

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3997

Appeal MA18-525

Ottawa Police Services Board

January 25, 2021

Summary: The Ottawa Police Service (the police) received a request for access to a specific police occurrence report concerning the death of the appellant's adult daughter. The police located a responsive record that contained witness statements, officers' notes and memorandum book entries. Before issuing a decision, the police notified several individuals whose interests might be affected by disclosure for their consent to disclose information relating to them. One affected party did not consent to the disclosure of information relating to him. The police issued a decision granting partial access with severances under sections 14(1) and 38(b) (personal privacy) of the *Act*. The appellant appealed the police's decision to withhold information relating to the affected party and seeks access to the statements he made to the police during the investigation. In this order, the adjudicator finds that the record contains the personal information of both the appellant and other identifiable individuals. She finds that the discretionary personal privacy exemption in section 38(b) applies to the information that has been withheld and that the exception in section 14(4)(c) (compassionate reasons) does not apply to it. She upholds the police's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 14(2)(e), 14(2)(f), 14(2)(h), 14(2)(i), 14(3)(b), 14(4)(c) and 38(b).

Orders Considered: Order PO-3129.

OVERVIEW:

[1] This appeal relates to a mother's request for access to a specific individual's statements made to the Ottawa Police Service (the police) during their investigation into

her adult daughter's death. These statements are contained in a police report.

[2] The police closed their investigation as "non-criminal" after concluding that there was no evidence that the death was caused by a criminal offence. No charges were laid.

[3] The deceased's individual's mother made a request to the police for:

Case [specific occurrence number] Request the whole report including witness reports & all photos.

[4] The police conducted a search and located photographs and a police occurrence report that they identified as responsive to the request. Because the report contains information about a number of individuals, including the requester, before issuing a decision the police contacted those parties whose interests could be affected by disclosure of this information to seek their comments or consent regarding disclosure of information relating to them. One of the individuals contacted for consent, the affected party in this appeal, did not give his consent and expressly objected to the disclosure of any information relating to him.

[5] The police then issued a decision (the August 2018 decision), granting partial access to the requested information. The police withheld some information from the report claiming it is exempt under the mandatory personal privacy exemption in section 14(1). The police also withheld references to CPIC codes and police codes in officers' notes under section 8(1)(l) (facilitate commission of unlawful act).

[6] The requester, now the appellant, appealed the police's decision to this office.

[7] The parties participated in mediation to explore the possibility of resolution. During mediation, as a result of additional consents by affected parties to disclose information relating to them, as well as for compassionate reasons (pursuant to section 14(4)(c) of the *Act*), the police issued a revised decision (the December 2018 decision) in which they granted access to additional information. Specifically, the police granted partial access to pages 12, 21 and 61 of the occurrence report. Later, in a further revised decision (the January 2019 decision), the police granted full access to page 21 of the report.

[8] After this further disclosure, the appellant maintained that she believed the police had withheld written statements of three additional witnesses that she said were not included in the materials disclosed to her and to which she was seeking access. The police conducted a further search to verify the existence of any such additional witness statements but could not locate any written statements other than those that had already been disclosed to the appellant. As part of their further search, the police asked the lead investigator to confirm whether written statements had, in fact, been collected from the three witnesses identified by the appellant. According to the lead investigator, no written statements had been taken from the three additional witnesses identified by

the appellant: those witnesses had only been interviewed at the scene and, because they consented to the release of the information they provided to the police, that information was included in the records previously disclosed to the appellant.

[9] As a result of this further search, the appellant indicated that the reasonableness of the police's search for responsive records was no longer an issue. The appellant also confirmed that she was not seeking access to those portions of the records withheld pursuant to the law enforcement exemption at section 8(1)(l), which removed that exemption from the scope of this appeal.

[10] However, the appellant advised that she wished to proceed to adjudication for access to information relating to the one affected party who did not consent to disclosure of information relating to him, and, in particular, to the statements he made to the police.

[11] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*. As part of my inquiry, I received representations from the police, the appellant and the affected party. I also received reply and sur-reply representations from the police and the appellant on the question of disclosure for compassionate reasons (section 14(4)(c)).¹

[12] In this order, I find that the affected party's statements to the police qualify for exemption under the discretionary personal privacy exemption at section 38(b) and that the exception in section 14(4)(c) does not apply to those statements. I uphold the police's decision and dismiss this appeal.

