



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2237

Appeal MA06-335

Barrie Police Services Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

The appellant's daughter died suddenly in the summer of 2005. At the time of her death, she resided in the town of Barrie and shared an apartment with another individual (the affected party). As a result of her sudden death, the Barrie Police Service (the Police) and the Coroner's Office conducted an investigation. As part of their investigation, the Police conducted a number of interviews and made a digital recording of two of those interviews. One of these interviews was with the affected party.

At the conclusion of the investigations by the Police and the Coroner, it was determined that the appellant's daughter died of natural causes.

NATURE OF THE APPEAL:

The appellant made the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

...I am writing to request disclosure of the entire contents of the investigation report for case reference BA06017317. This request is being initiated under the [Act] and is a request for disclosure of personal information for compassionate reasons.

The case in particular concerns the police investigation of the death of my 21 year old daughter, [name], found deceased of unknown causes on May 25, 2006 in Barrie, Ontario. [She] did not have a will at her time of death; there is no legal personal representation or executor of [her] estate. The disclosure of the contents of the police investigation is requested by [her] parents as part of our desired closure in dealing with the unexpected loss of a cherished child.

The Police identified a number of responsive records including a sudden death report, police officers' notes and two digitally recorded interviews. Information relating to four individuals, including the affected party, was identified by the Police in the responsive records. The Police sent a notice to the four individuals pursuant to section 21(1) of the *Act*. One of the individuals consented to the release of her personal information contained in police officers' notes and the digital recording of her interview. The other two individuals and the affected party did not consent to the release of any of their personal information.

The Police issued a decision letter releasing some of the responsive records in full and withholding portions of the other responsive records. In the decision letter, the Police stated:

After careful consideration of sections 38(a) and (b) of the *Act*, a decision was made to grant partial access to the records requested. Please be advised that each of the involved parties to this incident were contacted and asked for consent to release their personal information, including any applicable statements, to you. [One named individual] was the only individual who would provide her consent.

Accordingly, full disclosure would constitute an unjustified invasion of the privacy of the other involved parties.

In conjunction with sections 38(a) and (b) of the *Act*, the Police relied on sections 8(2)(a), 14(2)(f), 14(2)(h) and 14(3)(b) to support their decision to withhold portions of the records.

The appellant appealed this decision. In her notice of appeal, the appellant indicated that she did not seek the personal information of the two individuals who accompanied the affected party during her Police interview. Accordingly, the personal information relating to these two individuals is no longer at issue in this appeal.

Section 54(a) of the *Act* provides for the exercise of the rights of a deceased person by the individual's personal representative if the exercise of the right relates to the administration of the individual's estate. The appellant does not claim that this section applies, and in the circumstances of this appeal, I am satisfied that it does not. Rather, as noted, the appellant states that her request is made for "compassionate reasons", an apparent reference to the newly enacted section 14(4)(c) of the *Act*. This section contains provisions dealing with disclosure of the personal information of deceased individuals to a spouse or close relative where it is "desirable for compassionate reasons."

During mediation of the appeal, the Police issued a revised decision letter in which they stated that they were prepared to grant partial access to the notes of one of the police officers involved in the investigation. The Police relied on section 14(3)(b) to support the remaining severances made to these notes. At the same time, the Police prepared an Index of Records, which was reproduced in the Mediator's Report, a copy of which was provided to the appellant and the Police. In copies of the responsive records that were provided to this office along with the Index of Records, the Police identified some information in the records that was non-responsive to the request. The appellant advised that she was not seeking access to the information that the Police have identified as non-responsive. Nor is she seeking access to the cell phone number of the Coroner. Accordingly, this information is no longer at issue in this appeal.

Therefore, following mediation, the records remaining at issue were the severed portions of the sudden death report, severed portions of four police officers' notes and a digital recording of the Police interview with the affected party. Mediation did not resolve any other issues and this appeal was moved to the adjudication stage of the appeal process.

I began my inquiry by issuing Notices of Inquiry to the Police and affected party. I received representations from the Police and the affected party. I then issued a Notice of Inquiry to the appellant, enclosing the Police's representations in their entirety and inviting the appellant to submit representations. The affected party's representations were not provided to the appellant for reasons of confidentiality. I subsequently received representations from the appellant.

RECORDS:

The records that are at issue in this appeal are the severed portions of a sudden death report, four police officers' notes and a digital recording of an interview conducted by the Police with the affected party. The records are described in the table below, which also identifies the provisions of the *Act* relied on by the Police to withhold the records, or portions of records, that have not been disclosed.

