

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4454

Appeal MA21-00754

Halton Regional Police Services Board

October 27, 2023

Summary: The Halton Regional Police Services Board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records related to the death of the appellant's boyfriend. The police issued a decision granting partial access to the responsive records withholding information under sections 14(1) (personal privacy), 38(b) (personal privacy), and 8(1)(h) (security) of the *Act*. The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario. In this order, the adjudicator upholds the police's decision and orders the police to issue an access decision regarding the audio recording of the appellant's statement.

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" and "spouse"), 14(1), 14(3)(b), 14(4)(c), 17 and 38(b). IPC's *Code of Procedure*, section 11. *Family Law Act*, R.S.O. 1990, c. F.3, section 1(1).

Cases Considered: *M. v. H.*, [1999] 2 SCR 3.

OVERVIEW:

[1] This order determines the issue of access to police records related to the investigation into the sudden death of the appellant's boyfriend based on compassionate grounds. The Halton Regional Police Services Board (the police) received an access request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for all records, including reports, test results, detailed notes from

a cell phone that was handed over by the appellant, and occurrence reports in relation to the death of the appellant's boyfriend (the deceased) who died in her home.

[2] The police granted partial access to the occurrence report and officers' handwritten notes withholding information under sections 14(1) (personal privacy), 38(b) (personal privacy), and section 38(a) (discretion to refuse access to requester's own personal information) read with section 8(1) (law enforcement) of the *Act*. The police also denied access to the test results and information from the deceased's cell phone stating that the appellant had no basis under the *Act* to access this information. Some information was also withheld on the basis that it was non-responsive to the request.

[3] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[4] During mediation, the appellant advised that she is raising compassionate grounds as a basis for obtaining access to information in the occurrence report and officers' handwritten notes that were withheld under the sections 14(1) and 38(b) personal privacy exemptions. The police took the position that section 14(4)(c) (compassionate grounds) does not apply in the circumstances of this appeal.

[5] The appellant confirmed that she is not seeking access to certain information, identified by the police as operational codes, or the information withheld as non-responsive. Accordingly, sections 38(a) and 8(1), and responsiveness of the records are no longer at issue in this appeal. The appellant also confirmed that she seeks access to the test results and cell phone records of the deceased.

[6] The police issued a revised decision with an index of records, which stated that no medical records – and therefore “test results” – exist and that the police are denying access to the cell phone records under section 38(b) of the *Act*.

[7] The appellant clarified that she seeks access to drug identification test results and that regarding the cell phone records, she is only seeking access to media files such as photos, and video or audio files from the deceased's cell phone (the cell phone records).

[8] The police subsequently issued a second revised decision denying access in full to the cell phone records and drug identification test results and maintained their decision to grant partial access to the occurrence report and officers' handwritten notes.

[9] The appellant confirmed that she seeks access to the information withheld under the personal information exemption in the occurrence report, the officers' handwritten notes, the cell phone records, and the drug identification test results.

[10] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I

commenced an inquiry by inviting representations from the police, initially. In their representations, the police raised the application of the discretionary section 8(1)(h) (security) exemption to the cell phone records at issue. Since the police raised a new discretionary exemption late in the appeal, the late raising of a discretionary exemption and section 8(1)(h) were added as issues to this appeal.

[11] During the inquiry, the appellant confirmed that she is no longer seeking access to the drug identification test results, but does seek access to the audio recording of her statement to the police. Accordingly, the drug identification test results are no longer at issue in this appeal and the issue of scope was added to deal with the audio recording.

[12] During the inquiry, I sought and received representations from both parties about the issues in this appeal. Portions of their representations were withheld from each other in accordance with the confidentiality criteria in IPC Practice Direction 7 and section 7 of the IPC's *Code of Procedure*.

[13] In this order, I uphold the police's access decision with respect to the exemptions claimed. However, I find that the audio recording is within the scope of the appellant's request for records and order the police to issue an access decision to the appellant for the audio recording of her statement in accordance with the *Act*.

