

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3802

Appeal MA17-547

The Greater/Grand Sudbury Police Services Board

July 12, 2019

Summary: The appellant submitted an access request under the *Act* to the police for records relating to her father's death. The appellant referred to the compassionate reasons exception to the personal privacy exemption in section 14(4)(c) of the *Act* in her request. The police applied section 14(4)(c) in granting the appellant partial access to the records, but continued to withhold certain portions of the records under section 38(a), read with 8(1)(c) (investigative techniques or procedures), 8(1)(l) (facilitate commission of unlawful act), and 12 (solicitor-client privilege), and section 38(b) (personal privacy). The appellant appealed the police's decision and claimed that additional responsive records ought to exist, thereby raising reasonable search as an issue. In this order, the adjudicator upholds the police's decision in part. The adjudicator finds that the majority of the information at issue is exempt from disclosure and upholds the police's exercise of discretion to withhold it from disclosure. The adjudicator finds that some portions of the records are not exempt under section 8(1)(c) (or 38(a), read with section 8(1)(c), for the records containing the appellant's personal information) or section 8(1)(l) and orders the police to disclose them to the appellant. Finally, the adjudicator upholds the police's search for responsive records as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M56, as amended, sections 2(1) (definition of *personal information*), 8(1)(c), 8(1)(l), 12, 14(1)(f), 14(2)(f), 14(2)(h), 14(2)(i), 14(3)(b), 14(4)(c), 17, 38(a) and (b).

Orders and Investigation Reports Considered: Orders MO-2237 and MO-3393.

OVERVIEW:

[1] The appellant submitted an access request under the *Municipal Freedom of*

Information and Protection of Privacy Act (the *Act*) to the Greater/Grand Sudbury Police Services Board (the police) for records relating to the investigation of the fatal motor vehicle/pedestrian collision that resulted in the death of her father (the deceased). The appellant stated that she seeks access to all records, including officer's notes, a named individual's statement, the notes of the emergency responder, information from the Property Evidence Department and any records relating to the Crown's decision not to prosecute the individual involved in the collision. In her request, the appellant referred to the compassionate reasons exception to the personal privacy exemption in section 14(4)(c) of the *Act*.

[2] After locating responsive records, the police notified an individual whose interests may be affected by the disclosure of the records (the affected party) under section 21(1). The affected party did not consent to the disclosure of their personal information.

[3] The police issued an access decision to the appellant granting her partial access to the responsive records. The police withheld portions of the records under the discretionary exemptions in section 38(a) (discretion to refuse requester's own personal information), read with sections 8(1)(c) (investigative techniques or procedures), 8(1)(l) (facilitate commission of an unlawful act), 12 (solicitor-client privilege) and 13 (danger to safety or health), of the *Act*. The police also applied the personal privacy exemption in section 38(b) to withhold portions of the records. Finally, the police withheld portions of the records because they are not responsive to the appellant's request.

[4] The police then issued a revised access decision that identified additional officers' notes and claimed the exemptions previously identified to withhold them. The police confirmed that they continued to claim the exemptions identified in their original access decision.

[5] The appellant appealed the police's decision. In her appeal letter, the appellant took issue with the police's exemption claims and advised that she believes additional responsive records ought to exist.

[6] During mediation, the police conducted a number of additional searches and located additional responsive records. The mediator also sought and obtained consent from another individual whose interests may be affected by the disclosure of the records. Given the individual's consent and additional records, the police issued a number of revised access decisions to the appellant and disclosed a number of additional records to her. The police maintained their reliance on the exemptions in sections 38(a), read with sections 8(1)(c) and (l) and 12, and 38(b). The police no longer claimed the application of section 38(a), read with section 13, to withhold portions of the records. As a result, section 38(a), read with section 13, is no longer at issue.

[7] The appellant confirmed she does not pursue access to the information withheld as non-responsive. The appellant also confirmed she does not pursue access to the

severed portions of the photographs. Accordingly, these portions of the photographs are no longer at issue.

[8] The appellant confirmed her interest in pursuing access to the remaining information withheld from disclosure. The appellant also claimed that additional responsive records relating to the deceased's hearing aids, and his Air Miles and library cards ought to exist. The appellant reiterated that she relies on section 14(4)(c) of the *Act* to obtain access to the information remaining at issue.

[9] Mediation did not resolve the issues under appeal and the appeal moved to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry. I began my inquiry by inviting the police and the affected party to submit representations in response to a Notice of Inquiry, which sets out the facts and issues under appeal. The police submitted representations.

[10] I then invited the appellant to submit representations in response to the Notice of Inquiry and the police's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations.