Record #	Description of record	Severed or withheld in full by the Police	Section of the <i>Act</i>
1	Sudden death report	Severed	38(a), 8(2)(a), 38(b), 14(2)(h), 14(3)(b)
5	Police officer's #1 notes	Severed	38(a), 8(2)(a), 38(b), 14(2)(f) and (h), 14(3)(b)
6	Police officer's #2 notes	Severed	38(a), 8(2)(a), 38(b), 14(2)(h), 14(3)(b)
7	Police officer's #3 notes	Severed	38(a), 8(2)(a), 38(b), 14(2)(h), 14(3)(b)
8	Police officer's #4 notes	Severed	38(a), 8(2)(a), 38(b), 14(2)(h), 14(3)(b)
11	Digital recording	Withheld in full	38(b), 14(2)(f) and (h), 14(3)(b)

DISCUSSION:

SCOPE OF THE REQUEST

As noted above, the appellant stated during mediation that she is not seeking access to the personal information of the two individuals that accompanied the affected party during her Police interview, nor is she seeking access to the cell phone number of the Coroner. The appellant also indicated that she was not seeking access to any information that the Police had identified as non-responsive to the request. Therefore, this information was removed from the scope of the request during mediation.

In addition, following the exchange of non-confidential representations, the appellant removed from the scope of the request the personal information in record 1 of an individual who was not notified of this proceeding. The appellant also removed from the scope of the request the

personal information in record 7 that relates to another individual who was not notified of this proceeding.

In the representations filed by the Police, the Police state:

During the course of mediation, the appellant advised that she is now only seeking access to the records of one of the affected parties including an interview that was conducted with the police.

The appellant responded by stating:

Insofar as the personal information that is part of the excluded records relates solely to [her daughter], the Appellant states that she is entitled to the excluded records and seeks the immediate release of such information to her under the exemption clause set out in section 14(4)(c).

Insofar as the personal information that is part of the excluded record relates solely to the Affected Party, the Appellant does not seek disclosure of same.

Insofar as the personal information that is set out in the excluded records is linked to both [her daughter] and the Affected Party, and can be severed, the Appellant seeks such part of the personal information relating to [her daughter]. Where such information cannot logically be severed, the Appellant requests that pursuant to section 14(4)(c), for compassionate reasons the entirety of the excluded records should be released to her. The reasons for such release pursuant to this exemption are elaborated on below.

As both the Police's representations and the appellant's representations raise an issue relating to the scope of the request, I have made scope of the request an issue in this appeal.

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

.

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Section 17(1)(a) requires a person seeking access to a record to make a request in writing to the institution that the person believes has custody or control of the record and to provide sufficient detail to enable an experienced employee of the institution to identify the record. If the request is not sufficiently detailed the institution shall inform the requester and offer assistance and seek clarification of the request. This office has the power to determine on appeal what the scope of the request is.

As noted in the passage from the representations of the appellant, the appellant is not seeking access to any personal information that relates solely to the affected party and therefore this personal information has been removed from the scope of the request. However, the appellant does not qualify or limit her request for access in any other way. In these circumstances, it is reasonable to conclude that the appellant continues to seek access to her own personal information. More importantly, the appellant also clarifies that she wishes to pursue access to her daughter's personal information including any of her daughter's personal information that is mixed with and unseverable from the affected party's personal information.

In my opinion, although the appellant has narrowed the scope of the request in this proceeding to exclude the non-responsive information and the information of individuals other than the affected party, she has not narrowed the scope of the request in the manner suggested by the Police. This view is supported by the Mediator's Report which was sent to both parties at the conclusion of mediation. In these circumstances, I find that the appellant continues to seek access to her own personal information, the personal information of her daughter and the personal information of the affected party where it is not capable of being severed from the personal information of her daughter.

I now turn to consider this position in light of the information that is contained in the severed portions of the records. I find that the severed portions of record 1 contain the information of individuals that has been removed from the scope of the request and information that relates solely to the affected party. Record 7 also contains information of individuals that was removed from the scope of the request during mediation, and information that the Police have identified as non-responsive. As a result, all of the severed information from records 1 and 7 has been removed from the scope of the request, and no other information in these records is at issue in this appeal. Therefore, this finding is sufficient to dispose of the appeal as it relates to these records, and I uphold the decision of the Police to withhold the severed portions of records 1 and 7.

Some of the severed portions of records 5 and 6 contain the information of two individuals, namely their names, addresses and telephone numbers. This information has been removed from the scope of the request.

I also find that some of the severed portions of records 5 and 6 contain information that relates solely to the affected party, and therefore, this information has been removed from the scope of the request.

All the severed portions of record 8 also relate solely to the affected party. As no other information in this record is at issue, this finding is sufficient to dispose of the appeal as it relates to this record. Therefore, I find that the severed portions of this record should not be disclosed and I uphold the decision of the Police with respect to this record.

Record 11 includes an audio recording of statements and the voices of two individuals that accompanied the affected party. This is the information of those two individuals which, as noted above, was removed from the scope of the request. Record 11 also contains information that relates solely to the affected party and therefore, this information has also been removed from the scope of the request.