RECORDS:

[14] The records remaining at issue in this appeal include the audio recording of the appellant's statement and media files such as photos, videos, or audio files extracted from the cell phone (cell phone records), which were withheld in full. Also at issue are the withheld portions of a police occurrence report and handwritten notes from 11 police officers as outlined in the chart below.

Record	Description	Exemption claimed
1	Occurrence report	38(b)
2	Handwritten notes of Officer J.B.	14(1)
3	Handwritten notes of Officer B.B.	14(1)
4	Handwritten notes of Officer B.H.	38(b)
5	Handwritten notes of Officer L.M.	38(b)
6	Handwritten notes of Officer L.M.	38(b)
7	Handwritten notes of Officer D.P.	38(b)
8	Handwritten notes of Officer J.R.	38(b)
9	Handwritten notes of Officer M.S.	38(b)
10	Handwritten notes of Officer K.S.	38(b)
11	Handwritten notes of Officer K	38(b)
12	Handwritten notes of Officer S.S.	14(1)
13+	Cell phone records	8(1)(h), 14(1)/38(b)

ISSUES:

- A. Is the audio recording of the appellant's statement responsive to the request?
- B. Should I permit the police to claim a new discretionary exemption outside of the 35-day window for doing so?
- C. Does the discretionary exemption at section 8(1)(h) related to law enforcement activities apply to the cell phone records? If so, did the police properly exercise their discretion to apply it?
- D. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- E. Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue? If the discretionary personal privacy exemption at section 38(b) applies, did the police properly exercise their discretion to apply it?

DISCUSSION:

Issue A: Is the audio recording of the appellant's statement responsive to the request?

[15] During the inquiry of this appeal and prior to me inviting representations from the police, the appellant clarified that she sought access to the audio recording of her statement to the police, and the issue of scope was added to deal with the audio recording.

[16] To be considered responsive to the request, records must "reasonably relate" to the request.¹ Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester's favour.²

Representations, analysis and findings

[17] I find that the audio recording of the appellant's statement is responsive to the appellant's request for records.

[18] The appellant's request for records was for "any records" related to the death of her boyfriend. Since the audio recording is of the appellant's statement about her boyfriend's death, I find the audio recording of the appellant's statement to the police

¹ Orders P-880 and PO-2661.

² Orders P-134 and P-880.

about her boyfriend's death reasonably relates to her request.

[19] The police submit that the audio recording was only raised at the adjudication stage of the appeal process and the appellant had ample opportunity to address this during mediation. The police submit that the appellant did not indicate at any point that the audio recording was responsive to her request, so it is clearly outside the scope of the appellant's request for records.

[20] The appellant states that the audio recording is related to her original request because she specified "anything related" to the occurrence in her original request to the police.

[21] I acknowledge the police's position that access to the audio recording was not specifically raised in the Mediator's Report. However, I am also mindful that the issue of scope was clearly before me at the beginning of the inquiry into this appeal. In this case, the appellant has not attempted to expand the scope of her request, nor has she attempted to add new issues that she had expressly removed at earlier stages of the appeal.

[22] In summary, I find that the audio recording of the appellant's statement is within the scope of the appellant's request for records, and I order the police to issue an access decision for the audio recording.

Issue B: Should I permit the police to claim a new discretionary exemption outside of the 35-day window for doing so?

[23] During the inquiry of this appeal, the police took the position for the first time that the cell phone records are also exempt under section 8(1)(h).

[24] The section 8(1)(h) exemption is discretionary. This means that the institution can choose to withhold the information, but could also choose to disclose it. Here, the police did not claim the discretionary section 8(1)(h) (security) exemption in a timely way, and it is therefore possible for me to decide not to consider this exemption claim.

