

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3666-I

Appeal MA17-525

Timmins Police Services Board

October 4, 2018

Summary: The appellant requested any and all information about the death of her brother from the Timmins Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The police located various police officers' notes and occurrence reports. The police withheld portions of the responsive records and identified other portions as non-responsive to the request. During mediation, it was identified that the responsive information was withheld on the basis of the personal privacy exemptions at sections 14(1) and 38(b) of the *Act*. The exception on compassionate grounds at section 14(4)(c) of the *Act* was also considered. The adjudicator upholds the decision of the police to withhold information on the basis of the discretionary personal privacy exemption at section 38(b) of the *Act*. She does not uphold the reasonableness of the search of the police for responsive records, and orders the police to conduct a further search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 14(1), 14(2), 14(3), 14(4)(c), 17, 21, 38(b), and 54(a).

Orders Considered: Orders P-1618, MO-2237 and MO-2245.

OVERVIEW:

[1] The Timmins Police Services Board (the police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

Please give me a copy of anything and everything pertaining to the death of [named individual]. I already filled out and signed a form for the 911 recordings in audio made on June 21, 2017 – apparently there should be

at least [two] 911 calls. If there is no extra charge, I'd also like to have the written form of these 911 calls also.

I would like any and all transcripts and records of both my conversations with [named constable] (phone I made to him on Sunday June 25, 2017 about 3:20pm) and also my conversations with (named constable).

[2] The deceased individual referenced in the request is the requester's brother.

[3] The police located various police officers' notes and occurrence reports in response to the request. The police issued an access decision granting partial access to responsive records.

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

[5] Mediation led to several developments. The basis of the decision to withhold some information was established as the personal privacy exemptions at sections 14(1) and 38(b) of the *Act*. The exception set out in section 14(4)(c) (compassionate grounds) of the *Act* was considered. The police also advised that portions of the records were withheld on the basis that they were not responsive to the request. The appellant indicated that she is seeking access to the withheld information, including the information identified by the police as not responsive to the request. The appellant also raised reasonableness of the search as an issue and gave the mediator a list of expected documents to share with the police. The police conducted another search and confirmed that no further responsive records were located, but the appellant insisted that there are additional records, including audio and video recordings of conversations between herself and named constables. Only one of several affected parties notified by the police and/or mediator consented to disclosure of their personal information.

[6] Since no further mediation was possible, the file moved to the adjudication stage, where I conducted an inquiry under the *Act*. I sought written representations from the police and several affected parties initially, and then from the appellant. The police, three of the affected parties, and the appellant provided written representations in response. Only the police agreed to sharing and referencing their representations. The representations of the appellant and the affected parties were not shared as they met the criteria for withholding information under *Practice Direction 7* of this office's *Code of Procedure*.

[7] It is agreed that the appellant's brother passed away in circumstances that she is trying to understand. As much as I empathize with this, I must be clear that the Information and Privacy Commissioner of Ontario (IPC) is not the appropriate forum to address the cause of the appellant's death or any other issues raised that are outside the legal authority of the IPC. I only have the legal authority under the Act to address the issues examined in this order.

[8] This order upholds the access decision of the police, but not the reasonableness of their search, for the reasons that follow.

RECORDS:

[9] The information at issue is contained within nine records, as follows:

Record Numbers	Type of Record
1, 2, 3, 4, 8, and 9	Officers' notes
5, 6, and 7	Occurrence reports

ISSUES:

- A. Which records are responsive to the request?
- B. Do the responsive records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 38(b) apply to the responsive information in Records 3, 5, 6, and 7?
- D. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?
- E. Did the police conduct a reasonable search for records?

DISCUSSION:

Issue A: Which records are responsive to the request?

[10] The request is for all records ("anything and everything") relating to the appellant's brother's death. To be considered responsive to the request, records must "reasonably relate" to the request.¹

[11] I have reviewed the records in their entirety, so I can confirm that portions of information withheld as not responsive to the request are unrelated to the request (or "non-responsive"), as follows:

- all redactions in Records 1, 2, 4, 8, and 9; and
- redactions on pages 103, 122 and 123 of Record 3.

[12] The non-responsive information concerns matters such as involvement in other people's cases. Examining the officers' notes, it is clear from the times noted in the margins that they are taken throughout the day as records of the activities of that particular officer, as those activities occur. Based on my review of the records, I accept

¹ Orders P-880 and PO-2661.

that the information withheld as non-responsive does not reasonably relate to the subject matter of the appellant's request.