Therefore, I find that the information that falls within the scope of this request includes the personal information of the appellant and the appellant's daughter. Also within the scope of this request is any personal information of the affected party that is not capable of being severed from the personal information of the appellant's daughter. Any reference to the severed portions of records 5 and 6 below is a reference to the portions that fall within the scope of the request unless otherwise stated. In view of my findings above, only records 5, 6 and 11 remain at issue in this appeal.

PERSONAL INFORMATION

The Police rely on the discretionary exemptions in section 38(a) in conjunction with section 8(2)(a), and section 38(b) in conjunction with section 14, to support the severances made to responsive records. Before I can determine which sections of the *Act* may apply to the severed information, 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), in part, 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,

- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Representations

The Police state that the records contain the personal information of the appellant, the appellant's daughter and other individuals including their names, addresses, telephone numbers, dates of birth and statements made during the investigation conducted by the Police.

The affected party submits that the responsive records contain her personal information including information about her health, education, work and lifestyle. She submits that the records also include statements she made about the appellant's daughter.

The appellant submits:

The Appellant has reviewed the definition of personal information as defined in section 2(1) of the Act and can only assume that the excluded records must contain personal information as therein defined. The same would otherwise not have been excluded by the [Police]. Furthermore, the excluded information is mixed, or co-mingled in that it relates to the Affected Party as well as the Appellant's daughter. How exactly the co-mingling has occurred, and whether or not it is amenable to being severed has never been explained to the Appellant but, in itself, has never been stated as a reason for refusing disclosure.

The appellant also submits:

If any part of the excluded records includes an opinion or view expressed by the Affected Party (or anyone else) about [her daughter] it is submitted that the definition of "personal information" would make such views and opinions the

personal information of [her daughter] (and not personal information of the Affected Party), and therefore should be released under 14(4)(c).

Analysis and Findings

I have carefully reviewed the records and the representations of the parties. I find that the severed portions of records 5, 6 and 11 contain the appellant's personal information including information about her residence, the length of time that she has resided there and information about her children (paragraphs (d), (e) and (h) of the definition).

I also find that the severed portions of records 5, 6 and 11 contain the appellant's daughter's personal information including information relating to her medical history (paragraph (b)), the opinions or views of the affected party as they relate to her (paragraph (g)), her name along with other personal information about her (paragraph (h)), information about her activities and relationship with the affected party (paragraph (h)), and information relating to the circumstances of her sudden death (paragraph (h)).

I also find that the severed portions of records 5, 6 and 11 contain the affected party's personal information including the information relating to her activities and interactions with the appellant's daughter and her friends (paragraph (h)) and her personal opinions or views (paragraph (e)). In addition, record 11, because it is a digital recording, also includes the recorded images of the affected party such as her physical characteristics, voice, speech and mannerisms (paragraph (h)).

Previous orders have established that where a record contains both the personal information of the requester and another individual, the request falls under Part II of the *Act* and the relevant personal privacy exemption is the exemption at section 38(b) [Order M-352]. Some exemptions, including the invasion of privacy exemption at section 14(1), are mandatory under Part I but discretionary under Part II, and thus in the latter case an institution may disclose information that it could not disclose if Part I is applied [Order MO-1757-I].

Furthermore, the correct approach is to review the entire record, not only the portions remaining at issue, to determine whether it contains the requester's personal information. This record-by-record analysis is significant because it determines whether the record as a whole (rather than only certain portions of it) must be reviewed under Part I or Part II of the *Act* [Order M-352].

Applying this record-by-record approach, I find that records 5, 6 and 11 contain the personal information of the appellant and other individuals, including her daughter and the affected party. Accordingly, for the severed portions of records 5, 6 and 11, which I have found to contain the personal information of the appellant's daughter and/or other individuals, as well as the personal information of the appellant, I will consider whether the severed portions qualify for the personal privacy exemption under the discretionary exemption at section 38(b), found in Part II of the *Act*.

In the particular context of section 14(4)(c) (addressed in detail below) it is important to determine the extent of the personal information relating to the appellant's deceased daughter in the records at issue. Record 11 is a digital recording of the affected party's Police interview which I have already noted includes the personal information of the appellant and her daughter. Much of the personal information of the appellant and her daughter in record 11 is also contained in records 5 and 6 because those records are, in part, notes taken by two Police officers during the Police interview of the affected party. However, because record 11 is a digital recording, it also includes the affected party's personal information including her voice, image and mannerisms, as well as information about her activities where they relate to the appellant's daughter. The result is that some of the information in record 11 qualifies as both the personal information of the appellant's daughter *and* the affected party.

This is equally true with records 5 and 6 which also contain information about the affected party's activities as they relate to the appellant's daughter. This information also qualifies as both the information of the appellant's daughter *and* the affected party.

With respect to this issue, the appellant submits that the information of the appellant's daughter is "co-mingled" with the personal information of the affected party. In particular, the appellant submits:

Not known to the Appellant, but suspected to be the case is that the personal information refused to be disclosed by the [Police] is of such a "co-mingled" nature as to risk the disclosure of personal information pertaining to the Affected Party – and hence the blanket refusal. But if this is in fact true, and if both the Appellant and Affected Party are joint "stakeholders" or owners of that co-mingled information, does this not make both parties equally entitled to all?