[25] The IPC's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before the IPC. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

In an appeal from an access decision, an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[26] The purpose of section 11.01 is to provide an opportunity for institutions to raise a new discretionary exemption without compromising the integrity of the appeal process. Where an institution is aware of section 11.01, disallowing a discretionary exemption claimed outside the 35-day period is not a denial of natural justice.³

[27] In deciding whether to allow an institution to claim a new discretionary exemption outside of the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the requester.⁴ The specific circumstances of the appeal must be considered in making this decision.⁵

Representations of the parties

[28] The police submit that the appellant would not be prejudiced by allowing the late raising of the section 8(1)(h) exemption. The police submit that she is not entitled to the cell phone records regardless of how it was obtained, because they do not contain her personal information. The police further submit that the appellant is not the spouse or executor of the deceased's estate and therefore has no right of access under sections 14(4)(c) and 54(a) of the *Act*. The police state that they did not raise the section 8(1)(h) exemption earlier for this reason and they would be prejudiced if they were not allowed to claim this exemption. The police further state that the integrity of the appeal process will not be compromised if the police is allowed to claim this exemption because the information is already exempt from disclosure because it belongs to another individual.

[29] The appellant submits that the police should not be permitted to claim the discretionary section 8(1)(h) exemption because it would compromise the integrity of the appeal process and it does not apply in the circumstances of this appeal. The appellant submits that the police had ample time to apply any exemptions and they would not be prejudiced by not allowing them to raise this exemption.

Analysis and findings

[30] Based on the representations of the parties and the circumstances of this appeal, I am prepared to consider the police's late claiming of the discretionary exemption at section 8(1)(h).

[31] While the appellant claims that permitting the police to claim the section 8(1)(h) exemption would compromise the integrity of the appeal process, I find that this is not supported by the facts of this appeal. The records over which the additional

³ *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

⁴ Order PO-1832.

⁵ Orders PO-2113 and PO-2331.

discretionary exemption at section 8(1)(h) are being claimed were already withheld from the appellant under other exemption claims, so the additional exemption claim would not delay any disclosure that the appellant may be entitled to.

[32] Furthermore, the appellant was given a chance to review the police's representations about the application of the section 8(1)(h) exemption and to provide her own representations in response. Therefore, I find that there is no prejudice to the appellant in allowing the police to raise the discretionary section 8(1)(h) exemption outside of the 35-day window for doing so.

[33] Accordingly, I will consider whether the section 8(1)(h) exemption applies to the withheld cell phone records.

Issue C: Does the discretionary exemption at section 8(1)(h) related to law enforcement activities apply to the cell phone records? If so, did the police properly exercise their discretion to apply it?

[34] Section 8 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement.

[35] Section 8(1)(h) states:

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

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

[36] For section 8(1)(h) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to reveal a record which has been confiscated from a person by a peace officer in accordance with an act or regulation.

[37] The purpose of this exemption is to protect records that have been confiscated or "seized" by search warrant.⁶

[38] This exemption applies where:

- the record itself was confiscated from a person by a peace officer, or
- where disclosing the record could reasonably be expected to reveal another record confiscated from a person by a peace officer.⁷

⁶ Order PO-2095.

⁷ Order M-610.

Representations, analysis and findings

[39] I find that section 8(1)(h) applies to exempt the cell phone records at issue from disclosure because they were seized by a search warrant.

[40] The police concede that the cell phone itself was provided to them by the appellant. However, the police explain that a warrant was obtained to search the contents of the cell phone. The police submit that only when the search warrant was obtained, the records on the phone were able to be extracted. The police explain therefore the cell phone records were obtained by the police through a search warrant, which was obtained by a peace officer under section 487 of the *Criminal Code of Canada*. In support of their position, the police provided the search warrant that authorized the search of the deceased's cell phone.

[41] The appellant submits that the police concede that the physical cell phone was not confiscated by a search warrant, but was willingly handed over by her. The appellant submits that disclosure of the cell phone records would not reveal a record that has been confiscated by a search warrant or another legal process because she gave consent to the police to take the cell phone. The appellant cites Order MO-4119 in support of her argument.

[42] In MO-4119, the records at issue were surveillance videos from a transit company, which the transit company provided to the police without a search warrant. In this current appeal, the police have provided the search warrant used to access the records at issue in the cell phone. Therefore, I find that Order MO-4119 is not applicable to the facts of this appeal.