RECORDS:

[13] The record is a 64-page General Occurrence Report (62-page report plus cover page and table of contents). At issue is information withheld by the police from the General Occurrence Report (the report) that relates to the affected party, containing his statements made to the police during their investigation.

ISSUES:

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

¹ The police's and the appellant's representations were shared between them. Non-confidential portions of their respective representations were shared between the appellant and the affected party, in accordance with IPC *Practice Direction 7* on the sharing of representations.

- B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- C. Did the police exercise their discretion under 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[14] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, whose. That term is defined in section 2(1) as follows:

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

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and

(h) the individual's name 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;

[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.² According to section 2(2) of the *Act*, personal information does not include information about an individual who has been dead for more than thirty years.

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

Representations

[17] The police submit that the record contains "personal information" as defined in section 2(1) of the *Act*. The police submit that the entire report contains the personal information of multiple individuals, including the appellant, her daughter, and the affected party. They say that the personal information in the record consists of individuals' names, their sex, dates of birth, addresses, phone numbers and statements/personal views.

[18] The appellant does not dispute that the record contains the personal information of a number of identifiable individuals, namely of witnesses interviewed by the police, her own personal information, her daughter's and the affected party's personal information. She submits that she is seeking access only to the affected party's statements to the police, and not to any of his identifying biographical data.

[19] The affected party also does not dispute that the record contains personal information, including the appellant's, her daughter's and his own.

Analysis and findings

[20] After reviewing the record and the parties' representations, I find that the record contains the mixed personal information of the appellant, her daughter and the affected party, as well as the personal information of other identifiable individuals. First, the record contains the names, dates of birth, sex, race, address, telephone numbers, and statements of the various witnesses interviewed by the police. The record also contains the name, date of birth, sex, race and address of the appellant's daughter and information relating to her medical history. The record contains information relating to

² Order 11.

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

the employment history of an identifiable individual, the views of identifiable individuals about the appellant's daughter, their opinions or views about the event under investigation, and information relating to a financial transaction in which an identifiable individual was allegedly involved. Finally, the names of all of the identifiable individuals appear with other personal information relating to them that, if disclosed, would reveal other personal information about them. Collectively, I find that this information fits within paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

Issue B: Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[21] I note at the outset that the police's submissions focus on the application of the mandatory personal privacy exemption under section 14(1), and not the discretionary personal privacy exemption under section 38(b), to the information at issue.

[22] Previous IPC orders have established that where a record contains both the personal information of the requester and another individual, or individuals as in this case, the request falls under Part II of the *Act* and the relevant personal privacy exemption is the exemption at section 38(b).⁴ Some exemptions, including the personal privacy exemption, are mandatory under Part I (section 14(1)), but discretionary under Part II (section 38(b)), so that in the latter case, an institution may disclose information under Part II that it would not disclose if Part I is applied.⁵

[23] Assistant Commissioner Brian Beamish wrote in Order PO-3129 that the correct approach is to review the *entire* record, and not only those 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*.⁶

[24] As I have already noted, the police have claimed that section 14(1) applies to exempt the information at issue. However, I have already found (and the police do not dispute) that the record also contains the appellant's personal information, including her name along with other identifying personal information about her and her relationship with her daughter.

[25] Applying a record-by-record approach, I find that the appropriate exemption is the discretionary exemption at section 38(b). I will therefore consider whether the information at issue, namely the affected party's statements to the police that are

⁴ Order M-352.

⁵ Orders MO-1757-I and MO-2237.

⁶ Order M-352.

contained in the record, qualifies for exemption under the discretionary personal privacy exemption at section 38(b).

[26] Finally, I recognize that the appellant does not seek access to the affected party's name, date of birth, contact information or similar identifying information, but that she seeks access only to his statements and/or witness statements provided to the police. Accordingly, I will consider the possible application of the discretionary personal privacy exemption in section 38(b) only in relation to the affected party's statements to police that remain in issue. The affected party's other personal information is removed from the scope of this appeal.

