure, I find that none apply. I have also reviewed the factors favouring disclosure in section 14(2) and find that none apply.

[74] Taking into account the application of the presumptions in sections 14(3)(a) and (b) and the factors favouring privacy protection in sections 14(2)(f) and (i), I find that the disclosure of the records would constitute an unjustified invasion of personal privacy and that the records which do not contain the personal information of the appellant are exempt under section 14(1).

[75] With respect to the application of section 38(b) to the records, I previously noted that there are a number of records that contain the appellant's personal information. This personal information consists of his date of birth, his contact information, his personal views and opinions, the views and opinions of other individuals about him and his name as it appears with other personal information relating to him.

[76] Based on my review of the records that contain information relating to the appellant, I find that his personal information consists of only discrete portions of these records, while the overwhelming majority of them is highly sensitive personal information of the deceased and other individuals. Furthermore, I find that while certain portions of the records that remain at issue contain personal information relating

²¹ Order PO-3093.

²² Order PO-2196.

to the appellant, I find that these portions cannot be reasonably severed as the appellant's personal information is inextricably intertwined with that of other identifiable individuals. In addition, the presumptions in sections 14(3)(a) and (b) apply to the personal information of identifiable individuals other than the appellant. I also find that there are no factors under section 14(2) favouring the disclosure of this information to the appellant. Accordingly, I find that the records that contain information relating to the appellant qualify for exemption as their disclosure is presumed to constitute an unjustified invasion of personal privacy under section 38(b) of the *Act*.

[77] Having found that sections 14(1) and 38(b) of the *Act* apply to the records at issue, I will now consider whether the exception to these exemptions provided by section 14(4)(c) applies to entitle the appellant to disclosure of the records, or portions of them.

[78] I note that the exception in section 14(4)(c) can only apply to the personal information of the deceased. Accordingly, I will not consider its application to the personal information that relates solely to identifiable individuals other than the appellant and/or the deceased. I find that the personal information that relates to these third parties only consists of their names, contact information, descriptions, dates of birth and other information not relating to the appellant and/or the deceased. As I have found that the presumption in section 14(3)(b) and the factor favouring privacy protection in section 14(2)(f) apply to this information, the disclosure of this information would constitute an unjustified invasion of the personal privacy of these individuals under sections 14(1) or 38(b).

Section 14(4)(c)

[79] The principle issue in relation to the disclosure of the records at issue is whether the exception to the exemption in section 14(4)(c) of the *Act* applies to permit the further disclosure of the deceased's personal information (some of which is co-mingled with the information of other individuals).

[80] Section 14(4)(c) states, in part:

... a disclosure does not constitute an unjustified invasion of personal privacy if it,

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

[81] 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).²³

[82] 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."²⁴

[83] 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?²⁵

[84] With regard to the first question, I have found above that the records as a whole contain the personal information of the deceased. In addition, I have found that the records contain the personal information of a number of other individuals, including the appellant, other family members or friends/associates, witnesses and suspects.

[85] The term "close relative" is defined in section 2(1) of the *Act* and includes parents. As the deceased's father, the appellant satisfies this part of the test under section 14(4)(c).

[86] The appellant submits that he is entitled to examine all information relating to his deceased son that is in the possession of the police. The appellant submits that, in the 16 years since the death of his son, no convincing explanation has been provided to him by the police as to how and why the deceased met his death. The appellant states that he does not seek any information "about innocent individuals with no connection" to the incident that resulted in his son's death. The appellant submits that there is "no

²³ Order MO-2237.

²⁴ Order MO-2245.

²⁵ Orders MO-2237 and MO-2245.

justifiable reason for the withholding of his deceased son's criminal record." The appellant also states that he "cannot agree to the withholding of any other personal information on file concerning his deceased son."

[87] In their representations with regard to the application of section 38(a), in conjunction with the law enforcement exemption in section 8, the police submit that they exercised their discretion and "gave consideration to the appellant's right to access their own personal information and the right to access for 'compassionate' reasons as stated in section 14(4)(c)." The police further submit:

In this circumstance we are not satisfied, that disclosing the deceased individual's personal information to the appellant is desirable for compassionate reasons, because doing so could reasonably be expected to jeopardize the investigation and unjustifiably invade the personal privacy of other individuals. In addition, [the police submit] that the appellant has already been provided with a "significant amount of information" with respect to his son's death throughout the course of the investigation.

[88] The police conclude by submitting that "any further sharing of information with the appellant would be an unjustified invasion of personal privacy and would be detrimental to any future evidence or investigative processes".

[89] I disagree with the police's position. While the police claim, and the appellant does not refute, that the appellant has been provided with a "significant amount of information", neither party has identified what information the appellant has been provided with. Further, the appellant's request clearly states that he would like copies of "all records" relating to the deceased's death. Therefore, I will consider whether section 14(4)(c) applies to all of the records that remain at issue, as I have found them all to be exempt under the personal privacy exemption under section 14(1), regardless of what information the appellant has already received.