[11] In her representations, the appellant raises a number of concerns she has with various communications with the police as well as the information contained in the records she received. I reviewed the appellant's representations in full and confirm I cannot address her issues with the police's conduct nor can I respond to the questions the appellant has regarding the veracity of certain statements or notes in the records. My jurisdiction is limited to deciding whether the appellant is entitled to access the information withheld from disclosure and whether the police conducted a reasonable search for responsive records.

[12] In the discussion that follows, I uphold the police's decision, in part. I find the records contain the personal information of the appellant, the deceased, and other identifiable individuals. I uphold the police's application of section 14(1) or 38(b) to withhold the personal information that remains at issue. I uphold the police's application of section 38(a), read with section 12, to withhold a portion of page 7. I uphold the police's application of sections 8(1)(c) (or section 38(a), read with sections 8(1)(c), where the records contain the appellant's personal information) and section 8(1)(l), in part. Accordingly, I order the police to disclose the portions I find to be not exempt to the appellant. With regard to the information I found exempt under discretionary exemptions, I uphold the police's exercise of discretion to withhold that information from disclosure. Finally, I uphold the police's search for responsive records as reasonable.

RECORDS:

[13] The information at issue consists of the withheld portions of the following pages

of records:

- Occurrence Summary: page 1
- Motor Vehicle Collision Report: page 3
- Homicide/Sudden Death Report: pages 5 and 6
- Supplementary Occurrence Report: pages 7, 9 to 12
- Witness Statements: pages 13 to 15, 17, 19 to 24, 26 to 31, 33, 35, 36, 38 to 44
- Police Officers' Notes: pages 45 to 60

To be clear, the police applied the exemptions claimed to withhold portions of these pages from disclosure.

ISSUES:

- A. Do the records contain *personal information* as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the personal privacy exemption in section 14(1) or 38(b) apply to the records at issue?
- C. Do the discretionary exemptions at sections 8(1)(c), (l) and 12 or section 38(a), in conjunction with the section 8(1)(c), (l) and 12 exemptions, apply to the information at issue?
- D. Did the police exercise their discretion under sections 8(1)(c) and (l), 12, 38(a) and (b)? If so, should this office uphold the exercise of discretion?
- E. Did the police conduct a reasonable search for records?

DISCUSSION:

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

[14] In order to determine which sections of the *Act* may apply to the records, it is necessary to decide whether they contain *personal information* and, if so, to whom it relates. That term is defined in section 2(1) of the *Act* as follows:

“personal information” means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

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

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

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[15] 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.¹ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[16] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be *about* the individual.³ Even if information relates to an individual in a professional, official or

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴

[17] The police submit the information at issue contains personal information relating to a number of individuals, including the driver of the vehicle, a witness, next of kin of the deceased and a landlord. The police submit that some individuals provided their names as a result of their professional involvement in the matter, but details such as their dates of birth or home addresses do not relate to them in a professional capacity.

[18] The police submit that the individuals whose personal information is at issue did not consent to the disclosure of their personal information to the appellant.

[19] The appellant did not address the issue of whether the records contain personal information within the meaning of section 2(1) of the *Act* in her representations.

[20] I have reviewed the records at issue. I find that the records contain personal information relating to the deceased, including: information about his family status, sex, age (paragraph (a) of the definition of *personal information* in section 2(1)), information relating to his medical history (paragraph (b)), his address and telephone number (paragraph (d)), the views or opinions of other individuals about the deceased (paragraph (g)), and his name where it appears with other personal information about him (paragraph (h)).

[21] In addition, I find that some of the records, specifically the Occurrence Summary at pages 1–2, the Supplementary Occurrence Reports at pages 7–8, 9, and 10, and the officer's notes at pages 58–60, contain personal information relating to the appellant. The personal information relating to the appellant includes information about her family status, sex, age (paragraph (a)), her address and telephone number (paragraph (d)), and her name where it appears with other personal information about her (paragraph (h)).

[22] Finally, I find that the records contain information relating to other identifiable individuals, such as the affected party, witnesses, and the next of kin of the deceased. Specifically, the records contain information about their family status, sex, age (paragraph (a)), addresses and telephone numbers (paragraph (d)), their personal view or opinions (paragraph (e)), and their names where they appear with other personal information relating to them.

[23] Accordingly, the records contain the personal information of the affected party, the deceased, the appellant and other identifiable individuals. I will consider whether section 14(1) applies to the records that do not contain the appellant's personal

⁴ *Supra* note 2.

information. However, because the records at pages 1–2, 7–8, 9, 10, and 58–60 contain personal information relating to the appellant, I must consider access to the withheld portions of these records under Part II of the *Act* and determine whether the discretionary exemptions at section 38(a), read with section 8(1)(c), (l) and 12, and 38(b) apply to them.

Issue B: Does the personal privacy exemption in section 14(1) or 38(b) apply to the records at issue?