Does the discretionary personal privacy exemption at section 38(b) apply?

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

[28] 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 appellant. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[29] Sections 14(1) to (4) of the *Act* give guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b):

- if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b);
- section 14(2) provides a list of factors that must be considered. This list is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2);⁷
- section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and,
- section 14(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 14(3).

⁷ Order P-999.

[30] In determining whether the disclosure of the personal information in a record would be an unjustified invasion of personal privacy under section 38(b), the IPC will consider, and weigh, the factors and presumptions in section 14(2) and (3) and balance the interests of the parties.⁸

[31] The police rely on the presumption in section 14(3)(b), which provides that disclosure of one's personal information compiled and identifiable as part of an investigation into a possible violation of law is presumed to constitute an unjustified invasion of personal privacy.

[32] Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if an exception in section 14(4) or the "public interest override" at section 16 applies.⁹ The public interest override is not relevant to this appeal.

[33] Of the circumstances listed in section 14(4), section 14(4)(c) is relevant to this appeal. Section 14(4)(c) provides that, despite section 14(3)(b), a disclosure does not constitute an unjustified invasion of personal privacy if it discloses personal information about a deceased individual and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.¹⁰

Representations

The affected party's representations

[34] The affected party submits that the appellant is already aware of the circumstances of her daughter's death. He says that his statements to the police are private and personal, and he expresses concerns about comments he says the appellant made to him. He disputes that the appellant seeks access to the information for compassionate reasons, which I discuss further below.

The police's representations

[35] The police argue that disclosure of the information at issue is presumed to constitute a unjustified invasion of the affected party's personal privacy as contemplated by section 14(3)(b) because the record is a police report that was created in the course of a law enforcement investigation. They submit that the affected party spoke to the police in confidence and for the purpose of assisting with the investigation. The police say that there is an expectation of confidentiality when they collect personal

⁸ Order MO-2954.

⁹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

¹⁰ According to section 2(2) of the *Act*, personal information does not include information about an individual who has been dead for more than thirty years. That is not the case here.

information during law enforcement matters, and that the failure to safeguard information collected confidentially will serve to reduce public confidence and willingness to assist police in the future.

[36] The police also submit that they considered a number of factors in section 14(2) in determining that disclosure of the information at issue would constitute an unjustified invasion of the affected party's personal privacy. Specifically, the police say that they considered that:

- disclosure could be used in civil litigation which they suggest engages the factor at section 14(2)(e) (pecuniary or other harm);
- the information is highly sensitive (the factor at section 14(2)(f) (highly sensitive));
- the information was provided in confidence, and for the purpose of assisting in the investigation (the factor at section 14(2)(h) (supplied in confidence)); and that,
- disclosure of the information could cause unfair damage to the affected party's reputation (the factor at section 14(2)(i) (unfair damage to reputation)).

[37] The police argue that these factors all weigh in favour of non-disclosure. They say that this is especially so in view of the appellant's negative comments about the affected party during the investigation and her continuing assertions that he murdered her daughter. They submit that, despite section 14(4)(c), the information at issue should be withheld from disclosure.

The appellant's representations

[38] The appellant submits that she is concerned about the circumstances of her daughter's death and says that disclosure of the affected party's statements would clarify and correct her doubts regarding the police's investigation. She says that, if the affected party was not at fault for her daughter's death, he should not fear that she will misuse his personal information.

[39] She submits that the information disclosed to her to date has been confusing and that not having access to the "entire story" has left her with the view that the investigation was "inconclusive and incompetent." She states that her daughter's death was not properly investigated or afforded appropriate respect or response. She argues that the police's failure to properly investigate has left her having to conduct her own investigation.

[40] The appellant says that the police did not tell her for a year that they were not treating her daughter's death as suspicious. She says that this failure to communicate led her to believe that her daughter's death was being treated as criminal in nature.

She submits that "this very lack of investigation is why [the affected party's] statement is required and likely the only way I will get the answers..."

[41] The appellant maintains that the affected party has no reason to oppose disclosure of his statements to the police if he is innocent. She argues that if he had nothing to hide, he would not have blocked her from Facebook and that removing her ability to communicate "with him via Facebook messenger by using the block feature...raises questions as to his claim of lack of involvement." Finally, she submits that she has no intention to misuse her daughter's personal information contained in the statement, "regardless of any possible gain in terms of this investigation."

