



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1771-1

Appeal MA-030153-1

Ottawa Police Services Board



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NATURE OF THE APPEAL:

This appeal concerns a decision of the Ottawa Police Services Board (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requesters (now the appellants) requested “all the information, reports and data pertaining to the accident that occurred at [a specified address] on March 12, 2003 involving a pedestrian [the deceased individual] who was struck and killed [by a vehicle].” One of the appellants is the spouse of the deceased individual and the other is the daughter.

The Police issued a decision in which they provided access, in whole or in part, to a number of records, but denied access to all or portions of the remaining records under section 38(a), read in conjunction with sections 8(1)(i), 8(1)(l) and/or 8(2)(a), or in the alternative, sections 8(1)(i), 8(1)(l) and/or 8(2)(a) alone, section 38(b), read in conjunction with sections 14(1)(f), 14(3)(a), 14(3)(b), or in the alternative, sections 14(1)(f), 14(3)(a) and/or 14(3)(b) alone.

The appellants appealed Police’s decision.

During the mediation stage of the appeal process, the Police agreed to seek consent from the affected persons named in the records. One affected party, the driver of the vehicle, consented to the release of some of his personal information, namely a signed statement provided to the Police after the accident. In accordance with this person’s consent, the Police issued a new decision in which they agreed to release his statement. Also during mediation, the Police agreed to release some photographs to the appellants. In addition, the appellants agreed to remove police codes, severed under section 8(1)(l), and non-responsive portions of the records, from the appeal. Accordingly, this information is no longer at issue. Section 8(1)(l) is also no longer at issue.

Further mediation was not possible, and the file was moved to adjudication.

I first sent a Notice of Inquiry to the Police seeking representations. The Police submitted representations and agreed to share them with the appellants in their entirety. In their representations the Police raised for the first time the application of section 8(1)(a) to the records at issue. I will address the late raising of this discretionary exemption below.

I then sought representations from the appellants and I provided them with a complete set of the Police’s representations. The appellants made brief submissions and also asked that I consider their letter of appeal as part of their representations. Accordingly, I am treating the appellants’ letter of appeal as part of their representations.

The application of section 54(a) of the *Act* (right of access by a personal representative) is not at issue in this appeal.

RECORDS:

The following 18 records are at issue:

Record	Description	Withheld or Severed	Sections of the Act
A (pages 1-2)	Motor vehicle accident report	Withheld	38(a)/8(1)(a), 8(2)(a), 38(b)/14
B (page 7)	Witness statement	Withheld	38 (b)/14
C (pages 13-17)	Accident re-creation data and calculations	Withheld	14, 8(1)(a), 8(2)(a)
D (pages 18-27; 29-58)	General occurrence report	Severed	38(a)/8(1)(a), (i), 8(2)(a) 38(b)/14
E (pages 59-68; 70-72; 75)	Notes of Police officer #1	Severed	38(b)/14
F (pages 76-77)	Notes of Police officer #2	Withheld	14
G (pages 78-79)	Notes of Police officer #3	Severed	38(b)/14
H (pages 80-81)	Notes of Police officer #4	Severed	38(b)/14
I (pages 83-85)	Computer generated accident data	Withheld	14, 8(1)(a), 8(2)(a)
J (pages 86-88)	On-scene measurement record	Withheld	14, 8(1)(a), 8(2)(a)
K (page 89)	Coefficient of friction tests	Withheld	14, 8(1)(a), 8(2)(a)
L (page 90)	Field scene sketch	Withheld	14, 8(1)(a), 8(2)(a)
M (pages 91-92)	Pedestrian collision worksheet	Withheld	14, 8(1)(a), 8(2)(a)
N (pages 93-96)	Vehicle damage profile	Withheld	14, 8(1)(a), 8(2)(a)
O (page 97)	Witness statement	Withheld	14
P (page 98)	Computer generated drawing of accident scene	Withheld	14
Q (pages 99-101)	Notes of Police officer #5	Withheld	14
R (numbers 1-10, 16-19, 21-70)	Photos taken of accident scene	Withheld	14

DISCUSSION:

LATE RAISING OF A DISCRETIONARY EXEMPTION

Section 8(1)(a) is a discretionary exemption that must be raised within 35 days of the issuance of the Confirmation of Appeal by this office. In this case, the Confirmation of Appeal for this file

is dated May 27, 2003. The Police were advised in the Confirmation of Appeal that they had until July 2, 2003 to raise any new discretionary exemptions. There is no indication in the file that the Police ever raised the application of section 8(1)(a) prior to this date. After the conclusion of the mediation stage, a Mediator's Report (the Report) was issued on July 29, 2003. Section 8(1)(a) is not listed as an issue. The parties were invited to review the Report and to contact the mediator by August 18, 2003 with any errors or omissions. The Police did not raise the absence of section 8(1)(a) from the Report.