[13] Since I uphold the police's decision to sever the non-responsive portions of the records, I will only consider the remaining issues in this appeal in relation to the responsive portions of the records.

[14] The remaining records at issue are Records 5, 6, and 7 and the redactions on pages 107-111, 113-115, 117-121 of Record 3.

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

[15] To determine which sections of the *Act* may apply, it is necessary to decide whether the responsive information in Records 3, 5, 6, and 7 contains "personal information" and, if so, to whom it relates. Here, the responsive records contain the information of the appellant, her deceased brother, and several identifiable individuals who are affected parties.

[16] Personal information is defined in part in section 2(1) as "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,

...

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

...

(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;

[17] What has been withheld in the records at issue consists of the personal information of identifiable individuals other than the appellant and the deceased, such

as names in conjunction with contact information, and statements to the police.²

[18] Records 3 and 5 contain the personal information of the appellant, her deceased brother, and other identifiable individuals. The personal information includes names (paragraph h, above) appearing with contact information (paragraph d, above), and other personal information as described in the introductory wording of the definition of "personal information" in section 2(1) of the *Act*.

[19] Records 6 and 7 contain the personal information of the deceased and other identifiable individuals, as described in the introductory wording of the definition of "personal information" in section 2(1) of the *Act* as well as identifying information such as names (paragraph h, above). Records 6 and 7 do not contain the personal information of the appellant.

[20] Having found that the responsive records contain the personal information belonging to various identifiable individuals, the appellant, and/or her deceased brother, what I must do now is decide whether the appellant has a right of access to the personal information of the affected parties that the police have withheld, under section 38(b).

Issue C: Does the discretionary personal privacy exemption at section 38(b) apply to the responsive information in Records 3, 5, 6, and 7?

[21] All the responsive records contain the personal information of the deceased. Records 3 and 5 contain the appellant's personal information, and Records 6 and 7 do not.

[22] Under the *Act*, different exemptions may apply depending on whether or not a record contains the personal information of the appellant. If the records contain the appellant's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary personal privacy exemption at section 38(b) may apply. If the records contain the personal information of an individual other than the appellant but not that of the requester, access to the records is addressed under Part I of the *Act* and the exemption at section 14(1) may apply.

[23] Although the police have claimed that section 14(1) is the personal privacy exemption that applies to the responsive portions of the records, the correct exemption to apply in these circumstances is at section 38(b). As discussed above, Records 3 and 5 contain the personal information of both the appellant and other identifiable individuals, so I must consider them under section 38(b). As for Records 6 and 7 (which do not contain the appellant's personal information), because the police have already disclosed the personal information of the deceased and other identifiable individuals in these records to the appellant, as if she has a right of access in the place of her

² It appears that some personal information that was disclosed to the appellant was disclosed without the consent of certain affected parties. I would, therefore, remind the police of their obligations under the *Act* at section 21, in this regard.

brother,³ I will consider Records 6 and 7 under section 38(b). However, as explained later in these reasons, my ultimate finding would be the same under section 14(1).

[24] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from that right.

[25] Under section 38(b), if a record contains personal information of both the appellant and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁴

[26] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), sections 14(2) to (4) provide guidance.

[27] For records covered by section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties to determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁵ Any unlisted factors that may also be relevant must be considered, too. Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not considered to be an unjustified invasion of personal privacy.

[28] For records covered by section 14(1), the institution is not allowed to disclose personal information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)]. In addition, under section 14(1), there is no consideration of section 14(2) factors if a section 14(3) presumption applies. A presumption under section 14(3) can only be rebutted if one of the circumstances in section 14(4) applies, or if the public interest override at section 16 applies.

Section 14(4)(c)

[29] If any of the paragraphs in section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b) or section 14(1).

[30] Section 14(4)(c) states:

³ See section 54(a) of the *Act*.

⁴ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

⁵ Order MO-2954.

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

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

[31] The term "close relative" is defined in section 2(1) of the Act and includes a sister.

[32] For section 14(4)(c) to apply, the answer to all of the following questions must be yes:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, **in the circumstances of the request?**⁶ [Emphasis mine.]

[33] It is agreed that the personal information of a deceased individual is in the records, and the requester is a "close relative" under the *Act*, being his sister. Therefore, the first two requirements of the above test are met.

[34] Regarding the third requirement, after the death of an individual, it is that person's close relatives who are best able to act in their "best interests" with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons".⁷

[35] However, I am not satisfied that the third requirement has been met because of the particular circumstances of this request.

