

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4122

Appeal MA19-00832

Toronto Police Services Board

November 3, 2021

**Summary:** Pursuant to the *Act*, the appellant sought access from the police to a video of an interview that the police conducted with his deceased father. The police denied access to the video on the basis of the mandatory personal privacy exemption in section 14(1) of the *Act*. The appellant appealed the police's decision.

In this order, the adjudicator finds that the video consists of mixed personal information of the deceased, the appellant and others. She finds that the video is exempt from disclosure under the discretionary personal privacy exemption at section 38(b) of the *Act* and upholds the police's exercise of discretion to withhold the video.

In the inquiry, the appellant argued that the police's actions had prejudiced him from obtaining the consent of his deceased father. In this order, the adjudicator explains why these arguments had no bearing on the appeal.

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

**Orders Considered:** Orders M-1146, MO-4049 and MO-3753.

### OVERVIEW:

[1] In 2015, a Toronto Police officer interviewed an individual at his home and recorded a video of the interview. Also present at the interview was the individual's

grandson. The individual died in 2018 (the deceased). The deceased's children are involved in ongoing litigation regarding the deceased's estate.

[2] After the deceased's death, one of the deceased's sons made an access request under the *Municipal Freedom of Information and Protection of Privacy Act*<sup>1</sup> (the *Act*) to the Toronto Police Services Board (the police) for a copy of the video and transcript of the interview. The requester son included with the request the written consent of the grandson who was present at the interview.

[3] The police issued a decision denying access to the video on the basis of the mandatory personal privacy exemption in section 14(1) of the *Act* (with reference to section 14(3)(b)), stating that the video consisted of the deceased's personal information. The police said that the consent of the grandson was not sufficient to permit disclosure of the video.<sup>2</sup>

[4] The requester, now the appellant, appealed the police's decision to the Office of Information and Privacy Commissioner (the IPC).

[5] During the mediation stage of the appeal, the mediator had discussions with the appellant and the police and reviewed the video. At the request of the appellant, the mediator inquired with the police about the possibility of notifying the trustee of the estate of the deceased to obtain consent. The trustee is another son of the deceased.

[6] The police advised the mediator that in their opinion the video does not relate to the estate of the deceased and that even if the trustee consented they would be unable to disclose the complete video. The mediator conveyed this information to the appellant, who advised that he wished to pursue access to the video at the next stage of the appeal process.

[7] The appeal was then transferred to the adjudication stage of the appeal and I conducted a written inquiry. I invited representations from the police and the appellant on the issues relevant to the personal privacy exemptions. These representations were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] I also notified and invited representations from the trustee. The trustee agreed with the police's decision to withhold the video. I did not share the trustee's representations with other parties because I did not find it necessary to do so to fairly resolve the issues in the appeal.

[9] As I will explain in more detail below, the appellant contends that he made a

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<sup>1</sup> R.S.O. 1990, c. M.56.

<sup>2</sup> During the inquiry, the police advised that there is no transcript of the interview.

previous request for access to the video prior to the deceased's death and therefore at a time when the deceased could have consented to disclosure. He argues that the police were delayed in their response to the previous access request and that this delay prevented him from obtaining the deceased's consent. He argues that the police's prior delay entitles him to access the video at this time.

[10] As will also be seen, the appellant does not directly address many of the issues relevant to the personal privacy exemptions in the *Act* in his representations. Rather, he has focused his arguments on the prejudice that he alleges was caused by the police's delay. During the inquiry, I informed the appellant that his delay-based arguments would not be sufficient for me to order the police to disclose the video and I invited him to focus his arguments on the issues relevant to the personal privacy exemption. The appellant continued to pursue the delay-based arguments. In this order, I explain why these arguments and circumstances have no bearing on the outcome of this appeal.

[11] In this order, I find that the video is exempt from disclosure on the basis of the discretionary personal privacy exemption at section 38(b) of the *Act*. I also uphold the police's exercise of discretion to withhold the video and accordingly dismiss the appeal.

## **RECORD:**

[12] A 30 minute video of a 2015 police interview of the deceased.

## **ISSUES:**

- A. Does the video contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary exemption for personal privacy at section 38(b) apply to the video?
- C. Did the police exercise their discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

## **DISCUSSION:**

### **Issue A: Does the video contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?**

[13] As I will elaborate on below, the video contains personal information. The key issue for me to decide is whose personal information it contains. If the video contains personal information of individuals other than the appellant, the police may be required to withhold that information because of the mandatory personal privacy exemption at

section 14(1) of the *Act*. If the video contains the personal information of the appellant, different considerations apply under section 36(1) of the *Act*, which gives individuals a general right of access to their own personal information, subject to certain exemptions.