[43] It is understandable why the appellant takes the position that the records at issue were not seized because she provided the cell phone willingly to the police. However, the physical cell phone is not the record at issue but the files contained in it. The cell phone records at issue were contained in the physical cell phone and the police had no legal right to access them until they had obtained a search warrant. I have reviewed the search warrant provided by the police and I confirm that it authorizes them to search the deceased's cell phone.

[44] Based on the above, I find that the cell phone records at issue were "seized" by the police pursuant to a search warrant and section 8(1)(h) applies to exempt them from disclosure.

[45] The section 8(1)(h) 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. On appeal, I may determine whether the police failed to do so.

[46] The police submit that they exercised their discretion properly in applying the section 8(1)(h) exemption and it should be upheld. The police submit that they took

into consideration relevant considerations, especially the nature of the information and whether the appellant had a sympathetic and compelling need to obtain the records.

[47] The appellant submits that the police did not exercise their discretion in good faith, because they failed to take into consideration relevant factors including the nature of her relationship with the deceased.

[48] After considering the representations of the parties and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to their decision to deny access to the cell phone records at issue under section 8(1)(h) of the *Act*. I am satisfied that the police considered relevant factors, and did not consider irrelevant factors in the exercise of discretion. Accordingly, I find that the police exercised their discretion in an appropriate manner to apply the section 8(1)(h) exemption in this appeal, and I uphold it.

[49] Having found that section 8(1)(h) applies to exempt the cell phone records from disclosure, it is not necessary for me to consider the police's alternative exemption claims.

Issue D: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[50] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.⁸ Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.⁹

[51] Personal information is defined in section 2(1). The relevant portions are 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,

⁸ Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

⁹ Sections 14(1) and 38(b), as discussed below.

(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,

(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.

[52] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁰

Representations of the parties

[53] The police submit that the remaining records contain the personal information of the appellant and other identifiable individuals, including the deceased. The police submit that the records contain personal information relating to their age, sex, medical history, employment history, address, telephone number, driver's licence, and views or opinions. The police submit that the records also contain statements and opinions of other individuals about other individuals including the deceased. The police further submit that these individuals could be identified by the release of this information.

[54] The appellant concedes that the records contain her personal information and that of the deceased. The appellant also acknowledges that the records contain information about other individuals.

Analysis and findings

[55] Based on my review of the records and the representations of the parties, I find that the records contain the personal information of the appellant, the deceased, and other identifiable individuals. I find that the records contain personal information about

¹⁰ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

them, such as their name, address, sex, age, telephone numbers, employment/medical history, driver's licence, their views or opinions, views or opinions about them, and their name along with other information, which fits within paragraphs (a)-(e), (g), and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[56] From my review of the records, records 2, 3, and 12 do not contain the appellant's personal information. Therefore, I will consider the application of the mandatory personal privacy exemption at section 14(1) to them.

[57] The rest of the records contain the appellant's personal information. From my review of records 1 and 4-11, the police have disclosed all of the appellant's personal information to her that could reasonably be severed. I considered whether more of the appellant's personal information could be severed from the records. However, based on my review of the records, I find that the rest of the appellant's personal information is inextricably intertwined with that of other individuals and cannot be reasonably severed. Having found that records 1 and 4-11 contain the personal information of the appellant, the deceased, and other individuals, I will determine whether the withheld personal information in records 1 and 4-11 is exempt from disclosure under section 38(b) of the *Act*.

Issue E: Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue? If the discretionary personal privacy exemption at section 38(b) applies, did the police properly exercise their discretion to apply it?

[58] 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.

[59] Under the section 38(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.¹¹

[60] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of other individual's personal privacy.¹²

[61] In contrast, under section 14(1), where a record contains personal information of

¹¹ However, the requester'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; Order PO-2560.

¹² See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 38(b).

another individual but *not* the requester, the institution cannot disclose that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or the section 14(1)(f) exception applies, because disclosure would not be an “unjustified invasion” of the other individual’s personal privacy.