Analysis and findings

Section 14(3)(b): investigation into possible violation of law

[42] As noted above, the police rely on the presumption in section 14(3)(b). Section 14(3)(b) states that:

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

(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.

[43] I find that the personal information in the record was compiled and is identifiable as part of an investigation into a possible violation of law. Responding to a 911 call about the apparent death of an adult individual, the police began an investigation into the circumstances that could have resulted in criminal charges. The fact that no charges were laid is immaterial, since the presumption only requires that there be an investigation into a possible violation of law.¹¹ As a result, I find that the presumption against disclosure in section 14(3)(b) applies and that disclosure of the information at issue is presumed to constitute an unjustified invasion of the affected party's personal privacy.

[44] I agree with the police's submission that there are additional factors in section 14(2) that are relevant to a determination of whether disclosing the affected party's personal information would constitute an unjustified invasion of his personal privacy under section 38(b) and which favour non-disclosure in the circumstances.

¹¹ Orders P-242 and MO-2235.

Do any factors in section 14(2) apply?

[45] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.¹² The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹³

[46] The police rely on the factors in paragraphs (e), (f), (h) and (i) of section 14(2), which state that:

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,

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

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

Section 14(2)(e): Pecuniary or other harm

[47] The police say that the appellant's submission that disclosure of the affected party's statements "would have no legal bearing on any further action that I could take or foresee" is incorrect. As evidence of possible harm, the police submit that the information, if disclosed, could lead to civil litigation, which could result in financial loss to the affected party, notwithstanding that no criminal charges were filed.

[48] The appellant submits that she does not intend to misuse the appellant's personal information and that he should not be concerned if he has nothing to hide.

[49] The appellant retains the right to pursue civil remedies regardless of disclosure under the *Act*.¹⁴ I find that any damages against the affected party would only be

¹² Order P-239.

¹³ Order P-99.

¹⁴ The *Act* does not restrict a party's right to litigate. See, for example, section 51(1) of the *Act*, which governs the relationship between access under the *Act* and civil litigation. Section 51(1) states that the *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.

awarded against him in the event of a successful claim by the appellant, after a hearing of the case before a court of competent jurisdiction. In this context, I do not view any potential pecuniary or other harm to be unfair for the purpose of section 14(2)(e), and I find that this factor does not apply.¹⁵

Section 14(2)(f): highly sensitive

[50] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(f) requires the police to consider whether the personal information is highly sensitive.

[51] The police submit that the information at issue contains the affected party's personal statements and views about the occurrence under investigation, and is mixed with details about his personal life. They say that disclosure of this information could cause the affected party personal distress, especially where he has repeatedly and expressly refused his consent to the disclosure of this information.

[52] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁶

[53] In the circumstances of this appeal, the police concluded that the appellant's daughter's death was not the result of a criminal act and they laid no charges. The appellant, however, has maintained that the affected party was involved in and/or caused her daughter's death. Given the nature and character of the information that is at issue, I accept that the personal information that has been withheld can be considered to be "highly sensitive" within the meaning of section 14(2)(f) and that its disclosure could reasonably be expected to result in significant personal distress to the affected party. In addition to his views about what happened, mixed in with the withheld information are details about his personal life. Accordingly, I find that this factor applies and weighs heavily against disclosure.

Section 14(2)(h): supplied in confidence

[54] The police submit that there is an expectation of confidentiality when they collect personal information in law enforcement matters. They argue that this information must be safeguarded and if released without consent, people may be hesitant to assist police in the future.

[55] For the factor at section 14(2)(h) to apply, both the individual supplying the information and the recipient must have an expectation that the information would be treated confidentially and that this expectation is reasonable in the circumstances. As

¹⁵ See Order PO-1912.