The section 8(1)(a) exemption was first raised by the Police in their representations dated December 10, 2003, 171 days after July 2, 2003 deadline. This raises an issue of whether or not I should consider this exemption, despite the fact that it was raised after the expiry of the 35-day time period.

This office's *Code of Procedure* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal. Section 11 of the *Code* sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

The Police did not submit representations regarding the late raising of section 8(1)(a).

In the circumstances, especially given how late section 8(1)(a) was raised and the failure of the Police to provide any explanation for this delay, I am not persuaded that I should depart from this office's usual practice of not permitting institutions to raise new discretionary exemptions after the 35-day period has expired. Accordingly, I will not consider the application of this exemption.

PERSONAL INFORMATION

The Police have relied on section 38(b), read in conjunction with various provisions of section 14, or in the alternative, those section 14 provisions alone, and/or section 38(a), read in conjunction with various provisions of section 8, or in the alternative, those section 8 provisions alone, to deny access to the records at issue. In order to assess whether these provisions apply, it is first necessary to determine whether the records contain personal information, and to whom that personal information relates.

Under section 2(1) of the *Act*, "personal information" is defined, in part, as recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)], the address of the individual [paragraph (d)], the opinions or views of the individual [paragraphs (e) and (g)], and the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

To qualify as personal information, the information must be about the individual in a personal capacity. Previous decisions of this office have held that information "about" an individual in his or her professional or employment capacity does not constitute that individual's personal information (Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225).

In this case, the records contain the details of a Police investigation into a single vehicle accident, which resulted in the deceased individual's death. In general, the records contain information about named individuals who were involved in this incident in some manner including police officers, the deceased individual, the appellants and witnesses. The records contain, among other things, the deceased individual's date of birth, address and medical history, police officers' observations of the accident scene and the deceased individual (including information regarding his physical appearance, condition and personal belongings, and the care of his body by police and medical personnel), photographs of the deceased individual, the name, address, date of birth and a statement received from the driver of the vehicle, and the names, addresses and statements of several witnesses.

On my review, records A, B, D, E, G and H contain the personal information of the deceased individual, the appellants and, in some cases, several affected persons, including the driver of the vehicle and witnesses. Some of the information in records D and G relates to doctors and ambulance attendants who were involved in the deceased individual's care and assessment after the accident. Some of this information is personal in nature, including dates of birth, home addresses and telephone numbers and physical descriptions. On the other hand, some of this

information is associated with these individuals in their professional capacity, including business telephone numbers and occupations.

I find that the names and badge numbers of ambulance attendants and the names, business phone numbers, employers and areas of specialization do not qualify as personal information within the meaning of the *Act*. However, I will address the application of section 38(a)/8(2)(a) to this information (see below).

Having found that records A, B, D, E, G and H contain the personal information of the appellants and other individuals, I will consider the application of the section 38(b)/14 and/or section 38(a)/8(2)(a) exemptions to these records.

Records J, L and P contain the personal information of only the deceased individual. Records M, N, O, Q and R contain the personal information of the deceased individual and other individuals. I note that some of the photographs in record R contain the personal information of the deceased individual and other individuals while some of the photographs do not contain anyone's personal information. However, viewed as a whole, record R does contain personal information. I will consider the application of sections 14 and 8(2)(a) to records J, L, M and N and section 14 to records O, P, Q and R.

Records C, K and I contain accident data. These records do not contain anyone's personal information. Accordingly, the section 38(a)/8(2)(a) or section 38(b)/14 exemptions cannot apply to any of these records. However, I will consider the application of section 8(2)(a) alone to these records.