I find that in the circumstances presented by records 5, 6 and 11, portions of the records pertaining to the appellant's daughter constitute the personal information of *both* the appellant's daughter and the affected party.

However, I do not agree that, as a result, "both parties are equally entitled to all" as is suggested by the appellant. The rights of the parties with respect to the information must be determined by the application of the provisions of the *Act*.

PERSONAL PRIVACY

I must now consider whether the information at issue in the records is exempt under section 38(b). The Police have cited sections 14(2)(f), 14(2)(h) and 14(3)(b) in support of their view that disclosure of this information would constitute an unjustified invasion of personal privacy.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion"

of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

Based on its wording, the discretionary section 38(b) exemption will apply if I am satisfied that disclosure *would* constitute an unjustified invasion of personal privacy. Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

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

Section 14(2) lists criteria for the institution 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 the disclosure of which 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. Of relevance to this appeal, this section was recently amended by the addition of section 14(4)(c) which states:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (c) discloses personal information about a deceased individual to 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.

If none of the presumptions in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2), as well as other considerations that are relevant in the circumstances of the case. If a presumption listed in section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2).

A presumption can, however, be overcome if the personal information is found to fall under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record that clearly outweighs the purpose of the section 14 exemption [*John Doe v. Ontario (Information and Privacy Commissioner)*(1993), 13 O.R. (3d) 767]. Therefore, section 14(4) creates an exception to the exemption in section 14(1).

Section 14(4)(c)

The principal issue in this appeal is whether the exception to the exemption in section 14(4)(c) permits the further disclosure of the appellant's daughter's personal information (which may be co-mingled with the information of other individuals including the affected party) in records 5, 6 and 11. Based on the wording of this provision, a finding that the exception in 14(4)(c) applies to some or all of this personal information means that disclosure of that information would *not* be an unjustified invasion of personal privacy. Accordingly, where this provision applies, the information is not exempt under section 38(b) [see Orders MO-2171 and MO-2165].

The Police submit that section 14(4)(c) does not apply because the disclosure of the appellant's daughter's information would constitute an unjustified invasion of the affected party's privacy. The appellant submits that section 14(4)(c) applies and that the personal information of her daughter should be disclosed.

Scope of section 14(4)(c)

I have found that parts of records 5, 6 and 11 consist of the personal information of the appellant's daughter. Record 11 also contains the affected party's image, voice and mannerisms, and records 5, 6 and 11 contain information about the affected party's activities where these also involve the appellant's daughter. This information is inextricably intertwined in a way that cannot be fully resolved by severing, and accordingly, these records raise one of the more difficult aspects of applying section 14(4)(c), namely the question of how to treat information that is clearly the personal information of the deceased individual, but, at the same time, is also the personal information of another individual or individuals.

The first question to address here is whether the reference to "personal information about a deceased individual" can include information that also qualifies as that of another individual. In my view, this question should be answered in the affirmative. The circumstances of an individual's death, particularly one that is followed by a police or coroner's investigation, are likely to involve discussions with other individuals that will entail, to a greater or lesser extent, the collection and recording of those individuals' personal information. In my view, an interpretation of this section that excludes any information of a deceased individual on the basis that it also qualifies as the personal information of another individual would be inconsistent with the definition of "personal information", set out above, since the information would clearly qualify as recorded information "about" the deceased individual. It would also frustrate the obvious legislative intent behind section 14(4)(c), of assisting relatives in coming to terms with the death of a loved one.

In my view, this approach is borne out by the legislative history of section 14(4)(c) (and section 21(4)(d) of the *Freedom of Information and Protection of Privacy Act*, the equivalent section in that statute). Prior to the enactment of this provision, denial of access to information to family members regarding the circumstances of their loved ones' death was often forced upon institutions by the operation of section 14(3). Examples of the kind of information previously

withheld include records such as those at issue here and include police occurrence reports, ambulance call reports and 911 call reports [see Orders PO-2473, PO-1757]. This information was previously determined to be exempt from disclosure as an unjustified invasion of the privacy of the deceased because the presumptions of unjustified invasion in section 14(3)(a) (relates to medical history) and/or 14(3)(b) (compiled and identifiable as part of an investigation into a possible violation of law) applied to much of the personal information in these types of records.

As noted previously, grieving relatives who have been appointed administrators of the estates of their deceased family members, also have the option of seeking access to the deceased's personal information by exercising the rights of the deceased pursuant to section 54(a) of the *Act*. Section 54(a) states:

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

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

However, the rights of requesters to seek access to personal information under this section were limited because previous orders of this office gave this section a narrow interpretation (and as stated above, the provision does not apply here.) In Order M-1075 former Assistant Commissioner Tom Mitchinson stated:

The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the Act, where "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.