¹⁶ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

such, section 14(2)(h) requires an objective assessment of the reasonableness of the expectation of confidentiality.¹⁷

[56] I find that this factor applies in the circumstances and weighs against disclosure. In my view, the context and surrounding circumstances of this matter are such that a reasonable person would expect that the information supplied to the police by the individuals identified in the records, including the affected party, would be subject to a degree of confidentiality. I find this to be especially so in the case of the summary of the affected party's statement made to the police at the police station in the early hours of the investigation and without any charges having been laid. Accordingly, I find that in the context of this appeal, the factor at section 14(2)(h) is a relevant consideration that weighs against disclosure.

Section 14(2)(i): unfair damage to reputation

[57] The police submit that disclosure of the affected party's statements, which include information about aspects of his personal life, could lead to harassment, retaliation, false accusation and unfair treatment within the community and among his acquaintances.

[58] This factor applies where disclosure of personal information may unfairly damage the reputation of any person referred to in the record.

[59] The appellant challenges the police's conclusion that her daughter's death was not the result of a criminal act and maintains that, if not at fault, the affected party should consent to disclosure of his statements to the police. In her representations, the appellant has herself referred to heated communications with the affected party, and submits that his having blocked her on Facebook and removed her ability to send him messages via Facebook messenger are suspicious. The appellant submits that she will not misuse the affected party's personal information while continuing to accuse him of a crime with which he has not been charged. In these circumstances, I find that this factor is relevant and also weighs against disclosure of the information at issue.

Unlisted factor

[60] As noted above, the list of factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy is not exhaustive.

[61] I have considered as an unlisted factor the appellant's submission that a purpose of her access request is to understand what she believes to be deficiencies in the police's investigation. However, I find that the appellant has not provided me with any

¹⁷ Order PO-1670.

basis on which to conclude that the presumption against disclosure is outweighed by her suspicions regarding the adequacy of the police's investigation or that the information already disclosed to her, which I note is the majority of the record, is insufficient for her to take steps to challenge the investigation. I therefore find that this unlisted factor does not apply to weigh in favour of disclosure and that there are no factors in section 14(2) that weigh in favour of disclosure of the withheld information.

Summary of presumption and factors

[62] Because I have found that the presumption in section 14(3)(b) applies, that the factors favouring non-disclosure in sections 14(2)(f), (h) and (i) apply, and that there are no factors in section 14(2) that weigh in favour of disclosure of the withheld information, I will next consider whether any of the paragraphs in section 14(4) apply.

[63] The appellant argues that she needs access to the affected party's statements in order to have closure. She says that, as the last person to be with her daughter, the affected party's statements would allow her to grieve appropriately and move forward with a better understanding of what happened. I must consider whether the exception in section 14(4)(c) applies to the withheld information because if it does, disclosure is not an unjustified invasion of the affected party's personal information and it is therefore not exempt under section 38(b).

Does the compassionate reasons exception at section 14(4)(c) apply?

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

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?¹⁸

Parts 1 and 2: Do the records contain the personal information of a deceased individual and is the requester a spouse or "close relative" of the deceased individual?

[65] The terms "close relative" and "spouse" are defined in section 2(1) of the *Act*. "Close relative" is defined as follows:

¹⁸ Orders MO-2237 and MO-2245.

“close relative” means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption; (“proche parent”)

[66] There is no dispute, and I find that, the records contain the personal information of the appellant’s deceased daughter and that the appellant is therefore a “close relative” as that term is defined in the *Act*. I find that the first two requirements for the application of section 14(4)(c) have been met.

Part 3: Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?

The parties’ representations

The police’s representations

[67] The police argue that the appellant is not seeking access solely for compassionate reasons. They submit that several statements in the record reveal that she seeks access in order to lay blame on the affected party or in the hope of finding statements that she may use in litigation against him. They refer to instances in the record documenting the appellant’s calls to the police expressing negative comments about the affected party, and accusing him alternatively of murder or of killing her daughter, allegations the police say the appellant believes were not properly investigated.

[68] The police submit that the appellant’s representations also suggest that she continues to believe that the affected party is responsible for her daughter’s death, that there is “friction” between them, and that she may want the information “to possibly use against him.”

The appellant’s representations

[69] The appellant submits she seeks access only to receive answers. She says that her request is a mother’s cry for help: that she has lost her daughter and no one will tell her why. She submits that only the affected party has knowledge of her daughter’s final moments and that it is unfair to give him control over that information. She argues that the fact that no criminal charges were laid allows the affected party to give her access so that she can have closure and move on in the grieving process.