Record F, which comprises the notes of police officer #2, does not contain anyone's personal information. Since the Police have only raised the application of the section 14 exemption to this record, I will order the Police to release this record in its entirety to the appellant with the exception of the non-responsive information and police codes, which are not at issue in this appeal.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/INVASION OF PRIVACY

Introduction

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 exceptions to this general right of access.

Section 38(b) of the *Act* provides:

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

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

In this case I have determined that records A, B, D, E, G and H contain the personal information of both the appellants and other individuals. Therefore, I will consider whether the disclosure of this personal information would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under section 38(b).

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester. On appeal, I must be satisfied that disclosure *would* constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

Where, however, a record only contains the personal information of other individuals (as is the case with records L, M, N, O, P, Q and R), and the release of this information would constitute an unjustified invasion of the personal privacy of those individuals, section 14 of the *Act* prohibits an institution from releasing this information, unless one of the exemptions set out in that section applies. Accordingly, I will also consider whether the disclosure of portions of records L, M, N, O, P, Q and R would be an unjustified invasion of personal privacy under section 14.

In both these situations (where the records contain the personal information of the appellants and of others, and where the records contain the personal information of other individuals only), sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 14(3), the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)*]

(1993), 13 O.R. (3d) 767]. In other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to argue in favour of disclosure.

Unjustified invasion of another individual's personal privacy

Introduction

For records A, B, D, E, G, H, J, L, M, N, O, P, Q and R the Ministry has submitted that the presumption in section 14(3)(b) applies.

Section 14(3)(b) states:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Representations

The Police submit that the personal information in the records was compiled as part of an investigation into a possible violation of law as a result of a single car motor vehicle accident. While the Police do not expressly say so, it would appear from its submissions that its investigation was conducted under the *Highway Traffic Act* and the *Criminal Code*. The Police state that “[t]he driver of the vehicle could have been the subject of a charge that would have resulted in the driver being criminally responsible for the fatality.” The Police submit that investigations of this nature are confidential in order to “maintain fairness and presumption of innocence” and to gain the “co-operation from individuals when investigating offences.” The Police state that “[i]f this information is not safeguarded then it would be difficult for the [P]olice to get assistance/co-operation from individuals in the future and could hamper investigations.” In this case the Police did not lay charges.

In their representations the appellants do not specifically disagree with the Police's submissions regarding their role in conducting an investigation or the impact of section 14(3)(b) in denying access to personal information obtained during the course of an investigation into a possible violation of law. Rather, the appellants' state:

The family is requesting the above-mentioned information to get a better understanding of the events that led to [the named individual's] death. The family wishes to read all possible information available, thereby, being able to move on with the grieving process. The missing information has left the family with a

feeling of incompleteness. We feel that closure will not be possible until more information concerning our sudden and traumatic loss is obtained.

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[W]e believe that the [Act] does not address the matter of release of information to family members who are trying to deal with the loss of a loved one. There is no allowance made within the legislation to permit obtaining the requested information when the family member has been killed. How can I ask my husband of 28 years permission to release the information to us when he is unable to respond to my request? It was recommended to us that our only hope to gain this information was to initiate this appeal.

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The pictures, reports and other details of the accident which we are requesting copies of are to bring closure to the event and allow us to move on with our lives.

Findings

Records A, B, D, E, G and H

Based on the submissions of the Police and my review of the records, I find that the personal information contained in these records was compiled and is identifiable as part of an investigation into a possible violation of law, specifically the *Highway Traffic Act* and/or the *Criminal Code*. The fact that quasi-criminal or criminal proceedings were not commenced does not have a bearing on the issue, since section 14(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849). I find therefore that, to the extent that these records contain the personal information of individuals other than the appellant, disclosure of this personal information must be presumed to constitute an unjustified invasion of the personal privacy of those individuals. Having found that section 14(3)(b) applies I am precluded from considering any of the factors weighing for or against disclosure under section 14(2), because of the *John Doe* decision. Therefore, the personal information contained in these records is exempt under section 38(b)/14.

