

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4327

Appeal MA20-00227

Toronto Police Services Board

February 9, 2023

Summary: The Toronto Police Services Board (the police) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the sudden death of the appellant's adult son. The police provided access to the records, in part, but withheld portions of the records, claiming the discretionary personal privacy exemption in section 38(b) of the *Act*. In this order, the adjudicator finds that the withheld information contains the personal information of the appellant's son, an affected party and in some cases, the appellant. The adjudicator upholds most of the police's decision to withhold information on the basis of either of the personal privacy exemptions, section 14(1) or 38(b). The adjudicator finds that the compassionate grounds provision in section 14(4)(c) of the *Act* applies, and therefore the personal privacy exemption in section 14(1) does not apply to some of the withheld information. The adjudicator orders the police to disclose to the appellant the portions of the records to which section 14(4)(c) applies.

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

Orders Considered: Orders MO-2237, MO-2245, MO-4088 and PO-3273.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Toronto Police Services Board (the police). The police received a

request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a police occurrence report and the full report of first responders and the investigating detective concerning the sudden and tragic death of the requester's adult son.

[2] The police located records responsive to the request and granted access to the requester, in part. The police advised the requester that section 14(4)(c) (compassionate grounds) of the *Act* applied in the circumstances of the request. The police withheld other information from the requester, claiming the application of the personal privacy exemption in section 38(b), with reference to section 14(3)(b). The police also advised the requester that certain information was not responsive to the request.

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

[4] During the mediation of the appeal, the appellant informed the mediator that she was not pursuing the information the police deemed non-responsive to the request. However, as discussed under the heading "Preliminary Issue," the issue of the responsiveness of some of the records was raised by the appellant during the inquiry.

[5] The appellant further informed the mediator she was no longer pursuing the withheld information located on the following pages of the records:

- All of the information withheld on page 12,
- The names of individuals on pages 16 and 19, and
- The email address on page 22.

[6] Accordingly, this information is no longer at issue in this appeal and will not be disclosed to the appellant.

[7] Also during the mediation of the appeal, the mediator sought consent from a third party (the affected party), but consent was not obtained.

[8] The matter then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I sought and received representations from the police and the appellant. Limited portions of the police's representations were not shared with the appellant, as they met the confidentiality criteria in the IPC's *Practice Direction 7*. I will not be setting out these portions in this order, but have taken them into consideration in making my findings.

[9] I also sought representations from the affected party, but did not received representations from them.

[10] For the reasons that follow, I find that the withheld information contains the personal information of the appellant, her son and the affected party. I find most of the withheld personal information to be exempt from disclosure under either section 14(1) or 38(b). I also find that the compassionate grounds exception in section 14(4)(c) applies to the some of the information containing the appellant's son's and the affected party's personal information, such that this information is not exempt from disclosure under section 14(1). I uphold the police's exercise of discretion under section 38(b) for the information that it did withhold under that exemption and I order them to disclose to the appellant the portions of the records to which section 14(4)(c) applies.

RECORDS:

[11] The records consist of I/CAD Event Details Reports, a General Occurrence Report, and handwritten notes. The information at issue is set out as follows:

Pages that were withheld, in part under section 38(b)	Page that was withheld, in whole under section 38(b)
1-2, 7-11, 16-17, 19-22, 24-25, 27, 30, 32-33, and 36-37.	26

PRELIMINARY ISSUE

[12] In her representations, the appellant states that in addition to the pages listed above, she is also interested in obtaining disclosure of the withheld information on pages 31, 34, 38 and 39, which the police withheld on the basis that this information was not responsive to the appellant's access request. I have reviewed the withheld information contained in these pages, and I find that it is not reasonably related,¹ and therefore not responsive to, the appellant's access request. In particular, I find that these withheld portions refer to matters that are wholly unrelated to the untimely death of the appellant's son and the ensuing investigation regarding his death. As a result of finding that this information is not responsive to the appellant's access request, I will not be referring to it further in this order, and it is not to be disclosed to the appellant.

ISSUES:

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

¹ Orders P-880 and PO-2661.