[14] "Personal information" is defined in section 2(1) of the *Act* and means "recorded information about an identifiable individual." The definition at section 2(1) also contains a non-exhaustive list of examples of types of personal information, such as information relating to an individual's family status (paragraph (a)), financial transactions in which the individual has been involved (paragraph (b)), an individual's address (paragraph (d)), the personal opinions or views of the individual except if they relate to another (paragraph (e)), the views or opinions of another individual about the individual (paragraph (g)), or an individual's name if it appears with other personal information relating to the individual (paragraph (h)). The list of examples of personal information is not exhaustive, meaning that information that is not specifically listed in the definition may still qualify as personal information.<sup>3</sup>

[15] Section 2(2) of the *Act* states that personal information of deceased individuals remains their personal information unless the person has been dead for more than 30 years.

### ***Representations***

[16] The police submit that the video contains the deceased's personal information such as his name, date of birth, address and other types of information that it has described and characterized in their confidential representations. The police refer to paragraphs (a), (d), (e) and (h) of the definition of personal information and explain why the police became involved and why the interview occurred.

[17] The police also emphasize that the *Act* provides clarity that deceased people are entitled to privacy protection for 30 years after their death and that the deceased in this appeal is entitled to this protection for several more years.<sup>4</sup>

[18] The trustee agrees that the video contains the deceased's personal information.

[19] The appellant does not specifically address this issue, but does not appear to dispute that the video contains the deceased's personal information.

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<sup>3</sup> Order 11.

<sup>4</sup> Section 2(2) of the *Act*.

***Finding – the video contains personal information of the deceased, the appellant (requester) and others***

[20] Having reviewed it, I find that the video consists entirely of the personal information of the deceased. The video contains statements made by the deceased describing his date of birth, address, financial information, living situation, family circumstances and his views and opinions. I also find that the images captured in the video consist of the deceased's personal information. It is a video of him in his home. Regardless of what he is saying, the video reveals his demeanour, manner, emotions, and expressions as well as details about his residence.

[21] The video also contains small portions of personal information of people other than the deceased, such as financial information, information about their living situation(s), and their family circumstances. This includes the personal information of the appellant, as well as the trustee, the grandson and others. (I have intentionally omitted more detailed descriptions of the information to maintain confidentiality over the personal information of all individuals involved.)

***Can the appellant's or the grandson's personal information be severed?***

[22] Because the appellant, as the requester, has a general right of access to his own personal information, and because the grandson has consented to disclosing his own personal information, I considered whether their personal information may be severed from the video. For the following reasons, I have concluded that it may not.

[23] As indicated above, the entirety of the video consists of the deceased's personal information. Although the deceased describes some personal information of the appellant and of the grandson, this personal information is intertwined with the deceased's own personal information, either in the form of his views or because the video image would reveal his demeanour and emotions.

[24] The only other people who speak on the video are the grandson and the police officer. The grandson speaks twice – outside of camera view – for a combined total of approximately 8 seconds.

[25] I considered whether the portions of the video that contain the grandson's voice could be severed from the video. I have concluded that they may not. Severance of these two portions would produce an incoherent snippet of information rendering the severance option unreasonable. In any event, because the video portrays only the image of the deceased, disclosure of the portions in which the grandson speaks would still reveal the deceased's personal information.

[26] I considered whether the voice *only* of the grandson could be severed from the video, meaning that an audio clip of the grandson's voice could be severed from the video. I have concluded that due to the brevity of those statements, disclosure of them – even in audio only form – would result in incoherent snippets of information rendering

such a severance unreasonable.

[27] In conclusion, I find that the video consists entirely of the personal information of the deceased, although it is mixed with smaller portions of personal information of other individuals, including the appellant. This means that I must consider the appellant's right of access to the video under section 38(b) of the *Act*.

**Issue B: Does the discretionary exemption for personal privacy at section 38(b) of the *Act* apply to the video?**

[28] As explained above, 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 some exemptions from this right.

[29] Under the section 38(b) exemption, if a record contains the personal information of both the requester (the appellant in this appeal) and other individuals, the institution may refuse to disclose the other individuals' personal information to the requester if disclosing that information would be an "unjustified invasion" of other individuals' personal privacy. The section 38(b) exemption is discretionary.