[62] Sections 14(1) to (4) provide guidance in deciding whether the information is exempt under section 14(1) or 38(b), as the case may be.

[63] 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). In this appeal, none of the section 14(1) exceptions apply to the circumstances before me and I will not discuss them further in this order.

[64] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would not be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply. The appellant claims that section 14(4)(c) applies to the records at issue in this appeal.

[65] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.¹³

Representations, analysis and findings

[66] Since I have found that section 8(1)(h) applies to exempt the cell phone records at issue from disclosure, I will not consider the application of the personal privacy exemptions to them.

[67] As noted above, I must review the application of the mandatory personal privacy exemption in section 14(1) to records 2, 3 and 12, and the discretionary personal privacy exemption in section 38(b) to records 1 and 4-11.

[68] The police submit that either the mandatory section 14(1) or the discretionary section 38(b) personal privacy exemption applies to exempt the withheld personal information from disclosure.

[69] The appellant submits that neither the sections 14(1) or 38(b) personal privacy exemption apply to the withheld personal information.

¹³ Order MO-2954.

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

[70] The police argue that the section 14(3)(b) presumption applies to the withheld personal information because it was compiled and is identifiable as part of an investigation into a possible violation of law, specifically a sudden death.

[71] The appellant's representations did not address the section 14(3)(b) presumption.

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

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

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

[73] Based on my review of the withheld personal information in all of the records remaining at issue, I am satisfied that it was compiled and is identifiable as part of an investigation into a possible violation of law. The personal information at issue appears in police records about a sudden death. Even if no criminal proceedings were commenced against an individual, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law,¹⁴ and I am satisfied that there was one as documented by the police occurrence report. Therefore, I find that section 14(3)(b) applies to the personal information at issue in this appeal, and that its disclosure is presumed to be an unjustified invasion of the personal privacy of the deceased and other individuals.

Section 14(4)(c) exception: personal information of deceased individual for compassionate reasons

[74] If any of the paragraphs in section 14(4) of the *Act* apply, disclosure of personal information is not an unjustified invasion of personal privacy, even if one of the section 14(3) presumptions exists. Having found that the section 14(3)(b) presumption applies, disclosure of the withheld information in all of the records remaining at issue is presumed to be an unjustified invasion of the personal privacy of the deceased and other individuals unless one of the paragraphs in section 14(4) applies. The appellant claims that section 14(4)(c), the exception for compassionate grounds, applies to the information at issue in this appeal, while the police submit that it does not.

[75] The appellant argues section 14(4)(c) applies to the personal information at issue in this appeal because she is the deceased's spouse, while the police submit that she is not for the purpose of section 14(4)(c). In the circumstances of this appeal, in

¹⁴ Orders P-242 and MO-2235.

order for section 14(4)(c) to apply, the following conditions must be met:

1. the records must contain the personal information of someone who has died,
2. the appellant must be a spouse¹⁵ of the deceased individual, and
3. the disclosure of the personal information of the deceased individual must be desirable for compassionate reasons given the circumstances of the request.¹⁶

Parts 1 and 2: Do the records contain the personal information of someone who has died and is the appellant a spouse of the deceased individual?

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

"spouse" means,

- (a) a spouse as defined in section 1 of the *Family Law Act*, or
- (b) either of two persons who live together in a conjugal relationship outside marriage.

[77] Section 1 of the *FLA* defines "spouse" as follows:

"spouse" means either two persons who,

- (a) Are married to each other, or
- (b) Have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

[78] The parties agree, and I find that the records remaining at issue contain the personal information of a deceased individual, specifically the appellant's boyfriend, and part 1 of the conditions for section 14(4)(c) has been met.

[79] With respect to part 2 of the conditions, I find that the appellant is not a "spouse" of the deceased as that term is defined in section 2(1) of the *Act*.

[80] The police submit that the appellant does not qualify as a "spouse" of the deceased under the *Act* or the *Family Law Act (FLA)*. The police argue that the appellant was not married, cohabitating, or in a permanent relationship with the deceased at the time of his death. The police further argue that the appellant has failed to demonstrate that she and the deceased had entered into a marriage that is voidable

¹⁵ Section 14(4)(c) can also apply if a requester is a "close relative" of the deceased. However, that term is not relevant in this appeal.