[24] Under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. In the case before me, the majority of the records do not contain the personal information of the appellant, but do contain the personal information of the deceased, the affected party, and other identifiable individuals. If the personal information relating to these individuals fits within any of paragraphs (a) to (f) in section 14(1), it is not exempt from disclosure under section 14(1). I find that the information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 14(1) and the only exemption that could apply is paragraph (f), which states,

14(1) A head shall refuse to disclose personal information to any person other than the individual to whom the individual relates except,

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[25] As noted above, pages 1–2, 7–8, 9, 10, and 58–60 of the records must be reviewed under section 38(b) because these records contain both the appellant's and other individuals' personal information.

[26] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an *unjustified invasion* of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, however, the institution may also decide to disclose the information to the requester.

[27] Under both the section 14(1) and 38(b) analyses, I will consider the possible application of the provisions in sections 14(2), (3) and (4) to establish whether disclosure of the information at issue amounts to an unjustified invasion of personal privacy and is exempt from disclosure.

Sections 14(2) and (3)

[28] Under section 14(1), if any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the personal information at issue is presumed to be an unjustified invasion

of personal privacy. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if either one of the provisions at section 14(4) or the public interest override at section 16 applies.⁵ The public interest override has not been raised here.

[29] If the records are not covered by a presumption in section 14(3), section 14(2) lists various criteria that may be relevant in determining whether disclosure of the personal information would amount to an unjustified invasion of personal privacy. In such cases, the personal information will be exempt unless the circumstances favour disclosure.⁶

[30] The police submit that they withheld the personal information at issue on the basis that its disclosure would constitute an unjustified invasion of the personal privacy of the affected party and other individuals pursuant to section 14(1) or 38(b) of the *Act*. The police further contend that the disclosure of the personal information at issue is presumed to constitute an unjustified invasion of personal privacy pursuant to sections 14(3)(a) and (b) of the *Act*, which state,

14(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

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

[31] The police submit that section 14(3)(a) applies to the affected party's personal information contained on pages 53 and 59 because it relates to their "condition." I note the police do not specify the type of "condition" that the personal information at pages 53 and 59 relates to. In addition, the police submit that section 14(3)(b) applies to all the personal information at issue because the information was compiled and is identifiable as part of an investigation into a possible violation of law. In this case, the police state that no court proceedings resulted, but the personal information of the affected party and the other identifiable individuals was compiled to investigate the motor vehicle collision which resulted in the death of the deceased. The police submit that they investigated possible violations of the *Highway Traffic Act* and the *Criminal Code of Canada*.

⁵ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. 3(d) 767 (Div. Ct.).

⁶ Order P-239.

[32] Based on my review of the records, it is clear they were compiled as part of an investigation into a possible violation of law. Although no charges were laid, the police's investigation could have given rise to charges under the *Highway Traffic Act* or the *Criminal Code*. Accordingly, subject to the possible application of the exception at section 14(4)(c), I find that the disclosure of the personal information at issue is presumed to result in an unjustified invasion of personal privacy within the meaning of section 14(3)(b).

[33] In addition to section 14(3), the police referred to sections 14(2)(f), (h) and (i) as factors weighing against disclosure of the personal information at issue. These sections state,

14(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all relevant circumstances, including whether,

(f) the personal information is highly sensitive;

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

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

[34] With regard to section 14(2)(f) (highly sensitive), the police submit that the appellant has "made it very clear" that she is struggling to understand why no charges were laid against the driver in the motor vehicle collision. The police also state that the appellant is unwavering in her belief that she is entitled to all the information she seeks access to as the deceased's advocate. With regard to section 14(2)(h) (supplied in confidence), the police submit that the individuals whose personal information remains at issue provided this information to the police in confidence. Finally, with regard to section 14(2)(i) (unfair damage to reputation), the police submit that disclosure of the personal information that remains at issue could unfairly damage the reputation of the affected party.

[35] While the appellant does not directly address the factors listed in section 14(2), she submits that she seeks access to the records for purely compassionate reasons, not to use them for retribution or to damage the affected party's reputation.

[36] I have reviewed the personal information that remains at issue. This information relates primarily to the affected party and other identifiable individuals, most of whom were not notified by the police or the IPC. While there are discrete portions of the records that contain the personal information of the deceased, I find that the information relating to the deceased is inextricably intertwined with that of the affected party and/or other identifiable individuals and cannot reasonably be severed.

[37] Based on my review of the parties' representations and the records, I find that the personal information that remains at issue is highly sensitive and the factor listed in section 14(2)(f) applies to weigh against its disclosure. In my view, it is clear from the circumstances surrounding the deceased's death and investigation into his death that any further disclosure would result in significant personal distress to the affected party and other identifiable individuals.