[30] The appellant's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.<sup>5</sup> However, as I have explained above, the appellant's personal information is intertwined with the deceased's and incapable of being severed, so it is necessary to consider section 38(b) in relation to all of the information on the video.

[31] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of other individuals' personal privacy.

***14(1)(a): no prior written consent of the individuals***

[32] If any of the section 14(1)(a) to (e) exceptions apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b). Only section 14(1)(a) requires discussion in the context of this appeal.

[33] Section 14(1)(a) applies when there is, "prior written request or consent of the individual, if the record is on in which the individual is entitled to have access."

[34] This section requires discussion because:

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<sup>5</sup> Order PO-2560.

- the appellant provided a written consent from the grandson; and,
- the appellant argues the police's actions prejudiced him from obtaining the deceased's consent prior to his death.

[35] For the section 14(1)(a) exception to apply, the individual whose personal information is in the record must have consented in writing to the release of their personal information. The consent must be given in the specific context of the access request, meaning that the consenting individual must know that their personal information will be disclosed in response to an access request under the *Act*.<sup>6</sup>

*Consent of the grandson*

[36] The grandson provided consent to disclosure of his personal information and the consent was given in the context of the request. However, the grandson's consent may only pertain to his own personal information. Section 14(1)(a) only grants authority to consent over information that the individual is entitled to access. The grandson is not entitled to access any personal information other than his own.

[37] As discussed above, it is not possible to sever the grandson's personal information from the personal information of others in the video. Because the grandson's personal information is not reasonably severable, his consent is of no consequence in this appeal.

*Consent of the deceased/delay-based arguments*

[38] This appeal is about an access request that was made in 2019, after the deceased died and at a time, therefore, when it was not possible for him to consent to disclosure. In this inquiry, the trustee objects to disclosure of the video.<sup>7</sup>

[39] There is no evidence before me that the deceased ever gave consent to disclose the video and on that basis, I find that section 14(1)(a) has no application in relation to the video.

[40] However, the appellant's main argument in this appeal is that the police's actions prejudiced his ability to obtain consent from the deceased. In the paragraphs that follow I will explain this argument and why I have decided that it has no bearing on my decision in this appeal.

[41] There is significant disagreement between the police and the appellant about the

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<sup>6</sup> Order PO-1723.

<sup>7</sup> I note this but expressly do not decide whether it is possible in the context of this appeal for the trustee, as representative of the estate of the deceased, to consent to disclosure of the video.

events that transpired. The following paragraphs summarize but make no findings of fact about those events. I have included this information because the appellant's main focus in this appeal was the actions of the police.

[42] The appellant argues that the police mishandled a prior access request made by him at a time when the deceased was still alive. In 2016, the appellant made the following access to the police:

Police occurrence reports for calls made to [a specified address] RE [specified individuals] All calls made by [a specified individual] re the above individuals and the [specified address].

[43] At the time of the prior request (2016), the deceased could have consented. Alternatively, at that time the appellant was the power of attorney for the deceased and he had discussions with the police about the possibility of him giving consent on the deceased's behalf.

[44] The deceased died in 2018. Although the appellant was the deceased's power of attorney at one point in time, this changed later and, as is clear, the appellant is not the trustee for the deceased's estate.

[45] The appellant says that he followed up with the police about the 2016 request but did not receive a formal response from them until March 2019. In 2019, the police disclosed some records in response to the 2016 request but not the video. When the appellant realized that the police had not disclosed the video, he followed up with the police. It was discovered that the video had not been stored with the relevant occurrence reports.

[46] The appellant was informed that he should make a new request. Eight months later, the appellant made a new request, which was denied and then he made the request that is the subject of this appeal with the accompanying consent from the grandson.

[47] In response, the police submit that the video was not within the scope of the 2016 request because it was limited to occurrence reports. The police also concede that the video was not properly filed with the occurrence reports until 2019. The police say that in any event, they have never received any form of consent from the deceased to disclose any information, nor did it receive any confirmation that the appellant was ever the power of attorney for the deceased.

[48] The police also explain why the video would not have been disclosed "even with all the appropriate documentation" and the reasons for its delayed response to the 2016 request. The police also explain that although the appellant followed up in 2016 during the immediate aftermath of the request, he did not contact the police again until 2019.



## **Discussion and finding**

[49] During the inquiry, I informed the appellant that I would not be making findings of fact about the police's actions in relation to 2016 request or any prejudice that he alleges to have suffered. I explained that the focus of the inquiry was the 2019 request, including the possible application of sections 14(1) or 38(b) of the *Act*. The appellant's main argument continued to be that the police delay was prejudicial to his success in obtaining the video because he is no longer able to obtain the consent of the deceased.