- B. Does the mandatory exemption for personal privacy at section 14(1) or the discretionary exemption for personal privacy at section 38(b) apply to the information at issue?
- C. Did the police exercise their discretion under section 38(b)? If so, should the IPC 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?

[13] In order to assess the police’s claim that either of the personal privacy exemptions apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. 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;

[14] 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

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

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

Representations

[17] The police submit that the records contain personal information as defined in section 2(1). In particular, the police submit that the withheld information consists of the personal information of the affected party, who is not the appellant's son. This personal information, the police argue, includes their name, address, telephone number, date of birth and other identifying information, as well as their name with other personal information about them. The police further submit that the only personal information at issue is that of the affected party.

[18] While the appellant's representations do not directly address whether the records contain personal information, she implies that the records do contain personal information because she refers to the privacy of "other parties."

Analysis and findings

[19] I have reviewed the withheld information in the records and I find that it contains the personal information of the affected party, the appellant's son and the appellant. With regard to the affected party, the withheld information contains their name, and their telephone number, which falls within paragraph (d) of the definition of personal information as defined in section 2(1) of the *Act*. The records also contain information about the affected party's marital status, family status, age and race, which qualifies as their personal information under paragraph (a) of the definition of personal information. In addition, the records contain the name of the affected party where it

² Order 11.

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

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

appears with other personal information about them, such as statements made to the police about what they observed and did during the incident, which qualifies as their personal information under paragraph (h) of the definition.

[20] Turning to the appellant's son, I find that all of the records contain his personal information because they relate to his death and the police investigation about his death. In particular, the records contain the appellant's son's name where it appears with other personal information about him, which qualifies as his personal information under paragraph (h) of the definition. I also find that these portions also contain the views or opinions of the affected party about the appellant's son, which qualifies as his personal information under paragraph (g) of the definition. In both cases, the personal information reveals the circumstances surrounding the sudden and tragic death of the appellant's son.

[21] Finally, I find that the appellant's personal information is located only on pages 16 and 19 of the records. These pages contain her name where it appears with other information about her, which qualifies as her personal information under paragraph (h) of the definition.⁵ These pages of the records also contain her son's personal information and the affected party's personal information.

[22] Because the appellant's personal information appears only on pages 16 and 19 of the records (in addition to the son and affected party's personal information), I will consider the application of the discretionary personal privacy exemption in section 38(b) to these pages. With respect to the remaining pages at issue, I will consider the application of the mandatory personal privacy exemption in section 14(1) to them.

Issue B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b), both for personal privacy, apply to the information at issue?

[23] 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.

[24] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester. The police are claiming the application of section 38(b) to all of the information at issue, read with the presumption in section 14(3)(b).

[25] Under section 14(1), where a record contains the personal information of

⁵ I note that the appellant's personal information contained in the records was disclosed to her by the police at the time of the access request.

another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in paragraphs (a) to (e) applies, or unless the section 14(1)(f) exception applies.

[26] If any of paragraphs (a) to (e) of section 14(1) apply, neither the section 14(1) exemption nor the section 38(b) exemption applies.

[27] In applying either the section 38(b) exemption or the section 14(1)(f) exception to the section 14(1) exemption, sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[28] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[29] For records claimed to be exempt under section 14(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.⁶

[30] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's personal information), the IPC will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁷

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

Representations

[32] The police submit that the personal privacy exemption in section 38(b), read with the presumption in section 14(3)(b) applies to the withheld information (the affected party's personal information) and that the disclosure of this personal information would constitute an unjustified invasion of their personal privacy. They argue that the presumption in section 14(3)(b) applies because the police responded to an incident that was reported to them, and gathered personal information as part of an investigation into a possible violation of law. The police further argue that the exceptions to the personal privacy exemption in sections 14(1)(a) through (e), as well as the factors in section 14(2), which weigh either in favour of or against disclosure, do not apply in these circumstances.

⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

⁷ Order MO-2954.

[33] The police also note that the compassionate grounds limitation in section 14(4)(c) was applied at the time of the request to disclose as much information as possible to the appellant relating to her son.