[38] In addition, I am satisfied that the factor listed in section 14(2)(h) applies to weigh against disclosure of the personal information that remains at issue. Given the circumstances, I find that the individuals whose personal information remains at issue provided that information in confidence to the police.

[39] Finally, I am satisfied that the factor listed in section 14(2)(i) applies to weigh against disclosure of the affected party's personal information at issue. Given the circumstances of the deceased's death and upon review of the parties' representations, I find that the disclosure of the affected party's personal information may unfairly damage their reputation.

[40] I have reviewed the remaining factors in section 14(2) and find that none apply.

[41] For the records claimed to be exempt under section 14(1), that is, the records that do not contain the appellant's personal information, the section 14(3)(b) presumption can only be overcome by a section 14(4) circumstance. I find, therefore, that disclosure of these records would constitute an unjustified invasion of personal privacy, subject to my findings regarding the possible application of section 14(4)(c) below. Given this finding, it is not necessary for me to further consider whether section 14(3)(a) also applies to the personal information at issue.

[42] For the records that are claimed to be exempt under section 38(b), that is, the records that contain the appellant's personal information, taking the presumption in section 14(3)(b) and the factors in sections 14(2)(f), (h) and (i) into consideration, I find that disclosure of the personal information at issue in these records would constitute an unjustified invasion of the affected party and other identifiable individuals' personal privacy. Therefore, subject to my findings regarding the possible application of section 14(4)(c) below, I find that the personal information at issue in the records containing the appellant's personal information is exempt under 38(b) of the *Act*. Given this finding, it is not necessary for me to further consider whether section 14(3)(a) also applies to the personal information at issue.

Section 14(4)(c) – compassionate reasons

[43] Section 14(4)(c) permits the disclosure of personal information about a deceased individual to the spouse or close relative of the individual where it is desirable to do so for compassionate reasons. Based on the wording of this provision, a finding that section 14(4)(c) applies to some or all of the personal information means that disclosure would *not* be an unjustified invasion of personal privacy. Section 14(4)(c) of

the *Act* states,

... 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.

[44] Personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the circumstances to be considered include the fact that the personal information of the deceased is also the personal information of another individual or individuals. Additionally, 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).⁷

[45] The application of section 14(4)(c) requires a consideration of the following questions, all of which must be answered in the affirmative for the section to apply:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or close relative of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?⁸

[46] As discussed in Issue A above, I found that the records, considered in their entirety, contain the personal information of the deceased. Therefore, the first requirement of section 14(4)(c) is satisfied.

[47] The second requirement requires that the requester be a spouse or close relative of the deceased. The rationale for this requirement is that, after the death of an individual, it is the person's spouse or close relatives who are best able to act in their best interest 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."⁹

[48] The term *close relative* is defined in section 2(1) of the *Act* as "a parent, child,

⁷ Order MO-2237.

⁸ Orders MO-2237 and MO-2245.

⁹ Order MO-2245.

grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption.” The appellant is the deceased’s daughter. Therefore, she satisfies the second part of the test under section 14(4)(c).

[49] The third question for the application of section 14(4)(c) requires me to consider whether disclosure of the personal information of the deceased is desirable for compassionate reasons, which has been generally described as information that will assist a close relative in understanding the events leading up to and surrounding the death of an individual.¹⁰

[50] The police state that section 14(4)(c) applies to the deceased’s personal information. To that end, the police submit that they disclosed the deceased’s personal information to the appellant.

[51] In her representations, the appellant submits that she seeks access to the records for compassionate reasons. The appellant submits that disclosure of the records will assist with her grieving process.

[52] As discussed above, the records at issue contain the intermingled personal information of several identifiable individuals, including the deceased, the affected party, the appellant in discrete portions of the records, and other identifiable individuals. In Order MO-2237, the adjudicator applied section 14(4)(c) to records that contained the intermingled personal information of a number of identifiable individuals, including the deceased daughter of the appellant in that case. The adjudicator made the following comments on the application of section 14(4)(c):

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.”

¹⁰ *Ibid.*

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.

I agree with this approach and adopt it for the purposes of the current appeal.

[53] In the circumstances before me, the police disclosed the majority of the information in the records to the appellant. The police withheld a small amount of information from disclosure. On my review of the specific and limited amount of information that remains at issue, I find that it cannot be described as the personal information of the deceased alone. The personal information that remains at issue either relates solely to the affected party or other identifiable individuals or is their personal information intertwined with the deceased or other individuals. Furthermore, I find that the personal information relating to the deceased is inextricably intertwined with that of the affected party or other identifiable individuals in a manner than cannot be reasonably resolved by severing.