¹⁶ Orders MO-2237 and MO-2245.

under section 1(1)(b) of the *FLA*.

[81] The appellant states that the *FLA* is irrelevant because she qualifies under part (b) of the definition of "spouse" under the *Act*. The appellant states that the definition of "spouse" under the *Human Rights Code (HRC)* closely resembles the definition of "spouse" under the *Act* and is therefore more relevant.

[82] Because the appellant concedes that she does not meet the definition of "spouse" under the *FLA*, I will focus on part (b) of the definition of "spouse" under section 2(1) of the *Act*. The appellant argues that the *HRC* is more relevant and refers to it. However, I will not refer to the *HRC* because it is not relevant or referenced under the *Act*. The definition of "spouse" under the *Act* will determine the appellant's access rights under the *Act*.

[83] The appellant's representations go into detail about her relationship with the deceased. I have reviewed all of her representations and the supporting evidence. However, I will only refer to those portions of her representations that I find most relevant to the issues in this appeal.

[84] The appellant states that she and the deceased had been dating for six months and they had been living together for three months at her residence before his death. The appellant submits that she and the deceased were in a very loving strong relationship that was recognized by his friends and family. The appellant states that prior to dating her, the deceased was living with friends or out of his truck.

[85] The police submit that the appellant and others have advised them that the appellant and the deceased did not live together. The police submit that according to the appellant, she and the deceased had been dating for three months at the time of his death and this same time frame was provided by the appellant in a previous police occurrence report, days prior to the deceased's sudden death. The records and confidential portions of the police's representations provide further support of their position that the appellant and the deceased did not live together at the time of his death.

[86] The appellant states that if she told any police officer that the deceased did not live with her prior to his death, it would have only been because he was out on bail and supposed to be sleeping at his surety's place, which she states that he never did once. The appellant further states that the deceased could live where he wanted and the condition of his bail was that he sleep at his surety's home.

[87] The term "spouse" has a specific legal threshold and requirements that must be met, before one can legally claim that they are an individual's "spouse." Under the *Act*, the relevant portion of the definition of "spouse" is: "two persons who live together in a conjugal relationship outside marriage." The appellant argues that she was living together in a conjugal relationship with the deceased at the time of his death, and

therefore, she should be considered his spouse under the *Act*. While I accept that the appellant and the deceased were in a romantic relationship at the time of his death, I am not satisfied that there is a sufficient basis for me to find that the appellant meets the definition of “spouse” under section 2(1)(b) of the *Act*. My reasons follow.

[88] To begin, I accept that the deceased was staying with the appellant at her residence at the time of his death. However, “live together in a conjugal relationship” has a higher threshold and requires a degree of permanence and interdependence than simply dating. A conjugal relationship does not mean “sexual relations” alone. Of relevance to this issue, the *FLA* defines “cohabit” as to live together in a conjugal relationship, whether within or outside marriage.¹⁷ This definition is similar to the definition of “spouse” in section 2(1)(b) of the *Act*, and has been interpreted by the courts. As I will explain, the definition of spouse in section 2(1)(b) of the *Act* means a relationship of a greater degree of permanence and interdependence.

[89] In *M. v. H.*,¹⁸ the Supreme Court of Canada adopted a list of factors, from the Ontario Court of Appeal decision of *Moldowich v. Penttinen*, that should be considered to determine whether two individuals are living together in a conjugal relationship. These factors are often quoted in *FLA* decisions,¹⁹ and they include shared shelter, sexual and personal behaviour, services, social activities, economic support, children, as well as the societal perception of the couple. I will use these factors to guide my analysis.

[90] In support of her position that she meets the definition of “spouse” under the *Act*, the appellant provided evidence, such as a voice message of a male telling a friend he was “living” at the appellant’s address, undated text messages between her and the deceased, a receipt of an Interac e-Transfer from the deceased to her for \$300, and messages between the appellant and the deceased’s mother. However, this is not sufficient evidence to establish that the deceased was living with the appellant in a conjugal relationship at the time of his death.