[36] Personal information about a deceased individual can include information that also qualifies as that of another individual, as it is the case here with statements given by identifiable individuals about the appellant's brother. Where this is the case, the "circumstances" to be considered would include the fact that the personal information of the deceased is also the personal information of other individuals.

[37] In this particular case, it is crucial to keep in mind that the police have already disclosed most of the responsive records to the appellant, and have only withheld (mostly witness') names and contact information. I give this very significant weight in assessing whether any further disclosure is "desirable for compassionate reasons" to

⁶ Orders MO-2237 and MO-2245.

⁷ Order MO-2245.

meet the third part of the test for section 14(4)(c). The responsive records disclosed to the appellant include the statements of affected parties, which is their personal information (and that of the deceased) as described in the introductory wording of the definition of "personal information" in section 2(1) of the *Act*. It is not clear from the file whether the police decided to disclose as much of the responsive records as they did on the basis of section 14(4)(c) or not. Regardless of the basis of their decision, this level of almost full disclosure of the responsive records weighs against finding that section 14(4)(c) applies to the remaining bits of personal information that have been withheld.

[38] The factors and circumstances referred to in section 14(2) may also provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 14(4)(c).⁸ Later in these reasons, I explain that there are no listed section 14(2) factors favouring disclosure that apply, and that the presumption at section 14(3)(b) and the two factors at sections 14(2)(f) and 14(2)(h) apply and outweigh the unlisted factor favouring disclosure of the grieving appellant's desire for the information not disclosed to her. In these circumstances, I find that section 14(4)(c) does not apply to the remaining portions of personal information that have been withheld from the appellant.

Section 14(3)

[39] Although the police did not specifically claim that any presumptions at section 14(3) apply, I find that the presumption at section 14(3)(b) applies.

[40] Section 14(3)(b) says:

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;

[41] The responsive records in this case were created because the appellant's brother passed away and the appellant asked the police to investigate his death. I find that this context brings these records within the scope of the presumption at section 14(3)(b). The presumption at section 14(3)(b) applies even though no criminal proceedings were commenced against any individuals⁹ because all that is required for this presumption to apply is that there was an investigation into a possible violation of law,¹⁰ and from my review of the evidence, there was one in this case.

[42] If I were examining Records 6 and 7 under section 14(1) (as if the appellant had no right of access in the place of her brother), disclosure of the information withheld in

⁸ Order MO-2237.

⁹ Orders MO-2213, PO-1849 and PO-2608.

¹⁰ Orders P-242 and MO-2235.

Records 6 and 7 is presumed to be an unjustified invasion of personal privacy under because section 14(3)(b) applies. This presumption cannot be overcome by section 14(4)(c) because that exception does not apply to the information at issue, as already discussed. Nor can the presumption at section 14(3)(b) be overcome by the “public interest override” at section 16¹¹ because it was not argued, and I find that there is insufficient evidence to warrant its application.

Section 14(2)

[43] Examining the records under section 38(b), I continue my analysis of whether disclosure would be an unjustified invasion of personal privacy by turning to section 14(2).

[44] Section 14(2) states, in part:

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

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(b) access to the personal information may promote public health and safety;

...

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

...

(f) the personal information is highly sensitive;

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

...

Section 14(2) factors favouring disclosure

[45] Based on my review of the representations and evidence before me, I find that there is insufficient evidence to show that disclosing the personal information that has been withheld is “desirable for the purpose of subjecting the activities of the institution to public scrutiny” (paragraph (a), above), “may promote public health and safety”

¹¹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

(paragraph (b), above), or is "relevant to a fair determination of rights affecting [the appellant, as the requester]" (paragraph (d), above). Put another way, it is not clear to me how disclosing, for example, the names and contact information of affected parties that has been withheld would promote public scrutiny of the police or would promote public safety. Therefore, based on the evidence before me, no listed section 14(2) factors favouring disclosure apply to the information at issue.

[46] Although the appellant did not establish any of the listed factors that favour disclosure apply, it is clear that she is grieving the loss of her brother and would like as much information as possible about how he died. This is an unlisted factor that favours disclosure. However, it has little weight in these circumstances because the police have already disclosed most of the responsive records to the appellant, and what has been withheld is very limited personal information belonging to other identifiable individuals.