[54] I reviewed the personal information that remains at issue and the parties’ representations. Based on this review, I find that section 14(4)(c) does not apply to the personal information that remains at issue. As stated above, the police disclosed the majority of the records to the appellant. The small amount of personal information that remains at issue is not the personal information of the deceased alone, but also qualifies as the personal information of the affected party and other identifiable individuals. The personal information of the deceased is intertwined with that of these other individuals, who did not consent to the disclosure of their personal information. In addition, the police and appellant provided me with submissions to support a finding that the factor in section 14(2)(f) (highly sensitive) applies to the personal information that remains at issue. Based on my review of the information the police disclosed to the appellant, I find that this information provides her with an understanding of the circumstances leading up to and surrounding the death of her father. In light of these circumstances and upon review of the parties’ representations and the records, I find that it has not been established that the disclosure of the limited amount of personal information that remains at issue is desirable for compassionate reasons as contemplated by the third requirement for the application of section 14(4)(c).

[55] As the third part of the section 14(4)(c) test was not established, I find that the exception permitting the disclosure of personal information in compassionate

circumstances at section 14(4)(c) does not apply to the personal information that remains at issue.

[56] Therefore, having considered the factors, presumptions and exceptions set out in sections 14(2), (3) and (4), I conclude that disclosure of the personal information that remains at issue would amount to an unjustified invasion of the personal privacy of individuals other than the appellant. Therefore, I find that the personal information that remains at issue is exempt under the personal privacy exemption at section 14(1) or 38(b) of the *Act*. I will review the police's exercise of discretion to withhold personal information under section 38(b), as the case may be, to the records that contain the appellant's personal information, below.

Issue C: Do the discretionary exemptions at sections 8(1)(c), (l) and 12 or section 38(a), in conjunction with the section 8(1)(c), (l) and 12 exemptions, apply to the information at issue?

[57] As stated above, the records at pages 1–2, 7–8, 9, 10, and 58–60 contain personal information relating to the appellant. Therefore, I will consider whether section 38(a), in conjunction with sections 8(1)(c), (l) or 12, applies to these records. I will consider whether section 8(1)(c), (l) or 12 apply to the records that do not contain the appellant's personal information.

[58] Section 38(a) provides a number of exemptions to an individual's general right of access to their own personal information. Section 38(a) reads,

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

if sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[59] The police withheld portions of pages 9, 12, 15, 21, 22, 23, 46, 54, 56, 58 and 60 under section 8(1)(c) or 38(a), read with section 8(1)(c). The police applied section 8(1)(l) or 38(a), read with section 8(1)(l), to withhold "Mapping Identifiers", CPIC ORI numbers and 10-codes. Finally, the police applied section 38(a), read with section 12, to withhold a portion of page 7. I will consider the application of each exemption below.

Section 8(1)(c)

[60] Section 8(1)(c) states,

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

reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

[61] The term *law enforcement* is defined in section 2(1) of the *Act* and applies to police investigations into possible violations of the *Criminal Code*.¹¹

[62] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹²

[63] However, it is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.¹³ The institution must provide sufficient evidence to demonstrate a reasonable expectation for harm. The institution must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁴

[64] With regard to the section 8(1)(c) exemption, the police must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption will not normally apply where the technique or procedure is generally known to the public.¹⁵ The techniques or procedures must also be *investigative* and the exemption will not apply to *enforcement* techniques or procedures.¹⁶

[65] The police submit that references to various investigative databases such as the Canadian Police Information Centre (CPIC), the Ministry of Transportation Inquiry Services System (MTO ISS) and the Niche Records Management System on pages 9, 12, 22, 23 and 54 are exempt under section 8(1)(c). The police concede that section 8(1)(c) cannot be used to exempt portions of the records that simply make reference to the existence of these databases. Regardless, they submit that disclosure of these portions of the records would be harmful or could reasonably be expected to hinder or compromise their effective utilization. The police state that these databases are regularly used by police to assist in determining how police will communicate and interact with members of the public, how police communicate with other police/investigative agencies concerning investigative matters, and how to proceed with a police investigation into a potential violation of the law.

¹¹ Orders M-202 and PO-2085.

¹² *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹³ *Ibid.* and Order PO-2040.

¹⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

¹⁵ Orders P-170, P-1487, MO-2347-I and PO-2751.

¹⁶ Orders PO-2034 and P-1340.

[66] In addition, the police submit that these databases are used to identify lost or stolen property, which enables police to effectively determine if these items are associated to other criminal related investigations. The police submit that this information is generally tracked through information such as product make, model, and serial number. The police submit that if the information in pages 9 and 12 is disclosed, the disclosure would alert criminals to open investigations concerning property collected by police services, the nature and extent of the information possessed by these databases, and may encourage criminals to modify, alter or remove any identifiers associated with this property.