In order to give effect to these rights, I believe that the phrase "relates to the administration of the individual's estate" in section 54(a) should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate.

The effect of this was that the deceased's personal representatives who sought access to personal information surrounding the circumstances of the death were not able to get access to records such as those at issue here because they were usually found to fall outside the scope of section 54(a).

The *Act* was the subject of a three year review by the Standing Committee of the Legislative Assembly in 1994. In the "Report on the Municipal Freedom of Information and Protection of Privacy Act" presented to the Legislature in December of 1994, the Standing Committee stated:

Secondly, even where a “personal representative” has been appointed, but the reason for the request for access to personal information is not the administration of the deceased’s estate, subsection 54(a) cannot be relied upon. Where for example, the family of a deceased person is concerned about the health care their family member received or the medical history of the deceased person because of the genetic predisposition to certain illnesses, section 54(a) cannot be used.

In all of these situations a family member, like any unrelated person, is considered to be a third party seeking access to another person’s personal information and under the Act such information will only be disclosed if the disclosure does not constitute an unjustified invasion of personal privacy under section 14.

After reviewing the history of the *John Doe* decision (cited above), this report continues:

The Committee is concerned about this apparent gap in the legislation and believes that the Act should be amended to ensure wider access by family members and others who have a legitimate interest in the information.

The Committee proposed the following:

61. that subsection 54(a) be amended to ensure that family members and others with a legitimate interest are given greater access to the deceased person’s personal information in a way that does not require the formality of court appointment and that is not limited to situations involving administration of the deceased person’s estate.

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

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

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

In 1999, the IPC undertook a study on the impact of the legislation on individuals seeking access to information about deceased loved ones. We surveyed

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

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

...

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

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

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

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

Section 14(4)(c) had its genesis in Bill 190, the *Good Government Act*, which was an omnibus bill designed to amend a number of different legislation. During second reading debates on the bill, Mr. Zimmerman MPP, made the following comment regarding the amendment to section 14(4)(c):

Proposed amendments to the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act would allow disclosure of personal information about a deceased person to a spouse or close relative in very limited compassionate circumstances.

Accordingly, in my view, it is consistent with both the definition of “personal information” in section 2(1) and the legislative purpose behind this section to interpret “personal information about a deceased individual” as including not only personal information solely relating to the deceased, but also information that qualifies as the personal information of not only the deceased, but another individual or individuals as well.

The conclusion that personal information about a deceased individual can include information about other individuals, raises the further question of how the information of those other individuals should be assessed in deciding what to disclose under section 14(4)(c). In my view, assistance is provided in that regard by the legislative text, which permits disclosure that is “in the circumstances, desirable for compassionate reasons.”

Where this is the case, the “circumstances” to be considered would, in my view, 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).

As well, the fact that the protection of personal privacy is one of the *Act*’s purposes, articulated in section 1(b), must be considered in assessing whether to disclose information that, in addition to being personal information of the deceased, also qualifies as the personal information of another individual or individuals.

Another circumstance to consider is the privacy of the deceased individual. In this regard, it is noteworthy that section 2(2) of the *Act* provides that information about deceased individuals only ceases to be “personal information” after they have been dead for more than thirty years.

Steps to follow in applying section 14(4)(c)

In my opinion, 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 disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?

Step 1 - Personal Information of the Deceased

I have found, above, that the records all contain the personal information of the appellant, her deceased daughter, and the affected party. In records 5, 6 and 11, some of the personal

information of the deceased also qualifies as the affected party's personal information, and as noted above, this is inextricably intertwined with the appellant's daughter's personal information. Accordingly, severing this information to avoid disclosure of the affected party's personal information is not practicable. I find that this requirement for the application of section 14(4)(c) is satisfied.

Step 2 - Spouse or "Close Relative"

"Close relative" is defined in section 2(1) of the *Act*:

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

I am satisfied that the appellant is the parent of the deceased individual whose personal information is contained in the records at issue, and therefore she is a "close relative". I find that the requirement for the application of section 14(4)(c) is satisfied.

Step 3 - Desirable for Compassionate Reasons

Representations

The essence of the Police's position with respect to section 14(4)(c) appears to be that the section requires consideration of the appellant's right of access to the personal information of her daughter, as well as the privacy rights of the affected party. With respect to the application of section 14(4)(c) of the *Act*, the Police state:

The requester has applied for the information for compassionate reasons as "part of our desired closure in dealing with the unexpected loss of a cherished child". The Barrie Police Service has carefully considered the requester's need for closure in dealing with this matter. In reviewing the withheld portions of the record, there is nothing to indicate that disclosure of this additional information would provide any further assistance to the requester in dealing with this tragic situation. The requesters have spoken at length with the investigating officers about the details of the police investigation and they have received all of the pertinent facts from the Barrie Police Service. Furthermore, the requester has received the majority of the information compiled during the sudden death investigation. The Barrie Police Service does not believe that violating the right to privacy of the involved individual, especially when she has specifically refused to provide consent to the requester, would assist the requester any further in dealing with her loss.