[50] Findings about whether the police or the appellant ought to have acted differently in relation to the 2016 request could not change the critical fact that there is no evidence that the deceased provided consent to disclose the video. Even if the appellant could produce a consent provided by the deceased in the context of the 2016 request or otherwise, which he has not done, I would need to be satisfied that it clearly and specifically pertained to the video.<sup>8</sup>

[51] A lost opportunity to obtain a consent, even if it occurred, could not replace a consent which is required to be specific to the record at issue. Because there is no such consent and this fact resolves the matter of whether section 14(1)(a) has any application. It does not.

[52] I will now determine whether disclosure of the video would result in an unjustified invasion of personal privacy of individuals other than the appellant by considering sections 14(2), (3) and (4).

### ***Sections 14(2), (3) and (4)***

[53] Sections 14(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b).<sup>9</sup>

[54] I will first consider sections 14(2) and (3). Because the appellant's personal information is also contained in the video, this requires me to consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties – that is, the presence of a presumption does not prevail over other factors.<sup>10</sup>

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<sup>8</sup> Order PO-1723.

<sup>9</sup> Section 14(4) lists situations where disclosure would not be an unjustified invasion of personal privacy, in which case it may not be necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply. Although I consider section 14(4)(c) in this appeal, I find that it does not apply, so I will first consider the presumptions at section 14(3), followed by the factors at section 14(2).

<sup>10</sup> Order MO-2954.

*The presumption at section 14(3)(b) applies and supports privacy protection*

[55] Sections 14(3)(a) to (h) list several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 38(b). The police submit that presumption at section 14(3)(b) is relevant to the video.

[56] Section 14(3)(b) states that disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if it,

(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;

[57] The police submit that the deceased's personal information in the video relates to his involvement in an investigation into a possible violation of law, referring to Order MO-3423 in which the adjudicator found that section 14(3)(b) applied in a situation even when no charges were laid in the matter.

[58] Neither the appellant nor the trustee have directly addressed the application of section 14(3)(b).

[59] Based on my review, I agree that the video contains information about the deceased that falls squarely within the presumption at section 14(3)(b). This presumption requires only that there be an investigation into a possible violation of law, which there was.<sup>11</sup>

[60] The presumption at section 14(3)(b) applies and weighs in favour of privacy protection of the deceased.

*The sections 14(2)(f) and 14(2)(d) factors apply – supporting privacy protection and disclosure, respectively*

[61] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.<sup>12</sup> Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[62] The list of factors under section 14(2) is not a complete list. The police must also consider any other circumstances that are relevant, even if these circumstances are not

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<sup>11</sup> Orders P-242 and MO-2235.

<sup>12</sup> Order P-239.

listed under section 14(2).<sup>13</sup>

[63] The police argue that the factors at sections 14(2)(f), (h) and (i) apply, as well as other factors not listed in section 14(2). The appellant did not specifically address this issue; however, he refers to ongoing litigation involving the estate of the deceased and the video's relevance to that proceeding. I have therefore considered the possible application of section 14(2)(d).

[64] These sections state:

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

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

(f) the personal information is highly sensitive;

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

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

#### Section 14(2)(d) – fair determination of rights

[65] Section 14(2)(d) supports disclosure of someone else's personal information where the information is needed to allow the requester to participate in a court or tribunal process. The IPC uses the following four-part test to decide whether this factor applies:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information has some bearing on or is significant to the determination of the right in question?

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<sup>13</sup> Order P-99.

4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?<sup>14</sup>

[66] During the inquiry, I informed the appellant about the four-part test and invited him to make arguments in relation to this section (and others). The appellant did not address the four-part test. However, he argues that the video is important to help him in the ongoing litigation about the deceased's estate. He believes that the video reveals facts that are relevant to explaining the deceased's actions at certain points in time that are at issue in the litigation.

[67] The appellant also provided me with an interlocutory court order (the court order) from the estate litigation granting him certain rights to direct the assets of the deceased's estate and suggested that the court order provided the police with sufficient authority to disclose the video. The appellant also asked that I use the court order as to direct the police to disclose the video. By letter during the inquiry, I informed the appellant that I would not be making any directions to the police on the basis of the court order and that my inquiry would be limited to determining whether consideration of whether the personal privacy exemptions in the *Act* applied to the video.