[34] The appellant submits that she is seeking access to the withheld portions of the records where such disclosure would not be in contravention of existing privacy laws. She states:

I am asking that the adjudicator review my request and under compassionate grounds grant me access to as much information as possible about the circumstances surrounding my son's death. I understand that privacy laws preclude disclosure of identifying information; however in certain redactions, several lines of text are redacted (in some cases large paragraphs), more than can reasonably be believed to protect someone's name, address, DOB, etc.

Analysis and findings

[35] Turning to the personal information of the affected party and the appellant's son that was withheld from the appellant, I find that most of the withheld personal information is exempt from disclosure under both sections 14(1) and 38(b), as the case may be, (subject to the police's exercise of discretion under section 38(b)), because the disclosure of this personal information would constitute an unjustified invasion of the son's and the affected party's personal privacy. In making this finding, I find that the presumption in section 14(3)(b) applies to this information.

[36] Section 14(1)(f) states:

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

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

[37] Section 38(b) states:

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

(b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[38] Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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;

[39] The presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law.⁸ Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. I accept the police's evidence that all of the information contained in the records at issue was compiled and is identifiable as part of an investigation into a possible violation of law, and therefore the presumption in section 14(3)(b) applies.

[40] For the records that contain only the affected party's and/or the appellant's son's personal information, under the mandatory exemption in section 14(1), a presumed unjustified invasion of personal privacy under section 14(3)(b) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.⁹ In this case I find that the public interest override in section 16 does not apply to any of the personal information, nor was it raised by the appellant. With the exception of some of the information on pages 25, 26 and 27, I find that disclosure of this information is presumed to constitute an unjustified invasion of the personal privacy of the appellant's son and the affected party. I have reached a different conclusion with respect to some of the information on pages 25, 26 and 27, which I will discuss below.

[41] For the record that contains the personal information of the appellant, her son and the affected party,¹⁰ I have considered, and weighed, the factors and presumptions in sections 14(2) and (3) and balanced the interests of the appellant, her son and the affected party in determining whether the disclosure of the affected party's personal information would be an unjustified invasion of their personal privacy.¹¹ I find that the presumption in section 14(3)(b), discussed above, applies to this information and that none of the factors in section 14(2) that weigh in favour of disclosure apply. I also find that the factor in section 14(2)(f), a factor that weighs against disclosure, applies because the appellant's son's and the affected party's personal information is highly sensitive. As a result, I find that the appellant's son's and the affected party's personal information in this record is exempt from disclosure under section 38(b), subject to my findings regarding the police's exercise of discretion.

Pages 25, 26 and 27

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

⁸ Orders P-242 and MO-2235.

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

¹⁰ Regarding this record, the police disclosed the appellant's personal information as well as that of her son to the appellant during the processing of the access request.

¹¹ Order MO-2954.

appellant has raised the application of section 14(4)(c), the provision of the *Act* that requires disclosure of personal information for compassionate reasons.

[43] For the reasons that follow, I find that the compassionate grounds provision at section 14(4)(c) applies to portions of pages 25, 26 and 27 of the records, meaning that section these portions are not exempt under section 14(1).

[44] 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 of close relative of the deceased individual and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[45] The term "close relative" is defined in section 2(1) of the *Act* as follows:

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

[46] 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. Does the record 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?¹²

[47] After the death of an individual, it is that person's close relatives who are best able to act in their "best interests" with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons".¹³

[48] Concerning part one of the test, I have already found that pages 25, 26 and 27 contain the personal information of a deceased individual, namely the appellant's son (as well as the affected party's personal information) meeting the requirement of part one of this test. Regarding the second part of the test, there is no dispute that the

¹² Orders MO-2237 and MO-2245.

¹³ Order MO-2245.

appellant is a "close relative" of the deceased individual, in that she is the deceased's mother.

[49] The only outstanding issue then, with respect to section 14(4)(c), is whether part three of the test has been met, which is whether the disclosure of the appellant's son's and the affected party's personal information is desirable for compassionate reasons in the circumstances of the request. There have been several IPC orders dealing with the application of the compassionate grounds in section 14(4)(c), beginning with Order MO-2237, in which former Commissioner Brian Beamish found that the legislative intent of this section was recognition that, "for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate."