The Police also made representations on the application of sections 14(3) and 14(2) to the issues in this appeal. Some of the evidence that the Police refer to in this other context is relevant to the issues raised by the application of section 14(4)(c). For example, the Police state:

Section 14(3)(b) of [the *Act*] states that 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. The [Police] attended at this incident as a result of receiving a call for service. As a result of the investigation, the Police determined that the victim did not meet with foul play and the matter did not warrant the laying of criminal charges. This result does not negate the fact that an investigation commenced as an investigation into a possible violation of law.

The Police also state:

The affected party was in an extremely emotional state after learning of the death of her roommate and this leads to the sensitive nature of the content of her interview. Access to records was also denied under section 14(2)(h) of [the *Act*] as the personal information was supplied by the individual to whom the information relates in confidence. During third party notification, the affected party confirms that she was advised by the investigating officers that her interview would remain confidential and would only be used by the Barrie Police Service to assist in their investigation. As a police agency we frequently require information from members of the public to assist in investigating possible violations of the law. Members of the public must feel confident that any information supplied is not shared without their consent except for the purpose of completing these investigations.

For confidentiality reasons, I cannot disclose the representations of the affected party. However, the essence of the affected party's submissions on this issue is that she has provided the appellant with information regarding the circumstances of the death of her daughter and any disclosure of the information in these records would constitute an unjustified invasion of her privacy. The affected party also submits that she was assured that her interview with the Police would be kept confidential and for that reason any disclosure would amount to an unjustified invasion of her privacy.

Responding to the representations of the Police, the appellant submits:

In particular, section 14(4) sets out the circumstance under which a disclosure **does not** constitute an unjustified invasion of personal privacy. In particular section 14(4)(c) provides that disclosure does not constitute an unjustified invasion of personal privacy if it discloses personal information about a deceased individual to a close relative and such disclosure was made as recognition that disclosure is desirable on compassionate grounds.

The *Merriam-Webster* online dictionary defines "compassion" as follows:

Compassion (noun) - sympathetic consciousness of others' distress together with a desire to alleviate it.

Based on the above, prior to the introduction of section 14(4)(c) in 2006, the personal information of a deceased person would have been protected for 30 years. With section 14(4)(c) now in force, generally all personal information of a deceased person should be released and the Appellant would be entitled to receive any and all personal information relating to [her daughter] where she can show cause, based on compassionate grounds for the receipt of such information. The Appellant relies on section 14(4)(c) to request the release of all personal information about [her daughter] to her as [her] mother on the basis that such disclosure is desirable and fair on compassionate grounds.

If such disclosure of [her daughter's] personal information would also result in disclosure of personal information relating to the Affected Party because severance was not possible in a logical manner, or because it is co-mingled, then the Appellant suggests that the introduction of section 14(4)(c) allows for the release of such information to her for compassionate reasons.

However, the appellant states, in the alternative:

Again, if there is an overlap between the personal information of [the appellant's daughter] and that of the Affected Party, balancing the interests of both parties and the fact that the cause of death of [the appellant's daughter] remains very much an open question until it is known what the hours prior to [her] death were like, it is submitted that the information should be released to the Appellant.

The appellant further submits:

The excluded records that are being sought by the Appellant may be necessary or even crucial towards establishing an accurate diagnosis or cause of death. This information can be passed on to siblings and other family members who may perhaps prevent a similar occurrence in their lives by knowing the information. In other words, the fact of [the appellant's daughter's] siblings having a potential genetic based illness or allergy that could result in another fatality for the Appellant's other children is submitted as a legitimate concern.

Finally, the appellant submits:

[T]he conflicts and inconsistencies noted by the Appellant have had the effect of undermining the Appellant's ability to grieve. Therein lies the crux of what compassion means in the context of the Appellant's appeal. It is respectfully submitted that there exists sufficiently strong compassionate grounds to justify the ordering of disclosure of records sought insofar as they relate to [her daughter].

Analysis and Findings

As is suggested by the Police and the appellant in the representations referred to above, section 14(4)(c) raises an issue about the interpretation of the words “desirable for compassionate reasons”. The appellant refers to the *Webster’s Online* dictionary definition of “compassion.” The *Concise Oxford Dictionary, Eighth Edition*, defines “compassionate” as follows: “*adj.* sympathetic, pitying.” Compassion is defined in the *Concise Oxford Dictionary, Eighth Edition*, as follows: “*n.* pity inclining one to help or be merciful.”

I accept these definitions as evidence of the plain and ordinary meaning of the word “compassionate” and adopt it for the purposes of this appeal.

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

I now turn to consider the application of section 14(4)(c) to the portions of records 5, 6 and 11 that remain at issue.