[70] Given the opportunity to respond to the police’s submissions that her comments belie her claim that she seeks access solely for compassionate reasons, the appellant says that her accusations were reactions that came from “a place of grief and frustration created by the police departments lack of action [sic]” and that her reactions should not be a barrier to access. She maintains, however, that if indeed innocent, the affected party should not oppose disclosure.

[71] The appellant acknowledges that her conversations with the affected party have been “heated,” but says that in the past, he was like family, so that he should

understand her grief and want to help clear up the circumstances of her daughter's death rather than leave it to be a constant question in her mind. The appellant says repeatedly that if the affected party "feels no fault" in her daughter's death, he should be willing to disclose his statements, and that his refusal to consent leaves her to question what he is trying to hide and raises red flags regarding his involvement. As already noted, the appellant says that if in fact he was not involved in her daughter's death, the affected party should not fear that the appellant would misuse his statements.

[72] The appellant also says that her focus has moved past blame and is now "solely to provide any insight on behalf of the Law Enforcement's failure to provide adequate and thorough investigation tactics in resolving my daughter's death."

The affected party's representations

[73] The affected party submits that the appellant is already fully aware of the circumstances of her daughter's death. He disputes that the appellant seeks access to his personal information for closure. He says that the appellant has access to other information regarding her daughter's death, including access to the coroner's report.

Analysis and findings regarding the application of section 14(4)(c) (compassionate reasons)

[74] In the circumstances of this particular case, I find that disclosure of the information at issue is not desirable for compassionate reasons as contemplated by the third part of the section 14(4)(c) test.

[75] The police have disclosed a majority of the information in the record and have only severed limited information that they did not have consent to disclose and which they determined to be exempt. This information, while it is the affected party's personal information, is mixed with some of the deceased's personal information in parts of the withheld portions of the record.

[76] In Order PO-3732,¹⁹ the adjudicator found that the institution had disclosed the majority of information in responsive records to the appellant and was satisfied that the disclosed information provided the grieving family with an understanding of the circumstances of their family member's death. The adjudicator also found, however, that the remaining information at issue was "inextricably intertwined with that of the affected party in a manner that cannot be fully resolved by severing." I find the same to be true in this case: the police have disclosed the majority of the information in the responsive record, and a portion of the information that has been withheld cannot be described as either the affected party's or the deceased's alone. The withheld

¹⁹ Order PO-2732 deals with the provincial equivalent of section 14(4)(c), which is section 21(4)(d).

information includes a summary of the affected party's statement that contains details about his own life in addition to his views about the appellant's daughter's death. I adopt the reasoning in Order PO-3732 and find that the deceased's personal information is so inextricably intertwined with the affected party's in portions of the withheld information in this case that it cannot reasonably be severed.

[77] In any event, while disclosure of some of this information might provide a small amount of additional information about the incident that has not already been disclosed to the appellant, in considering the relevant circumstances before me, including the appellant's need to have access to better understand the circumstances of her daughter's death, I am not persuaded that it would offer substantially more information than that which has been disclosed. In reaching this conclusion, I have considered that the police have disclosed another witness's statement that details that witness's knowledge of the circumstances of the appellant's daughter's death.

[78] While there can be no doubt that compassionate reasons exist for disclosure of as much information as possible to the appellant, I have also considered statements in her representations that contradict her submission that she seeks access for the primary purpose of moving on. For example, while the appellant argues that she is no longer interested in blame, and that her sole purpose has shifted to understanding deficiencies in the police's investigation, she continues to argue that if the affected party is not to blame, he would consent to disclosure because she will not misuse his personal information if indeed he is not at fault. I agree with the police that there appears to be significant friction between the appellant and the affected party, and when her statements regarding the affected party and her comments about possible future legal action are considered, I find that they do not weigh in favour of disclosure for compassionate reasons under section 14(4)(c) of the *Act*.