[68] The trustee did not address this section or the appellant's position; however, he argues that the deceased's privacy should be protected from the appellant.

[69] Although invited to do so, the police did not make representations specifically about section 14(2)(d). (This is understandable because the appellant did not argue that it applied.) However, the police are aware of the litigation and have taken it account in their decision making.

### **Finding**

[70] As indicated, the appellant has not made arguments directly about the possible application of section 14(2)(d). Although it is ordinarily for the appellant to establish the applicability of section 14(2)(d), it is my view that fairness requires that I give the appellant's representations a broad reading and consider the arguments that the appellant has attempted to make.

[71] Toward this end, I easily conclude that the appellant has established the first two parts of the four-part test. He is a party to ongoing litigation involving his legal rights.

[72] I am also satisfied that some parts of the video may have some bearing on the determination of the appellant's rights in the litigation. On the basis of the information

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<sup>14</sup> See Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

before me about the litigation as explained by the appellant, I am not able to discern which parts are of relevance and to which legal issues. Nevertheless, giving the appellant's representations a broad reading, I accept that the third part of the test has been met.

[73] To meet part four of the test, I must be satisfied that the video is *required* to prepare for the hearing or ensure an impartial hearing. The appellant perceives the video to be important to his position in the litigation. As I understand the appellant's arguments, he is of the view that without the video he will be significantly prejudiced in the litigation.

[74] The preponderance of IPC orders involving section 14(2)(d) involve information that is required to commence litigation – such as the identity of a potential defendant.<sup>15</sup> The other common thread that emerges from the IPC's consideration of section 14(2)(d) is that the factor may only be said to be relevant only to the parts of the personal information at issue that are *required*. For instance, the factor may be relevant to a party's name and address but not other personal information.<sup>16</sup>

[75] I find that the appellant has established the fourth part of the test. In reaching this conclusion, I have considered the views of the appellant that the video is important to his position and the efforts that he has undertaken to obtain the video under the *Act*. It would have been better if the appellant had more clearly articulated the issues in the litigation and how the types of information in the video were required to address those issues; however, it is my view that in the circumstances of this appeal he has made a sufficiently consistent case that is within the realm of reasonable possibilities that the video is required.

[76] I will account for the deficiencies in the appellant's arguments to establish section 14(2)(d) in the amount of weight that I give to the factor when balanced against the other relevant factors in this appeal.

[77] Consistent with other IPC orders, I will also afford this factor less weight because as a party to ongoing litigation, the appellant is able to use the disclosure and discovery procedures under the *Rules of Civil Procedure*<sup>17</sup> to gather and access relevant evidence, such as the video.

[78] In conclusion, I find that section 14(2)(d) is a relevant consideration favouring disclosure of the video, although in the circumstances of this appeal the amount of weight to be given to it should be reduced.

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<sup>15</sup> See Order M-1146.

<sup>16</sup> Order M-1146 and for example, Order MO-4049 and MO-4041.

<sup>17</sup> R.R.O. 1990, Reg. 194.

14(2)(f) and (h) – highly sensitive and supplied in confidence

[79] Section 14(2)(f) is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive. To be considered “highly sensitive,” there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>18</sup> For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.<sup>19</sup>

[80] Section 14(2)(h) against disclosure if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. This requires an objective assessment of whether the expectation of confidentiality is “reasonable.”<sup>20</sup>

[81] The police submit that the information contained in the statement is highly sensitive and was provided by the deceased in confidence to the police. The police made confidential representations further characterizing the information in the video, including how disclosure of the information would impact individuals other than the deceased.

[82] The police refer to Order MO-3666-I in support of the proposition that the IPC has consistently held that personal information relating to individuals relating to their contact with the police “as complainants witnesses or suspects” is highly sensitive.

[83] The police also refer to Order MO-2830 in which the adjudicator determined that there was an expectation of confidentiality of statements made to police in circumstances where there was an underlying adversarial relationship.

[84] The appellant has not specifically addressed this issue. However, when I view his representations in their totality, I understand that he believes that the deceased would have wanted the video to be disclosed at this time in the context of the litigation, suggesting perhaps that there was no expectation of confidentiality or that the deceased would not agree that the information is highly sensitive.

**Finding**

[85] Having reviewed the video, I agree that disclosure of some of the personal information in the video is highly sensitive. I reach this conclusion in consideration of the subject matter of the information and not merely because of the involvement of the police. In order to protect the confidentiality of that information, I will not characterize it further in this order.