Record 11

As previously noted, record 11 is a digital recording of the affected party taken during an interview conducted by the Police in the course of their investigation into the sudden death of the appellant’s daughter. Some of the information in the digital recording is solely the affected party’s personal information and the personal information of other individuals, which I have already found is outside the scope of the request. For example, the affected party discusses activities occurring outside the apartment where she and the deceased individual resided that are unrelated to the deceased individual or the circumstances of her death. Also, the affected party provides telephone numbers of other individuals to the Police. To the extent that it is possible to do so and in accordance with section 4(2) of the *Act*, I find that all non-responsive personal information should be severed from the digital recording of the affected party’s interview. The particulars of these portions of record 11 that should be severed are set out below.

However, much of the personal information qualifies as both the personal information of the appellant’s daughter and the affected party. With respect to this information only, any order that I make that requires the disclosure of the appellant’s daughter’s personal information will result in the disclosure of the personal information of the affected party. In this situation, the relevant circumstances that must be considered are the nature of the request, and the privacy interests of the appellant’s deceased daughter *and* the affected party.

I have already determined that the appellant falls within the definition of “close relative” in section 2(1) of the *Act* and that the information she requests in record 11 is the personal information of her deceased daughter.

I turn first to consider the privacy interests of the appellant’s deceased daughter and the nature of the request. Although the Police refer to the affected party’s privacy interests, they did not submit any representations concerning the appellant’s daughter’s right to privacy.

In assessing the relevant circumstances, including the appellant’s need to receive this information to gain a better understanding of the circumstances of her daughter’s death, as well as her daughter’s right to privacy, I give significant weight to the fact that much of her daughter’s personal information in this record includes the affected party’s observations about the deceased’s health and circumstances prior to her death. In my view, this is the appellant’s daughter’s sensitive personal information. However, in circumstances where the deceased is determined to have died of natural causes and grieving relatives seek access to information about the circumstances of the death, I also attribute significant weight to the appellant’s need for this information as part of her grieving process. I have also considered the appellant’s perception that the information that has been disclosed to her to date has not provided her with clarity regarding the circumstances of death as a relevant circumstance favouring disclosure. I give significant weight to the fact that the appellant is seeking information for the purposes of arriving at an accurate diagnosis or cause of death of her daughter. I also give significant weight to the relationship that existed between the appellant and her daughter and the fact that the appellant appears to have been involved in her daughter’s life despite the fact that at the time of her death she did not reside at the family home. There is no evidence that the appellant’s daughter was estranged from the family.

I must also now consider the additional circumstance of the affected party’s privacy rights since disclosure of the deceased individual’s information will result in the disclosure of the affected party’s personal information.

The Police and the affected party did provide representations on this issue. I have carefully considered those representations. In arriving at my conclusion, I give moderate weight to the fact that the personal information of the affected party was provided to the Police in the context of a law enforcement investigation. I accept that the Police advised the affected party that her interview would remain confidential and would only be used by the Police to assist in their investigation. However, I have also considered the fact that the affected party must have been aware that if the Police had determined that there was any evidence of “foul play” any agreement as to confidentiality she had with the Police would not have been enforceable. I give this consideration moderate weight in view of the fact that the law enforcement investigation has concluded and that the Police have found that the appellant’s daughter died of natural causes.

I give considerable weight to the fact that the affected party’s personal information in the record is sensitive, because it reveals her emotional state at the time the statement was provided to the

Police. I have considered the affected party's confidential representations regarding her own health and I give considerable weight to them and the possibility that disclosure may cause her distress. However, as noted, wherever possible, I will be ordering the severance of personal information relating only to the affected party, which will limit the disclosure of sensitive personal information.

The Police submit that there is nothing to indicate that disclosure of the information would provide further assistance to the appellant in her grieving process. I attribute little weight to this factor as I accept the evidence of the appellant regarding her need to know all of the circumstances surrounding her daughter's death, and to resolve what she believes is a lack of clarity in the information that has been provided to her to date about the circumstances of her daughter's death. Contrary to the position taken by the Police, having reviewed record 11, I am satisfied that it contains the type of information regarding the events surrounding the death that would assist family members in better understanding the death.

The factors that I have considered favouring disclosure of the appellant's daughter's information have already been discussed above. I will not repeat this analysis here.

Having carefully considered all the circumstances surrounding this request and appeal, including the interests of the appellant, her daughter and the affected party, I find that disclosure of the appellant's daughter's personal information to the appellant in record 11 is "in the circumstances, desirable for compassionate reasons." Although I take the affected party's concerns very seriously, I have concluded that in the circumstances of this case, and in relation to the information in the interview that qualifies as the appellant's daughter's personal information, the affected party's privacy interests must yield to the compassionate reasons for disclosure articulated by the appellant, with one exception.