[91] I accept the police’s position and place greater weight on the police’s representations because they are supported by statements and records made prior to and at the time of the deceased’s death. The police’s confidential representations as well as portions of the records,²⁰ support the police’s position that the appellant and the deceased had been dating for a relatively short period of time and he was not living with her at the time of his death, even if he may have been staying with her. Even if I accepted that the deceased was living with the appellant at the time of his death, living together alone is not sufficient to meet the definition of “spouse” under the *Act*, the appellant must establish that they shared a conjugal relationship.

¹⁷ Section 1(1) of the *FLA*.

¹⁸ *M. v. H.*, [1999] 2 SCR 3. Cited by the police in their representations.

¹⁹ For example, *Muir v. Schaaf*, 2023 ONSC 4105 (CanLII) or *Climans v. Latner*, 2020 ONCA 554 (CanLII).

²⁰ For example, page 42 of the records.

[92] As noted above, there are relevant factors to consider in determining whether a conjugal relationship exists. The appellant has not provided sufficient evidence to establish that their relationship had a sufficient degree of permanence and interdependence to be considered a conjugal relationship. The appellant and the deceased dated for a few months. They did not have any children together. The deceased's address on file with the police is not the appellant's residence. The appellant was not the deceased's next of kin or the executor/trustee of his estate. She did not provide sufficient evidence to demonstrate that they had joint finances or joint possessions. Assessing the entirety of their relationship, and without sufficient evidence to the contrary, I find that the appellant and the deceased were not living together in a conjugal relationship outside marriage as required by the definition of "spouse" in section 2(1)(b) of the *Act*.

[93] Accordingly, I find that the appellant has not met part 2 of the conditions for section 14(4)(c) to apply because she is not the "spouse" of the deceased, and I find that the section 14(4)(c) exception does not apply to the personal information at issue in this appeal.

[94] I acknowledge the tragic circumstances of this appeal and the appellant's reasons for requesting the withheld personal information. I understand the sudden death of the deceased has greatly impacted the appellant and she has found it difficult to find closure. However, under the *Act*, the appellant's desire to access the withheld personal information must be balanced with the privacy interests of the other individuals whose information appear in the records at issue.

The application of section 14(1) to records 2, 3, and 12

[95] In reviewing the mandatory exemption in section 14(1), once a section 14(3) presumption has been established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.²¹

[96] I have found that the section 14(3)(b) presumption applies to the withheld personal information in records 2, 3, and 12 and (as discussed above) the exception in section 14(4)(c) does not apply in the circumstances of this appeal. The parties did not argue that the "public interest override" at section 16 applies to the personal information at issue, and I am satisfied that it does not.

[97] Therefore, I find that the mandatory personal privacy exemption at section 14(1) applies to exempt the withheld personal information in records 2, 3, and 12 from disclosure.

²¹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

The application of section 38(b) to records 1 and 4-11

[98] Under section 38(b), the presumptions in section 14(3) must be weighed and balanced with any factors in section 14(2) that are relevant, as well as the interests of the parties.

[99] Neither party argued that any of the factors in section 14(2) apply to the personal information at issue in records 1 and 4-11, and I find none of the listed or unlisted factors apply. I also considered whether the tragic circumstances of this appeal and the appellant's reasons for requesting the withheld personal information qualify as an unlisted factor weighing in favour of disclosure, and I find that they do not.

[100] Overall, I have found that the section 14(3)(b) presumption applies to the withheld personal information in records 1 and 4-11 and none of the factors in section 14(2) apply. Balancing the interests of the parties, the facts of this appeal weigh against disclosure of the withheld personal information in records 1 and 4-11. Therefore, I find that the withheld personal information in records 1 and 4-11 is exempt from disclosure under the discretionary exemption at section 38(b) of the *Act*.