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<sup>18</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>19</sup> Order MO-2980.

<sup>20</sup> Order PO-1670.

[86] However, I do not agree that there was an objective expectation of confidentiality over the information in the video because the grandson was present at the interview. While it may be reasonable to conclude in certain circumstances, such as those at issue in Order MO-2830, that discussions with police are intended to be confidential, I am not able to make this conclusion when there was another person present at the interview.

[87] In summary, I find that the factor at section 14(2)(f) – that the personal information is highly sensitive – is present and that it weighs in favour of privacy protection.

14(2)(i) – disclosure may unfairly damage an individual’s reputation

[88] Section 14(2)(i) weighs against disclosure if disclosure of personal information might create damage or harm to an individual’s reputation that would be considered “unfair” to the individual.<sup>21</sup>

[89] The police made confidential representations about the application of section 14(2)(i) that I am not disclosing further as to do so would reveal the content of the video itself. Neither the appellant nor the trustee has specifically addressed this factor.

**Finding**

[90] In my view, there is insufficient evidence before me to conclude that section 14(2)(i) applies to the circumstances of this appeal. Although I am unable to characterize the basis for the police’s concern in this order, I find that is reasonably-held; however, for me to conclude that any individual’s reputation would be harmed unfairly would require inappropriate speculation on my part.

[91] In summary, I find that section 14(2)(i) has no application to the present appeal.

Other factors or relevant circumstances

[92] The police are required to take into account other relevant considerations. The police submit that because the statement was provided in 2015, the views and opinions of the deceased at issue may have changed prior to his death in 2018. Relatedly, they submit that disclosure of the video at a time when the deceased is not able to explain the information in it could have negative impacts.<sup>22</sup>

[93] The appellant has not specifically addressed this issue. However, when I consider

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<sup>21</sup> Order P-256.

<sup>22</sup> I have intentionally refrained from disclosing the details of the police’s arguments about this factor due to confidentiality concerns.

his overall representations, I understand that he believes that disclosure of the video would, contrary to the police's view, *enable* his deceased father to have a voice in the context of the ongoing litigation and that this factor should favour disclosure.

### **Finding**

[94] Although the interests advanced by the parties are germane to the circumstances, I am not satisfied that any of them have been sufficiently established by the evidence to weigh for or against disclosure. To do so would require me to speculate about underlying circumstances, which I am not prepared to do.

#### Balancing of the presumption and factors

[95] Above, I have found that the presumption pertaining to law enforcement investigations at section 14(3)(b) applies and weighs in favour of privacy protection of the deceased and individuals other than the appellant. I also found that the section 14(2)(f) factor pertaining to highly sensitive information applies and favours privacy protection.

[96] I have also found that the factor pertaining to fair determination of rights at section 14(2)(d) applies and favours disclosure of the video, although I have concluded that this factor should be given less weight.

[97] Considering that the video contains predominantly the deceased's personal information, it is my view that factors 14(3)(b) and 14(2)(f) weigh heavily in favour of privacy protection of the video. The information that the deceased chose to disclose to the police and the manner in which he did is inherently sensitive and personal. In my view, these factors strongly support a conclusion that disclosure of the video would result in an unjustified invasion of the personal privacy of the deceased.

[98] While the appellant perceives the video to be important to the fair determination of his rights (section 14(2)(d)), and I have accepted this as a relevant factor, it is my view that the appellant's interests are not sufficient to outweigh the deceased's privacy interests to permit disclosure under the *Act*.

[99] Although the *Act* provides that a person's ability to a fair determination of rights may be into account, as I have, one of the animating principles embedded within the factor is ensuring that the *Act* does not improperly prevent individuals from seeking justice against those who have been involved in wrongful actions.<sup>23</sup> With sufficient evidence, this factor has most commonly supported disclosure of discrete portions of personal information to facilitate or enable commencement of proceedings or assessment of events involving themselves.

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<sup>23</sup> Order M-1146.



[100] In the present appeal, there is no suggestion that the video is necessary to commence litigation. As I understand the appellant, he perceives the video as helpful to his position. It is also apparent based on the information before me that the appellant is able to make the allegations and arguments that he wishes to make. The appellant seeks access under the *Act* to gather additional evidence. Gathering evidence is an entirely proper objective; however, it must be weighed against the other factors that have been established.

[101] After weighing the factors, I am of the view that disclosure of the video would constitute an unjustified invasion of the personal privacy of the deceased and others. This finding is subject to my consideration of section 14(4)(c). Although the appellant has not specifically referred to section 14(4)(c), portions of his representations in this inquiry are arguably relevant to that section.