[50] In Order MO-2245, former Commissioner Beamish added that:

Losing a loved one is a sad and difficult process. Section 14(4)(c) of the *Act* was designed to allow families to have the records they feel they require in order to grieve in the way they choose.

[51] Subsequent IPC orders have also found that, in interpreting section 14(4)(c), a broad and all encompassing approach should be taken in determining whether or not disclosure is "desirable for compassionate purposes."¹⁴

[52] I give significant weight to appellant's position that disclosure of the records will help her understand the circumstances around her son's death. Section 14(4)(c) of the *Act* was designed to allow families to have the records they feel they require in order to grieve in the way they choose. Therefore, on the question of what is "compassionate", I accept the evidence and representations of the appellant.

[53] The police's position is that they have disclosed as much information as possible about the appellant's son to the appellant under section 14(4)(c). In that regard, I find Order PO-3273 instructive and I agree with it and adopt it for the purposes of this appeal. In that order, former Adjudicator Daphne Loukidelis noted that the institution had provided a great deal of information to the appellant about an accident that took the life of the appellant's son. Despite that, she concluded that the institution's reasons for not providing greater disclosure reflected its own views, rather than the appellant's, about what information might assist the appellant and his family in grieving the loss of their son in the way they chose. Adjudicator Loukidelis found that this was not the correct approach to take in assessing what disclosures are compassionate in the circumstances. This principle is applicable to the present appeal and I find that the police's views about what might assist the appellant are the police's view and that the appellant is in the better position to decide what information might assist her in grieving the loss of her son.

[54] For these reasons, I am satisfied that disclosure of portions of pages 25, 26 and

¹⁴ See, for example, Orders PO-3129, PO-3273 and PO-3951.

27 is desirable for compassionate reasons and that all the requirements for the application of section 14(4)(c) have been satisfied. These portions are not exempt under section 14(1) and I will order the police to disclose them to the appellant.

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

[55] 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 IPC may determine whether the institution failed to do so. It is only necessary that I review the police's exercise of discretion to withhold the information on pages 16 and 19, the two pages of records that contain the appellant's personal information.

[56] In addition, the IPC 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, or it fails to take into account relevant considerations.

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

[58] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁷

- 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 his or her 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

¹⁵ Order MO-1573.

¹⁶ Section 43(2).

¹⁷ Orders P-344 and MO-1573.

- 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, and
- the historic practice of the institution with respect to similar information.

Representations

[59] The police submit that they properly exercised their discretion and in so doing did not exercise their discretion in bad faith or for an improper purpose, took into account all relevant considerations, and did not take into account irrelevant considerations. In particular, the police submit that they applied the exemption in a limited and specific manner, taking into account the personal privacy of individuals other than the appellant. They also argue that they maintained a balance between the protection of the affected party's personal privacy with the appellant's right of access, based on the compassionate grounds in section 14(4)(c), and that they disclosed as much information about the appellant's son's death based on these grounds.

[60] The appellant's representations do not address the police's exercise of discretion.

Analysis and findings

[61] As set out above, I have found the affected party's personal information contained in pages 16 and 19 to be exempt from disclosure under section 38(b).¹⁸ Based on the police's representations and my review of the pages themselves, I find that the police properly exercised their discretion in good faith under section 38(b), taking into account relevant considerations and not taking into account irrelevant considerations. In particular, I find that the police balanced the privacy interests of the affected party with the appellant's sympathetic and compelling need to access the information in the records. I am also satisfied that the police disclosed as much information as possible to the appellant under section 38(b). As a result, I uphold the police's exercise of discretion under section 38(b).

ORDER:

1. I uphold the police's access decision, in part.
2. By **March 20, 2023** but not before **March 13, 2023**, I order the police to disclose some information on pages 25, 26 and 27 because it is not exempt from disclosure under section 14(1) due to the application of section 14(4)(c). I will provide a copy of these pages to the police, highlighting the portions of them that are to be disclosed to the appellant.

¹⁸ As indicated above, the portions of these pages that contain the appellant's personal information have already been disclosed to her.

3. I reserve the right to require the police to provide a copy of the record to the IPC it discloses to the appellant.

Original signed by: _____

Cathy Hamilton
Adjudicator

February 9, 2023 _____