[79] Also based on the information already disclosed, I am not persuaded by the appellant's submission that without access to the affected party's statements she is without an understanding of the investigation's conclusion or of the police's conclusion about her daughter's cause of death. It is clear from portions of the occurrence report already disclosed and which describe the circumstances surrounding her daughter's death, that the police informed the appellant that they closed their investigation as "non-criminal," without a finding of criminal activity. In addition to describing the steps taken by the police during their investigation and their conclusion, disclosed portions of the record, as I have noted above, include written and oral witness accounts that contain details about the appellant's daughter's death.²⁰ In my view, the disclosed information provides the appellant with an understanding of the circumstances and events around her daughter's death and of the results of the investigation.

²⁰ The police also disclosed photographs of the scene taken during their investigation.

[80] Having taken into consideration the information that remains at issue and balancing the reasons for and against disclosure, I am not persuaded that disclosure of the personal information at issue (as described above) is desirable for compassionate reasons in the circumstances of the request. Because I find that the third part of the test under section 14(4)(c) is not established, I find that it does not apply in the circumstances of this appeal.

[81] For the reasons described above, I find that the facts before me weigh against the disclosure of the information at issue and that it is therefore exempt from disclosure pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*, subject to my findings below regarding the police's exercise of discretion.

Issue C: Should the police's exercise of discretion under section 38(b) be upheld?

[82] 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.

[83] 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.

[84] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ The IPC may not, however, substitute its own discretion for that of the institution.²²

[85] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²³

- the purposes of the *Act*, including the principles that
 - information should be available to the public

²¹ Order MO-1573.

²² Section 43(2).

²³ Orders P-344 and MO-1573.

- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person.

Representations

[86] The police did not specifically address their exercise of discretion to withhold the affected party's personal information under section 38(b), because, as I have already noted above, they submit that the affected party's personal information was withheld under the mandatory personal privacy exemption in section 14(1). However, the police say in their representations, and I have already found, that the entire record contains the mixed personal information of various individuals when they submit that the appellant "has sought access to the entirety of a Police Occurrence Report, which contains [her] own personal information, as well as that of the deceased person, the individual not providing consent [the affected party], as well as other third parties." Accordingly, as already discussed above, the appropriate exemption is section 38(b).

[87] The appellant submits that the police erred in considering accusations she made in anger and grief to deny her access. The affected party did not submit representations on the police's exercise of discretion under section 38(b).

Analysis and findings

[88] As noted above, the IPC is entitled to consider whether the police did, in fact, properly undertake an exercise of their discretion, but cannot substitute its own discretion for that of the police. Section 43(3) of the *Act* states:

- (2) If the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

[89] Although the police did not provide representations specifically addressing the exercise of discretion, I have considered their representations regarding the various factors on which they relied for the purpose of my findings regarding the exercise of discretion.

[90] I find that the police did not take into account improper considerations in deciding to withhold the information at issue. In obtaining consent of a number of affected parties, and in disclosing substantial portions of the record, I find that the police considered the specific circumstances of this case, including the need to be transparent, and the appellant's sympathetic and compelling need to have as much information as possible regarding the circumstances of her daughter's death.

[91] I am satisfied that the police also considered the nature of the information at issue, and the circumstances under which it was collected. The police took into account the need to safeguard witness statements and balanced that need against the appellant's right to access to a record that contained her personal information and the personal information of her deceased daughter. In giving effect to the latter, I am satisfied that the police disclosed a significant portion of the record. The police also considered the sensitivity of the information at issue and the fact that it includes information about the affected party. I am also satisfied that the police disclosed additional information for compassionate reasons. Given the otherwise near-full access granted to the appellant, which, as I have already noted, included photographs as well as other witness statements, I find that the police attempted to give the appellant broad access while protecting limited information relating to an affected party who expressly asked that his personal information be kept confidential.

[92] After considering the parties' representations and the circumstances of this appeal, I find that the police did not err in the exercise of their discretion to withhold the affected party's personal information, and, specifically, his statements to which the appellant seeks access. Accordingly, I find that the police exercised their discretion in an appropriate manner to withhold personal information that I have found to be exempt under section 38(b), and I uphold the police's exercise of discretion as reasonable.

ORDER:

I uphold the police's decision and dismiss this appeal.

Original signed by: _____

Jessica Kowalski
Adjudicator

January 25, 2021 _____