*Section 14(4)(c) – compassionate reasons*

[102] Section 14(4)(c), provides for the disclosure of the personal information of a deceased individual, if disclosure to a “close relative” would be desirable for compassionate reasons. Section 14(4)(c) states:

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

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

[103] IPC adjudicators have consistently followed the approach taken in Orders MO-2237 and MO-2245 to determine if section 14(4)(c) applies and I will proceed in similar fashion.<sup>24</sup> In order for section 14(4)(c) to apply, the following conditions must be present:

1. the records contain the personal information of someone who has died;
2. the requester is a spouse or “close relative” of the deceased individual; and,
3. the disclosure of the personal information of the deceased individual is desirable for compassionate reasons given the circumstances of the request.

[104] In the circumstances of this appeal, the first two conditions are present. The

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<sup>24</sup> See for example Orders PO-4190, MO-4088, PO-4148, PO-3504, and PO-3533.

video contains the personal information of someone who has died and the requester, the appellant and the deceased's son, is a close relative within the meaning of the *Act*.<sup>25</sup>

[105] Assessing the third condition requires that I determine whether, "in the circumstances, disclosure is desirable for compassionate reasons," taking into account factors such as the need to assist the requester in the grieving process.<sup>26</sup>

[106] As summarized by the adjudicator in Order MO-3753, "[c]ompassionate reasons have generally been found to exist where information will assist a close relative in understanding the events leading up to and surrounding the death of an individual." This may include information about related events that occurred prior to the individual's death if that information would assist with the requester's grieving process.<sup>27</sup>

### Representations

[107] The police explain that they considered section 14(4)(c) but concluded that it did not apply because the interview occurred well prior to the deceased's death and that disclosure of the video could be said to be of any assistance to the appellant in the grieving process. The police refer to Order MO-3307, in which the adjudicator found that section 14(4)(c) did not apply in circumstances when the records at issue related to incidents that occurred more than a year prior to the deceased person's death.

[108] Relevant to section 14(4)(c), albeit in the context of other arguments, the appellant submits that disclosure of the video would be "positive" for the deceased's grandchildren to see him one more time.

[109] In response, the police expressed sympathy to the appellant's situation, but it maintained its position that the privacy protection provided to the deceased under the *Act* prevailed in this situation.

### Compassionate reasons within the meaning of section 14(4)(c) are not present

[110] As described above, the main reason why the appellant seeks the video is to assist with the ongoing estate litigation. He has also made a brief suggestion that disclosure could be "positive" for the deceased's grandchildren.

[111] I have little evidence before me about how disclosure could assist with the appellant's grieving process or, for example, aid in understanding the circumstances of the deceased's death.

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<sup>25</sup> See definition of "close relative" in section 2(1).

<sup>26</sup> Order MO-2245.

<sup>27</sup> Order MO-3753 at para 48.

[112] Considering the legislative history<sup>28</sup> of, and the IPC's consistent prior consideration of section 14(4)(c), it is my view that for me to find that this section applies I must be satisfied that video sheds some light on or is connected to the circumstances of the deceased's death.

[113] Having reviewed the video, the subject matters discussed in it, and taking into account the passage of time between the video and the deceased's death (approximately three years), I am unable to discern how the video or the topics discussed in that video have any connection to the deceased's death. I therefore find that section 14(4)(c) does not apply.

*Absurd result – the section 38(b) exemption may not apply*

[114] An institution might not be able to rely on the section 38(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In such situations, withholding the information might be absurd and inconsistent with the purpose of the exemption.<sup>29</sup>

### Representations

[115] The police submit that it is not absurd for them to withhold the video. They submit that the appellant was not present nor did he provide the information in the video to the police. The police concede that for a variety of reasons the appellant may have second-hand knowledge of what was said in the video, but they submit that if this is true it does not permit disclosure.

[116] The police refer to Order MO-3307, in which the adjudicator held that the absurd result principle may not apply even when some of the information at issue may be within the appellant's knowledge. The police quote at some length from this order, one passage of which is:

I accept that some of the information contained in the records may very well be within the appellant's knowledge as it contains information that can be described as her own personal information .... However, I do not accept that the absurd result principle applies in the circumstances of this appeal.

None of the information contained in the records amounts to information that the appellant provided directly to the police. Additionally, she was not present when the information was provided to police by other identifiable

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<sup>28</sup> See Orders MO-1449 and MO-2337.