Records J, L, M, N, O, P, Q and R

I also find that the personal information contained in these records was compiled and is identifiable as part of an investigation into a possible violation of law, specifically the *Highway Traffic Act* and/or the *Criminal Code*. Under section 14(3)(b), the disclosure of this personal information is, therefore, deemed to constitute an unjustified invasion of the personal privacy of the individuals to whom that information relates. As a result, these records qualify for exemption under section 14 of the *Act*.

Again, having regard to this finding, I am precluded from considering the application of the factors under section 14(2).

LAW ENFORCEMENT

Introduction

In addition to section 38(b) of the *Act*, another exemption to the general right of access is found in section 38(a) of the *Act*, under which the institution has the discretion to deny an individual access to his or her own personal information in instances where the exemptions in sections 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

I will now consider the application of section 38(a) and/or sections 8(1)(i) and 8(2)(a) to the information that remains at issue (comprised of portions of records D, G, J, M and N and all of records C, I and K).

Record D is an occurrence report and record G consists of excerpts from a police officer's notebook. The information at issue in record D consists of the non-personal information of ambulance attendants and doctors and the results of a CPIC search of a vehicle licence plate number. Since these records contain the appellants' personal information, I must consider the application of section 38(a) in conjunction with section 8(1)(i) and 8(2)(a) to these records.

The information contained in records C, I, J, K, M and N can be described generically as forensic testing results, consisting of accident re-creation data and calculations, an on-scene measurement record, the results of coefficient of friction tests, a pedestrian collision worksheet and a vehicle damage profile. I will consider the application of section 8(2)(a) alone to these records.

Section 8(1)(i) reads:

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

endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required

For section 8(1)(i) to apply, the Police must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Police have not provided any representations regarding the application of section 8(1)(i) to record D. However, I note that in an earlier version of an index of the records the Police had

indicated that they were claiming section 8(1)(i) in regard to specific portions of record D. On my review, I note that the information at issue in record D concerns the results of a CPIC search on a vehicle bearing a specified licence plate number. I have already found this information exempt under section 38(b)/14. Therefore, I will not consider the application of section 8(1)(i) to this information.

Section 8(2): law enforcement report

Section 8(2)(a) reads as follows:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

Only a report is eligible for exemption under this section. The word “report” is not defined in the *Act*. For a record to qualify as a report it must consist of “a formal statement or account of the results of the collation and consideration of information.” Generally speaking, results would not include mere observations or recordings of fact (Orders P-200, M-1048, MO-1238 and MO-1337-I).

The Police have not made any representations regarding the characterization of records A, C, D, G, I, J, K and M as reports within the meaning of section 8(2)(a).

After a review of these records, I am not satisfied that they meet the definition of “report” under the *Act*.

Record A is a two-page motor vehicle accident report. I have already found a portion of it exempt under section 38(b)/14. The portion that remains at issue sets out the results of a mechanical inspection of the vehicle that was involved in the accident shortly after the accident occurred. The document is essentially a checklist of vehicle components to determine their condition. I am not satisfied that this record meets the definition of “report” under the *Act*, in that it consists essentially of observations and recordings of fact.

Records C, I, J, K and M contain raw numeric results, derived through observation, the recording of data and the completion of calculations. Record N contains both numeric data and a narrative description of the damage to the driver’s vehicle. I am not satisfied that these records constitute formal statements or accounts of the results of the collation and consideration of this data and narrative.

Record D consists of a forty-one page occurrence report compiled in relation to the motor vehicle accident. Generally, occurrence reports generated by police forces have been found not to meet the definition of “report” under the *Act*, in that they are more in the nature of recordings

of fact than formal, evaluative accounts of investigations (see Orders PO-1845, PO-1796, P-1618, M-1341, M-1141 and M-1120). In Order M-1109, Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a “report.”

On my review of this occurrence report, I am satisfied that it also does not meet the definition of “report” under the *Act*, in that it consists essentially of observations and recordings of fact. Although there are a few comments by police officers which might be considered evaluative, the records consist primarily and essentially of descriptive information.

Record G contains an excerpt from a police officer’s notebook. I am satisfied that these excerpts do not meet the definition of report under the *Act*. They do not constitute formal statements or accounts of the results of the collation and consideration of information, but consist of observations and records of fact made by this officer during the course of his investigation.

Accordingly, I find that none of records C, D, G, I, J and K fall under the exemption contained in section 8(2)(a).