[101] Before leaving this issue, I will consider whether my finding leads to an absurd result.

Absurd result

[102] The absurd result principle may apply where the appellant originally supplied the information at issue or is otherwise aware of it. Where circumstances are present, the information may not be exempt under section 38(b) because withholding the information might be absurd and inconsistent with the purpose of the exemption.²²

[103] For example, the "absurd result" principle has been applied when:

- the requester sought access to their own witness statement,²³
- the requester was present when the information was provided to the institution,²⁴ and
- the information was or is clearly within the requester's knowledge.²⁵

[104] The appellant argues that the absurd result principle applies to the withheld personal information because it is clearly within her knowledge.

[105] The police concede that the appellant may be aware of some of the withheld

²² Orders M-444 and MO-1323.

²³ Orders M-444 and M-451.

²⁴ Orders M-444 and P-1414.

²⁵ Orders MO-1196, PO-1679 and MO-1755.

personal information, but her right to this information must be balanced with the purpose of protection of privacy. The police argue that despite some of the withheld information was provided by the appellant, its disclosure would be inconsistent with the personal privacy exemption under the *Act*.

[106] Based on my review of the withheld personal information in records 1 and 4-11, I find that the absurd result principle does not apply. It appears that some of the withheld personal information is within the appellant's knowledge, as some of the withheld personal information is from the police's summary of her statement, and I considered whether some of it should be disclosed under the absurd result principle. However, previous IPC orders have held that, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is otherwise known to the requester.²⁶

[107] Given that the withheld personal information appears in police records about an investigation into a sudden death, and my finding that disclosure of the withheld personal information would be an unjustified invasion of personal privacy of the deceased and other individuals under section 38(b), I find that disclosure under the absurd result principle would be inconsistent with the purpose of the section 38(b) exemption. Therefore, I find that it would not be absurd to withhold the personal information in records 1 and 4-11 in the circumstances of this appeal.

[108] Since withholding the personal information at issue in records 1 and 4-11 would not be absurd, I find that the withheld personal information in records 1 and 4-11 is exempt from disclosure pursuant to the discretionary exemption at section 38(b) of the *Act*, subject to my findings on the police's exercise of discretion below.

Exercise of discretion

[109] 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. On appeal, I may determine whether the police failed to do so.

[110] The police state that they properly exercised their discretion under section 38(b) to withhold the personal information of the deceased and other individuals from the appellant. The police state that they took into consideration relevant factors, such as whether the appellant was seeking her own personal information, whether the appellant had a sympathetic or compelling need to receive the information, the relationship between the appellant and the other individuals in the records, and the nature of the information and the extent to which it is significant and/or sensitive to them, the appellant, or other individuals that appear in the records. The police further state that they applied the exemptions in a limited and specific manner, keeping in mind that the appellant has a right to access her own personal information, but the privacy of other

²⁶ Orders M-757, MO-1323 and MO-1378.

individuals should be protected.

[111] The appellant submits that the police's discretion should not be upheld because they did not exercise their discretion in good faith. She submits that the police are denying her access to the withheld information to "cover up" their mistakes. She also submits that she has a compelling and sympathetic need to receive the information.

[112] After considering the representations of the parties and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to their decision to deny access to the withheld personal information of the deceased and other individuals in records 1 and 4-11 under section 38(b) of the *Act*. I am satisfied that the police considered relevant factors, and did not consider irrelevant factors in the exercise of discretion. In particular, it is evident that the police considered the fact that records 1 and 4-11 contain the appellant's own personal information, and I am satisfied that the police disclosed as much of the records as they could, without disclosing the personal information of others.

[113] Accordingly, I find that the police exercised their discretion in an appropriate manner in this appeal, and I uphold it.

ORDER:

1. I uphold the police's access decision with respect to the application of the exemptions claimed.
2. I order the police to issue an access decision to the appellant for the audio recording of her statement in accordance with the *Act*. For the purposes of the *Act*, the date of this order shall be deemed to be the date of the request.

Original Signed by: _____

Anna Truong
Adjudicator

October 27, 2023