[67] The police also submit that the "Total Station" Crash Data Retrieval Software referenced and severed from pages 15, 46, 54, 56, 58 and 60 is exempt under section 8(1)(c) or 38(a), read with section 8(1)(c), of the *Act*. The police explain that the software is used in traffic related occurrences to measure the scene of a motor vehicle collision to assist in determining how the investigation should proceed. The police submit that the information contained in the record may, if disclosed, encourage the public to alter or modify their behaviour or the scene of a motor vehicle collision.

[68] The appellant did not address the application of section 8(1)(c) in her representations.

[69] I have reviewed the police's representations and the information describing the databases that were searched as well as the search results on pages 9, 12, 22, 23 and 54. In addition, I reviewed the information relating to the "Total Station" software on pages 15, 46, 54, 56, 58 and 60. In Order MO-3393, the adjudicator considered police use of databases during investigations and found,

... it would be generally known that the police rely on databases to gather information about individuals who have had dealings with the police. The existence of such databases and their acronyms would not, therefore, qualify for exemption under section 8(1)(c). Although the police argue that it is the information gleaned from the searches that could compromise the investigation, I find, based on my review of the information at issue, that its disclosure could not be expected to hinder or compromise the effective utilization of the databases. I find, therefore, that section 8(1)(c) does not apply.¹⁷

[70] I agree with the adjudicator's approach and adopt it for the purposes of this appeal.¹⁸ I am satisfied that the public would generally assume that the referenced

¹⁷ Order MO-3393 at para 82.

¹⁸ This approach was also followed in Order MO-3615 for databases searched and the search results at issue.

databases and the publicly known "Total Station" software would be used by the police in conducting an investigation involving a motor vehicle collision. I am also satisfied that disclosure of the information relating to the databases search and the results of those searches on pages 9, 12, 22, 23 and 54 could not reasonably be expected to hinder or compromise the police's effective use of those databases in the future. Similarly, I am satisfied that the references to the "Total Station" software could not, if disclosed, reasonably be expected to hinder or compromise the police's effective use of the "Total Station" software in the future. Therefore, I find that the "Total Software" information withheld from pages 9, 12, 22, 23, 54, 56, 58 and 60 is not exempt under section 8(1)(c) or 38(a), read with section 8(1)(c) of the *Act*. I note, however, that in some cases, the results of database searches contain the personal information of identifiable individuals other than the appellant or the deceased.¹⁹ Where this occurs, that information is exempt from disclosure pursuant to section 14(1), per my findings above.

[71] I am satisfied that the information withheld under section 8(1)(c) on pages 15 and 46 of the records is exempt from disclosure. The information at issue on these pages contains a significant amount of detail regarding the process and techniques used to investigate the vehicle and the scene of the collision. Based on my review of this information, I am satisfied that the disclosure of this information could reasonably be expected to hinder or compromise the police's effective use of the "Total Station" software in the future. Accordingly, I find that the information withheld under section 8(1)(c) on pages 15 and 46 of the records is exempt from disclosure, subject to my findings on the police's exercise of discretion below.

Section 8(1)(l)

[72] Section 8(1)(l) states,

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

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[73] The police submit that it withheld information such as Mapping Identifiers, CPIC ORI numbers and ten-codes from the records under section 8(1)(l) or 38(a), read with section 8(1)(l).

[74] In order to justify the application of section 8(1)(l), the police must provide evidence of how disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. This office has consistently held that

¹⁹ For example, page 22 of the records contains personal information relating to an identifiable individual who is not the deceased or the appellant.

the disclosure of police codes could reasonably be expected to lead to the harms considered in section 8(1)(l).²⁰ Given this office's consistent approach to section 8(1)(l), and subject to my findings on the police's exercise of discretion below, I find that the police codes that appear in the records qualify for exemption under section 8(1)(l) or section 38(a), read with section 8(1)(l), of the *Act*.

[75] I note the police withheld two portions of page 40 of the records under section 8(1)(l) of the *Act*. These two portions identify the locations in which documents or records are stored in the police database or records holdings. The police did not address these severances in their representations. Based on my review, the information severed on page 40 is generic and does not provide any information that could reasonably be expected to lead to the harms contemplated by section 8(1)(l) if it were disclosed. Therefore, I find that the severed information in page 40 of the records is not exempt under section 8(1)(l) of the *Act*. I will order the police to disclose this information to the appellant.

Section 12

[76] The police applied section 38(a), in conjunction with section 12, to withhold a portion of page 7. Section 12 of the *Act* states,

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[77] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. In this case, the police claim the application of Branch 1 to the information at issue in page 7, specifically solicitor-client communication privilege.