<sup>29</sup> Orders M-444 and MO-1323.

individuals. In my view, it is not evident which portions of the information contained in the records might be in the appellant's knowledge and which are not. All of the information that can be described as the appellant's own personal information is inextricably intertwined with that of other identifiable individuals and cannot be meaningfully severed. I am satisfied that in the circumstances of this appeal, withholding the information would not be absurd or inconsistent with the purpose of the exemption at section 38(b). For this reason, I find that the absurd result principle does not apply.

[117] The police also refer to Orders MO-2571, MO-1323 and MO-3723 in support of their conclusion that it is not absurd to withhold the information in the video from the appellant.

[118] The appellant has not argued that withholding the video results in an absurd result. However, when I view his representations in their totality, it is clear that the appellant believes that he has general knowledge of the content of the video. Although he does not reference this, it is also reasonable to conclude that he could have second hand knowledge because the grandson was present.

#### Finding

[119] Having reviewed the video, I am satisfied that withholding it would not lead to an absurd result. To begin with, the appellant was not present at the interview. While the appellant appears to have some general knowledge about what he thinks is on the video, it is not evident to me the full scope of the appellant's knowledge of all of the contained in the video, including the deceased's demeanour.

[120] The absurd result principle does not apply in this appeal.

#### **Issue C: Did the police exercise their discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?**

[121] The section 38(b) exemption is discretionary, meaning that the police can decide to disclose information even if the information qualifies for exemption. The police must exercise their discretion and I must consider whether they have done so.

[122] In addition, I must also consider whether the police exercised their discretion in bad faith, for an improper purpose, in consideration of irrelevant considerations or without regard for relevant considerations.

[123] If I find that the police did not exercise their discretion or acted improperly in

doing so, I may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>30</sup> I am not able to substitute my own discretion for that of the police.<sup>31</sup>

[124] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:<sup>32</sup>

- the purposes of the *Act*, including the principles that:
  - information should be available to the public,
  - individuals should have a right of access to their own personal information,
  - exemptions from the right of access should be limited and specific, and
  - the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their own personal information,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

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<sup>30</sup> Order MO-1573.

<sup>31</sup> Section 43(2).

<sup>32</sup> Orders P-344 and MO-1573.

### ***Positions of the parties***

[125] The police submit that they exercised their discretion and that it should be upheld. They say that they acted properly and that they balanced the privacy protections in the *Act* with the public's right to know. The police say that in exercising their discretion to withhold the video, they concluded that disclosure could aggravate a volatile situation within the deceased's family and would contravene the protection provide in the *Act* to the deceased, which they refer to as the "30-year privacy protection."

[126] The police submit further that disclosure in the face of the 30-year privacy protection for the deceased would impair public confidence in the police hindering their ability to conduct their work.

[127] Although not specifically referred to in relation to its exercise of discretion representations, the police have during the course of the inquiry indicated that they have sympathy for the appellant's position but they have placed a priority on the privacy interests of the deceased.

[128] The appellant's main argument throughout the appeal is that the police's actions in relation to the 2016 access request harmed his ability to obtain the video. In this regard, I understand the appellant's position to be that the police have acted in bad faith toward him.

[129] Although he is clearly dissatisfied with the police's decision and their actions, he has made no arguments that they are taking into account improper considerations when applying the *Act*. In fact, the appellant appears to accept that the only way for him to obtain access is if the deceased had consented and it may be for this reason that he has focused his arguments on his lost opportunity to obtain that consent, rather than the other considerations under section 38(b).

### ***Finding***

[130] I find that the police have exercised their discretion and I uphold it.

[131] I am satisfied that even though the video is exempt from disclosure under section 38(b), the police have genuinely and in good faith considered whether to disclose all or parts of the video to the appellant.

[132] In making the decision about whether to disclose the video, the police weighed relevant considerations. It is appropriate for the police take into account the relationship between the appellant and any affected persons and to consider the interests protected by the exemption at issue in the appeal.

[133] In addition, the police have expressed an understanding of the appellant's position and they have conveyed a sympathy for it. They have also candidly addressed

the appellant's allegations of delay and misfeasance in relation to the 2016 request.

[134] I am satisfied that the police have assessed and weighed the competing interests present in this appeal, but they have determined that protection of the privacy rights of the deceased is paramount.

**ORDER:**

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

Original signed by \_\_\_\_\_  
Valerie Jepson  
Adjudicator

November 3, 2021 \_\_\_\_\_