[90] In Order MO-2245, Commissioner Brian Beamish ordered the disclosure of highly sensitive personal information about a deceased individual to a close relative. In doing so, the 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 that 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.

[91] I adopt Commissioner Beamish's approach in this appeal and accept the appellant's submissions that he requires more information that will assist him in understanding the events leading up to and surrounding the death of his son.

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

Personal information of other individuals

[93] As stated above, I have found that the records at issue contain the personal information of a number of identifiable individuals, as that term is defined in section 2(1) of the *Act*. This includes these individuals' race, national or ethnic origin, colour, age, sex, marital or family status [paragraph (a)], their criminal, employment and/or medical histories [paragraph (b)], their address and telephone number [paragraph (d)], their personal opinions or views [paragraph(e)], the views or opinions of another individual about them [paragraph (g)] and their names, along with other personal information related to them [paragraph (h)].

[94] In addition, I have found that some of the information at issue contains the personal information of the appellant and/or the deceased and that this information is comingled with that of a number of other identifiable individuals. For example, there are a large number of witness statements and interview statements at issue that include both an identifiable individual's personal information and that of the appellant and/or deceased. Further, there are a number of records relating to "persons of interest", including these individuals' photographs and criminal records, and a number of photographs of suspect vehicles and related information relating to these vehicles.

[95] The relevant circumstances in this case include the appellant's need to receive the records at issue for closure and to better understand the circumstances around his son's death, the privacy interests of the deceased and the privacy interests of the other identifiable individuals whose personal information is contained in the records. I give significant weight to the fact that much of the deceased's personal information in the

records consists of individuals' observations and statements about him prior to his death and is, therefore, his personal information under paragraph (g) of the definition of "personal information" in section 2(1) of the *Act*.

[96] I also give some weight to the police's concerns regarding the privacy interests of the other identifiable individuals whose personal information is contained in the records. That being said, I have found that some of the personal information of these identifiable individuals, specifically their contact information and other information relating only to them, did not include the personal information of the appellant and/or the deceased and is properly exempt under sections 14(1) or 38(b).

[97] What remains at issue consists of information in which the personal information of the deceased and other identifiable individuals are comingled, such as the witness statements and interviews of potential suspects. Based on my review of these records, I find that the majority of these records contain personal information that relates mainly to identifiable individuals other than the deceased. Furthermore, I find the personal information of the deceased is found in very discrete portions of the record.

[98] Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can be reasonably severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.²⁶

[99] Based on my review of the records, I find that significant portions of the personal information of the deceased contained in the records cannot be reasonably severed as they are intertwined with that of other identifiable individuals. Furthermore, I find that there are certain portions of the record that could be easily separated. However, this information which relates solely to the deceased cannot reasonably be severed as this would lead to the disclosure of "disconnected snippets" or "worthless", "meaningless" or "misleading" information. The witness statements, interviews and officers' notes relating to those statements also contain highly sensitive personal information relating to identifiable individuals other than the deceased. Reviewing this personal information, I find that the appellant is not entitled to access this information under section 14(4)(c).

[100] However, I find that the disclosure of the remaining information in the records that relates to the deceased, particularly information about the circumstances surrounding his death, is desirable for compassionate reasons under the exception in section 14(4)(c) of the *Act*. Accordingly, I find that the exception in section 14(4)(c) applies to much of the information contained in the records and that its disclosure would

²⁶ Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

not result in an unjustified invasion of personal privacy within the meaning of sections 14(1) or 38(b). I have provided the police with a highlighted version of the records which sets out the information whose disclosure is desirable for compassionate reasons.

Video and Audio Recordings of Witness Statements

[101] The records at issue also include video and audio recordings of statements taken from a number of witnesses and potential suspects who were interviewed. I note that the substance of these statements is included in the notes and written versions of these statements.

[102] In Order MO-2387, Commissioner Beamish considered the application of section 14(4)(c) to digital recordings of affected parties statements during an interview conducted by the police in the course of their investigation into the death of the appellant's son and found as follows:

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 appellants' son.

[103] After considering all of the circumstances, Commissioner Beamish 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.

[104] I adopt this analysis for the purposes of this appeal. In the present appeal, I am cognizant of the fact that the identifiable individuals (other than the appellant and/or deceased) whose information is contained in the records were not notified. In addition, it is not evident that the appellant is aware of the identities of the individuals who provided the statements. Finally, the information contained in the audio and video recordings of the witness statements and interviews contain little information that is not

already contained in the officers' notes of these statements or the individuals' witness statements. Having considered these factors and reviewed the records at issue, I find that it is not desirable to disclose the video and audio recordings of the witness statements because the information they contain is substantially similar to that which is also recorded in the records that I will be ordering the police to disclose. I find that section 14(4)(c) does not apply to these records and that the exemptions in sections 14(1) or 38(b) apply to exempt them from disclosure.