[78] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.²¹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.²² The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at

²⁰ Order M-757. See also, MO-1715, MO-2414, MO-2446, MO-3393 and PO-1665.

²¹ *Decôteaux v. Mierzwinski* (1982), 14 D.L.R. (3d) 590 (SCC).

²² Orders PO-2441, MO-2166 and MO-1925.

keeping both informed so that advice can be sought and given.²³

[79] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.²⁴

[80] The police submit that the portion of page 7 subject to its solicitor-client privilege claim clearly contains communications between Crown counsel and police. The information contains the Crown's legal opinion on the evidence presented and the police's decision as a result of that opinion. The police submit that the information at issue contains internal communications between Crown counsel and the police, made for the purpose of seeking, formulating or providing legal advice with respect to the investigation.

[81] The appellant did not address the application of section 38(a), read with section 12, in her representations.

[82] Based on my review of page 7 and the police's representations, I find that the information at issue is subject to solicitor-client communication privilege. I am satisfied that the information at issue on page 7 would, if disclosed, reveal communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice and aimed at keeping both informed so that advice can be sought and given. The information subject to the police's exemption claim contains information relating to an exchange between the police and Crown counsel in which legal advice was requested and provided. Based on my review, I find this portion of page 7 forms a part of the continuum of communications between a solicitor and client. Therefore, I am satisfied the information at issue in page 7 is protected by common law solicitor-client communication privilege and is exempt under section 38(a), read with section 12, subject to my review of the police's exercise of discretion below.

Summary

[83] In summary, I find that section 8(1)(c) or section 38(a), read with section 8(1)(c), applies to the information withheld from pages 15 and 46 of the records. I find that the remainder of the information subject to the police's section 8(1)(c) claim is not exempt from disclosure and I will order the police to disclose it to the appellant.

[84] I also find that section 8(1)(l) or section 38(a), read with section 8(1)(l), applies to the majority of the information subject to this exemption claim. However, I find that the information at issue on page 40 is not exempt. I will order the police to disclose it

²³ *Balabel v. Air India.*, [1988] 2 W.L.R. 1036 at 1046 (Eng. CA).

²⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

to the appellant.

[85] Finally, I find that section 38(a), read with section 12, applies to the information at issue on page 7.

Issue D: Did the police exercise their discretion under sections 8(1)(c) and (l), 12, 38(a) and (b)? If so, should this office uphold the exercise of discretion?

[86] The exemptions in sections 8(1)(c) and (l), 12, and 38(a) and (b) are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[87] 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, takes into account irrelevant considerations or fails to take into account relevant considerations.

[88] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁵ This office may not, however, substitute its own discretion for that of the institution.²⁶

[89] The police submit they exercised their discretion properly. The police acknowledge that an individual has the right to their personal information and, in this case, the appellant seeks access to records under compassionate grounds as a result of the loss of her father. However, the police submit that the privacy of other identifiable individuals must be protected. To that end, the police submit that they disclosed portions of the responsive records to the appellant in good faith.

[90] The police submit they did not act in bad faith and took into account all relevant considerations including,

- Whether the requester has a sympathetic or compelling need to receive the information;
- The relationship between the requester and any affected parties;
- The nature of the information; and
- The extent to which the information the information is significant and/or sensitive to the police, the requester or any affected person.

²⁵ Order MO-1573.

²⁶ Section 43(2).

The police submit that they did not take into account any irrelevant factors.

[91] The appellant did not directly address the police's exercise of discretion in her representations. However, it is clear the appellant pursues access to the information that remains at issue for compassionate reasons.

[92] Upon review of the parties' submissions and the information remaining at issue, I find that the police exercised their discretion under sections 8(1)(c) and (l), 12, 38(a) and (b) properly. Based on the evidence before me, I am satisfied the police did not exercise their discretion in bad faith or for an improper purpose. From my review of the records, it is clear the police considered that the appellant was seeking access to the records for compassionate reasons and, therefore, that she should have access to her own personal information as well as the personal information of the deceased. The police also considered the privacy interests of the affected party and other identifiable individuals. In addition to the privacy protection interests, I find the police properly considered the law enforcement interests protected by sections 8(1)(c) and (l) and the interests protected by the solicitor-client privilege exemption in section 12. I am satisfied the police took relevant factors into consideration and did not take into account irrelevant factors. Accordingly, I uphold the police's exercise of discretion to apply sections 8(1)(c) and (l), 12, 38(a) and (b) of the *Act* to the information I found qualifies for those exemptions.

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

[93] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 17 of the *Act*.²⁷ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the police's search. If I am not satisfied, I may order further searches.

[94] The *Act* does not require the institution prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show it made a reasonable effort to identify and locate responsive records.²⁸ To be responsive, a record must be *reasonably related* to the request.²⁹

[95] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.³⁰

²⁷ Orders P-85, P-221 and PO-1954-I.