I am cognizant of the fact that the appellant is aware of the identity of the affected party. However, others who may obtain possession of the digital recording may not be. I am also of the view that the appellant can glean relevant information regarding her daughter's death without having access to the visual portion of the recording. As a result, some protection can be given to the affected party's privacy interests by blurring out or severing the images on the recording or by releasing only the audio portion of the recording, without impacting the compassionate reasons for disclosure articulated by the appellant. This will be reflected in the order provisions.

Therefore, I find that section 14(4)(c) applies to the information at issue in record 11, and the disclosure of the information at issue does not constitute an unjustified invasion of privacy. As a result, the exemption in section 38(b) in conjunction with section 14(1) does not apply to this record. Accordingly, record 11 should be disclosed to the appellant subject to the severances that I have identified below.

Records 5 and 6

As previously noted, records 5 and 6 are police officers' notes, portions of which record statements made by the affected party during the interview recorded on record 11. Apart from the personal information captured by a digital recording, the personal information of the appellant's daughter in records 5 and 6 is the same type of personal information that is contained in record 11.

For the same reasons that I have articulated above in concluding that the appellant's daughter's information should be disclosed in record 11, I now find that the factors that weigh in favour of the disclosure of the daughter's information in records 5 and 6 should be given more weight than the factors that favour the daughter's privacy. Having carefully considered all the circumstances surrounding this request and appeal, including the interests of the appellant and her daughter, I find that disclosure of the appellant's daughter's personal information in records 5 and 6 to the appellant is "in the circumstances, desirable for compassionate reasons."

Some of the personal information at issue in records 5 and 6 also includes personal information of the affected party. As is the case with record 11, therefore, the "relevant circumstances" that must be considered before ordering the disclosure of the appellant's daughter's personal information include the privacy interests of the affected party.

I have already found that the disclosure of the appellant's daughter's personal information in record 11 is desirable for compassionate reasons having considered all relevant circumstances including the interests of the affected party in the information that also qualifies as her personal information. For the same reasons, I find that the disclosure of the appellant's daughter's personal information in records 5 and 6 is "in the circumstances, desirable for compassionate reasons."

Therefore, I find that section 14(4)(c) also applies to the information at issue in records 5 and 6, and the disclosure of the information does not constitute an unjustified invasion privacy. As a result, the exemption in section 38(b) does not apply to these records. Accordingly, records 5 and 6 should be disclosed to the appellant subject to the severances that I have identified in relation to information that is solely the affected party's personal information and the other information that falls outside of the scope of this request.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

The Police claimed that section 38(a) in conjunction with section 8(2)(a) applies to the information severed from the responsive records. However, they did not submit any representations on this issue, although they were invited to do so. In addition, neither the appellant nor the affected party submitted representations on this issue.

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

Section 8(2)(a) states:

A head may refuse to disclose a record,

- (a) 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;

The word “report” means “a formal statement or account of the results of the collation and consideration of information”. Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I]. The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

I find that none of the records at issue meet the definition of a “report”. As noted above, these records consist of excerpts from police officers’ notebooks and a digital recording of an interview of the affected party. Generally, and despite the appearance of the word “report” in document names, occurrence reports and similar records of other police agencies 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, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120. In Order M-1109, former 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”.

I agree with this approach and adopt it here. On my review of the records remaining at issue in this appeal, I am satisfied that they also do not meet the definition of a “report” under the *Act*, in that they consist of observations and recordings of fact rather than formal, evaluative accounts. The content of these records is descriptive and not evaluative in nature.

Accordingly, I find that the discretionary exemption in section 38(a) in conjunction with section 8(2)(a) does not apply to the records.

PUBLIC INTEREST OVERRIDE

Although I made section 16 an issue in this appeal, I did not receive any representations from the appellant on this issue. However, in view of my findings above that all of the information in records 5, 6 and 11 which is responsive to the request should be disclosed to the appellant, it is not necessary for me to make a determination on the application of this section.

ORDER:

1. I order the Police to disclose to the appellant those portions of records 5 and 6 that contain the appellant's daughter's personal information. For the sake of clarity, I have highlighted the portions of records 5 and 6 in the duplicate copy of the records enclosed with this order that should **not** be disclosed. The information that is not highlighted is to be disclosed.
2. I order the Police to disclose record 11 to the appellant, with the following severances:
 - (a) Record 11 should be edited so that the images on the recording are blurred or so that only the audio portion of the interview is disclosed.
 - (b) The following portions, identified using the time codes that appear in the digital recording, of the audio recording should be severed – (i) from the beginning of the recording to 20:12:30 (ii) from 20:21:01 to 20:21:08 (iii) from 20:23:48 to 20:24:30 (iv) from 20:24:55 to 20:26:00 (v) from 20:26:40 to 20:26:50 (vi) from 20:27:18 to 20:27:41, (vii) from 20:31:21 to 20:31:38, (viii) from 20:36:14 to 20:37:13, and (ix) from 20:40:50 to the end.
3. I order the Police to disclose the records in compliance with provisions 1 and 2 of this order by **November 26, 2007**, but not earlier than **November 20, 2007**.

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ October 19, 2007