Section 14(2) factors weighing against disclosure

14(2)(f): highly sensitive

[47] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹²

[48] I find that the personal information of the affected parties that has been withheld is highly sensitive information because it was compiled in the context of an investigation into the death of the appellant's brother. The IPC has long held that personal information of individuals relating to their contact with police "as complainants, witnesses or suspects...is highly sensitive information".¹³

14(2)(h): supplied in confidence

[49] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁴ I find that the personal information of the affected parties who gave the police witness statements was information provided to the police in confidence. In addition, with respect to those affected parties that called for help, I accept that in the circumstances, they had a reasonable expectation of confidentiality when they called 9-1-1 for assistance.

[50] In conclusion, since the presumption at section 14(3)(b) and the factors at sections 14(2)(f) and 14(2)(h) far outweigh any unlisted interest of the appellant in the disclosure of the remaining personal information, I find that all the responsive information in the records is exempt from disclosure under the personal privacy exemption at section 38(b), subject to my review of the exercise of the discretion of the

¹² Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹³ Order P-1618.

¹⁴ Order PO-1670.

police.

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

[51] Based on the following, I find that the police properly exercised their discretion in deciding to withhold the personal information at issue.

[52] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[53] 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.

[54] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁵ This office may not, however, substitute its own discretion for that of the institution.¹⁶

[55] While the police did not provide representations on their exercise of discretion, based on the information disclosed to the appellant, I find that there is no evidence that their decision to withhold small portions of the responsive records was made in bad faith, for an improper purpose, or taking into account irrelevant considerations. What has been withheld appears to reflect a balancing, on the one hand, of the right of an individual to have access to her own personal information and that of her deceased brother on compassionate grounds with, on the other hand, the need to protect highly sensitive information that was given in confidence to the police in the course of a law enforcement investigation. The volume of disclosure already made does not weigh in favour of finding that what has been withheld from the appellant was withheld in bad faith towards her or for an improper or irrelevant purpose.

[56] Therefore, without evidence of improper decision-making, I uphold the exercise of discretion by the police.

Issue E: Did the police conduct a reasonable search for records?

[57] The appellant claims that additional records exist beyond those identified by the institution, so the issue to be decided is whether the police have conducted a

¹⁵ Order MO-1573.

¹⁶ Section 43(2).

reasonable search for records as required by section 17.¹⁷

[58] The Act does not require an institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹⁸ To be responsive, a record must be "reasonably related" to the request.¹⁹ A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²⁰

[59] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.²¹

[60] The appellant's position is that the police should have located a Timmins Transit video as a responsive record, but I do not find that she established a reasonable basis for this belief. The police have confirmed to our office that they did not ever have a responsive Timmins Transit video in their record holdings. I, therefore, do not find that there is a reasonable basis to believe that such a record should have been located in the police's search of their own records in response to the request.

[61] However, what is unclear or contradictory is the position of the police regarding conversations between the appellant and the duty officer on specified dates. At paragraph 2(a) of the police affidavit, the police do not deny that the appellant had conversations with a duty officer on specified dates. At paragraph 2(b), they note that "the only recorded line in [their] building is that of the duty officer's".²² And yet, they indicate at paragraph 2(d) that "no recording was made of any conversation other than those referred to in paragraph (c) on an external microphone [which was a different conversation from either of the conversations referred to in paragraph (a)]. The police did not explain how or why it was that conversations with a duty officer on the only recorded line were not recorded. Therefore, I have insufficient evidence to uphold the search as reasonable, and I am ordering a further search.

ORDER:

1. I uphold the access decision of the police. Accordingly, that portion of the appeal is dismissed.
2. I do not uphold the police's search for records responsive to the request. I order the police to conduct a further search for records of telephone conversations

¹⁷ Orders P-85, P-221 and PO-1954-I.

¹⁸ Orders P-624 and PO-2559.

¹⁹ Order PO-2554.

²⁰ Order MO-2185.

²¹ Order MO-2246.

²² Paragraph 2(b) of the affidavit from the police.

between the appellant and duty officer(s). The search should be conducted by an experienced individual or individuals employed by the police who would be reasonably knowledgeable in the subject matter of the request. This would include any employees in the police's IT department. I further order the police to provide me with an affidavit sworn by an employee or employees who have direct knowledge of the search, including the following information:

- the name(s) and position(s) of the individual(s) who conducted the search;
 - the steps taken in conducting the search;
 - the results of the search; and
 - if no records are located, a detailed explanation for why no records are located.
3. I order the police to provide representations and affidavits to this office, within 30 days of this order, detailing the further search for records responsive to the request.
 4. If the police locate further records responsive to the request as a result of the search, I order the police to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.
 5. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 2 and 3 of this order.

Original Signed by: _____

Marian Sami
Adjudicator

October 4, 2018 _____