²⁸ Orders P-624 and PO-2559.

²⁹ Order PO-2554.

³⁰ Order MO-2246.

[96] The police submit they conducted a reasonable search for records responsive to the appellant's request. The police state that the Manager of Records and Customer Service and Privacy and Information and Privacy Coordinator (the manager) conducted a search of the Records Management System (RMS) for responsive records. The police state that the manager has been a member of the police's Records Branch for 29 years. The police submit that the manager searched the RMS using the occurrence number provided and matched the details identified in the appellant's request. The police state that the RMS database is an operational policing system that manages information in relation to the core policing entities, people, locations, vehicles, organizations/business, incidents/occurrence and property/evidence. The police state that the Customer Service Release of Information Supervisor (the supervisor) assisted the manager in processing the request. The police state that the supervisor searched RMS as required and spoke with the appellant while processing the records.

[97] The police stated that the appellant provided a sufficiently detailed request and did not initially contact her for additional information or clarification. The police state that they searched their RMS for the occurrence number, which resulted in 44 pages of records, including the "Traffic Report." The police also requested the involved officers to locate and provide copies of their notes. The police state that they also requested photos with the Forensic Identification Unit. The police state that they issued an access decision to the appellant and advised her that the "emergency responder notes" she identified in her request are not in their custody or control and referred the appellant to the appropriate institution to file a request.

[98] During mediation, the police stated that the appellant requested a copy of documentation she signed as part of the process for retrieving personal items and property seized from the deceased. The appellant requested further information relating to the location of the deceased's Air Miles card and Sudbury library card as well as his hearing aids.

[99] The police submit they conducted another search in its RMS to confirm whether the items were seized by the police. The police reviewed the list of property collected at the scene and state that these items were not seized.

[100] The manager then contacted the Property and Evidence Control Branch, which forwarded a copy of the Property Tag and Currency Tag, which were provided to the appellant. The supervisor of the Property and Evidence Control Branch confirmed that a hearing aid was not noted in any of the Property Tag items. In addition, the supervisor of the Property and Evidence Control Branch advised that various papers were in a sealed evidence bag and the appellant claimed the evidence bag, along with the currency. The police state that there is no description of the contents of the evidence bag. The manager reviewed the Property Tag and Currency Tag and sought and received clarification from a Property Clerk to ensure that she could properly respond to any questions from the appellant.

[101] Finally, the manager contacted the Forensic Identification officer of record

regarding the location of the hearing aids. The officer advised the manager that the hearing aids were not seized and left on the roadway.

[102] In her representations, the appellant refers to various portions of the records that refer to "hearing aids" and the deceased's Air Miles and library cards. The appellant submits that these items should have been accounted for and there "might" be records to account for these outstanding items.

[103] Based on my review of the parties' representations, I am satisfied the police conducted a reasonable search for responsive records. I am satisfied that an experienced employee knowledgeable in the subject matter of the request and the police's records holdings expended a reasonable effort to locate records reasonably related to the request.³¹ It is clear that the manager is an experienced employee knowledgeable in the subject matter of the request and expended a reasonable effort to locate the responsive records, given her detailed summary of the searches conducted and the various branches and individuals she contacted for records and/or clarification regarding the records. As set out above, the *Act* does not require the police to prove with absolute certainty that additional responsive records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate responsive records. In my view, the police demonstrated that they expended a reasonable effort to identify and locate records responsive to the appellant's request.

[104] In addition, I am not satisfied that the appellant has provided me with a reasonable basis for her belief that additional responsive records exist. The appellant maintains her belief that the deceased's hearing aids, Air Miles card and library card "might" exist in the police's record holdings. However, I find the police provided the appellant with a reasonable explanation regarding these outstanding items and I am satisfied the police conducted a reasonable search for them.

[105] In conclusion, I am satisfied the police conducted a reasonable search for records responsive to the appellant's request.

ORDER:

1. I order the police to disclose all of the information subject to its section 8(1)(c) or 38(a), read with 8(1)(c), claim with the exception of the information severed from pages 15 and 46.
2. I order the police to disclose the information subject to their section 8(1)(l) claim on page 40.

³¹ Orders M-909, PO-2469 and PO-2592.

3. I uphold the police's decision to withhold the remainder of the information at issue.
4. I order the police to disclose the information identified in Order Provisions 1 and 2 to the appellant by **August 12, 2019**.
5. I uphold the police's search as reasonable.
6. I reserve the right to require the police to provide me with a copy of the records disclosed to the appellant in accordance with Order Provision 4.

Original Signed by: _____
Justine Wai
Adjudicator

July 12, 2019 _____