SEVERANCE

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

The parties did not submit representations on severance.

The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information.

For the most part, the Police have provided the appellants with their personal information. However, there are some instances where the Police have severed the appellants’ personal information where it appears together with the personal information of others.

In my view, no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information that what is disclosed is substantially unintelligible. 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 [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997),

102 O.A.C. 71 (Div. Ct.)]. With these principles in mind, I have arrived at the following conclusions.

Some of the personal information exempt from disclosure under section 38(b)/14 is readily severable from non-exempt information in records A, D, G, H, J, M, N, Q and R. Where this is the case, the remaining information is either non-personal or about the appellants only.

In addition, as indicated above, I have found that records C, F, I and K do not qualify for exemption under sections 14 or 8(2)(a). Accordingly, these records should be released to the appellants in their entirety. I note that with respect to record F certain non-responsive information and the police codes would not be disclosed to the appellant.

EXERCISE OF DISCRETION

The section 38(a) and (b) exemptions are discretionary, and permit the Police to disclose information, despite the fact that they could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant (Orders P-344, 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
- 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
- the historic practice of the institution with respect to similar information

In this case, the Police have made representations that allude to their reasons for protecting personal information contained in the records at issue.

The Police state:

Police investigations into the conduct of citizens are both confidential and privileged to the investigative body to maintain fairness and presumption of innocence. It is imperative that the police get co-operation from individuals when investigating offences.

If this information is not safeguarded then it would be difficult for the police to get assistance/co-operation from individuals in the future and could hamper investigations.

After careful consideration of the above we exercised our discretion to deny access to the information.

The Police also indicate that on two occasions they contacted all of the involved parties in an effort to obtain their consent to the release of their information. As I have indicated above, the driver of the vehicle consented while the others did not.

In my view, the representations of the Police clearly do not constitute a proper exercise of discretion. There is no indication that the particular circumstances of the appellant's request or the contents of the records themselves were taken into account by the Police in reaching their section 38(a) and 38(b) decisions, or that the Police considered any factors that might weigh in favour of disclosure. The Police have simply stated their general policy that the privacy of citizens is imperative in order to ensure their ongoing assistance in the investigation of criminal and quasi-criminal offences. The *Act* recognizes a higher right of access to records containing a requester's personal information, and it is not acceptable for an institution, such as the Police in this case, to simply establish the requirements of an exemption claim without taking the additional step of deciding whether or not it will disclose the record despite the fact that it qualifies for exemption, taking into account all relevant circumstances. This is especially so in cases such as this one where the appellants have requested information about a deceased family member.

Accordingly, I will include a provision in this interim order returning the matter to the Police for a proper exercise of discretion under sections 38(a) and 38(b) of the *Act* with respect to all of the withheld personal information in records A, B, D, G and H.

ORDER:

1. I uphold the Police's decision that the severed portions of records A, B, D, G, H, L, O and P qualify for exemption under the *Act*.
2. I order the Police to re-exercise their discretion under sections 38(a) and 38(b) of the *Act*, in respect of the information described in provision 1 of this order, taking into account all of the relevant factors and circumstances of this case and using the above principles as a guide.
3. I order the Police to provide me and the appellants with representations on their exercise of discretion no later than **April 15, 2004**.
4. The appellants may submit responding representations on the exercise of discretion issue no later than **April 29, 2004**.
5. I order the Police to disclose parts of records A, D, E, G, H, J, M, N, Q and R (photos 1, 2, 7, 8, 9, 10, 16, 17, 18, 21, 25, 26, 27, 28, 29, 30, 31, 39, 42, 43, 44, 45, 46, 53, 55, 58, 62, 63, 65, 66, 67, 68, 69 and 70) no later than **April 15, 2004**, in accordance with the highlighted versions of these records included with the Police's copy of this order. To be clear, the Police should not disclose the highlighted portions of these records.

6. I order the Police to disclose records C, F (with the exception of the non-responsive information and police codes), I and K in their entirety.
7. In order to verify compliance with provisions 5 and 6 of this order, I reserve the right to require the Police to provide me with a copy of the records they disclose to the appellants.
8. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues that may be outstanding.

Original Signed by: _____
Bernard Morrow
Adjudicator

_____ March 25, 2004