Absurd result

[105] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 14(1) or 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.²⁷ The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement;²⁸
- the requester was present when the information was provided to the institution;²⁹ or
- the information is clearly within the requester's knowledge.³⁰

[106] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.³¹

[107] Neither party made submissions on whether withholding some of the records would result in an absurd result.

[108] Based on my review of the records, I find that a number of the records were either supplied by the appellant himself or contain information that is clearly within his knowledge. For example, there are a number of audiotapes contained in Box #4 of the records that were provided by the appellant. As the appellant himself provided this information, it is clearly within his knowledge. Therefore, I find that the police should provide the appellant with access to the information that the appellant himself provided, which are identified in the index as Tapes #8, 9, 10, 11, 13 and 21, on the basis of the absurd result principle.

[109] In addition, a number of occurrence reports and officers' notes contain summaries of conversations the police had with the appellant. As the appellant was

²⁷ Orders M-444 and MO-1323.

²⁸ Orders M-444 and M-451.

²⁹ Orders M-444 and P-1414.

³⁰ Orders MO-1196, PO-1679 and MO-1755.

³¹ Orders M-757, MO-1323 and MO-1378.

present when this information was provided to the police and, in many cases, provided this information to the police, it is clearly within his knowledge. Therefore, I find that the police should provide the appellant with access to the information that was provided to the police in the appellant's presence or is otherwise clearly within his knowledge on the basis of the absurd result principle.

[110] In conclusion, I find that the personal privacy exemption in section 14(1)/38(b) applies to the records that remain at issue, with the exception of the information that relates only to the appellant. I also find that the appellant is entitled to access the information that relates only to the deceased under the exception to the exemption in section 14(4)(c). Further, I find that certain records should be disclosed to the appellant on the basis of the absurd result principle. I note that there are a number of duplicates contained in the records. The police are only required to disclose one copy, or portions thereof, of the records that I will order to be disclosed.

[111] With regard to the information that remains exempt from disclosure under section 38(b), I will consider whether the police properly exercised their discretion in denying access under this provision.

Issue D: Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[112] The sections 38(a) and 38(b) exemptions are discretionary, and permit 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.

[113] 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; or it fails to take into account relevant considerations.

[114] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³² This office may not, however, substitute its own discretion for that of the institution.³³

[115] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁴

³² Order MO-1573.

³³ Section 43(2) of the *Act*.

³⁴ Orders P-344 and MO-1573.

- the purposes of the *Act*, including the principles that: information should be available to the public; individuals should have a right of access to their own personal information; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[116] In its representations, the police submit that they have met their obligation to the appellant under the *Act* and complied with his request. The police submit that they followed their established policies and procedures in responding to the request. The police also submit that they properly exercised their discretion, carefully considered and reviewed all relevant factors.

[117] The appellant does not make specific submissions on the police's exercise of discretion. However, the appellant submits that the denial of access to the requested records "cannot be justified" when the police's investigation appears to have been placed in abeyance.

[118] I have found that the police codes, statistical and patrol zone information to be exempt under section 8(1)(l). In addition, I have found that the information relating solely to individuals other than the appellant and the deceased to be exempt under section 38(b). Based on my review of the parties' submissions, I find that the police's

exercise of discretion was proper. The police took into account relevant considerations and did not take into account irrelevant considerations in their exercise of discretion. Therefore, I uphold the police's exercise of discretion with respect to the records that I found to be exempt under sections 38(a), read with section 8(1)(l) and 38(b) of the *Act*.

ORDER:

1. I uphold the police's application of section 8(1)(l) of the *Act* to the statistical codes, patrol zone and similar information contained in the records.
2. I order the police to disclose all of the records they identified as records they are willing to release on the Index of Records to the appellant.
3. I order the police to disclose all of the personal information that relates only to the appellant to him.
4. I uphold the police's decision to apply the personal privacy exemption in section 14(1)/38(b) to the records. However, I order the police to grant the appellant access to the information that I have found to be subject to the exception in section 14(4)(c). In addition, I order the police to grant the appellant access to the information to which he is entitled on the basis of the absurd result principle. For the sake of clarity, I have highlighted the portions of the records that **are to be disclosed** on the copy of the records enclosed with this order.
5. Further, I order the police to disclose Tape #8, 9, 10, 11, 13 and 21 to the appellant.
6. The police is required to comply with provisions 2, 3, 4 and 5 of this order by **September 1, 2015** but not before **August 27, 2015**.
7. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the records disclosed pursuant to order provisions 2, 3, 4, 5 and 6 above.

Original Signed By:
Justine Wai
Adjudicator

July 27, 2015