

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4536

Appeal MA23-00033

Niagara Regional Police Services Board

June 27, 2024

Summary: The appellant submitted a request under the *Act* to the police for an audio/video statement made by her deceased brother to the police. The police denied the appellant access to the record, claiming the application of the personal privacy exemption. The appellant appealed the police's decision, claiming the application of the compassionate grounds exception to the personal privacy exemption in section 14(4)(c) of the *Act*. In this decision, the adjudicator upholds the police's decision, finding the record is exempt under the personal privacy exemption at section 38(b) and not subject to section 14(4)(c).

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) and (i), 14(4)(c) and 38(b).

Orders and Investigation Reports Considered: Orders MO-2245 and PO-4519.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the Niagara Regional Police Services Board (the police) for access to a copy of any video or audio statements made by her deceased brother in relation to a specified incident.

[2] The police located one audio/video statement and a general occurrence report. The police denied the appellant access to the records, claiming they are exempt under

the mandatory personal privacy exemption in section 14(1) of the *Act*.

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

[4] During mediation, the appellant advised her brother passed away shortly after he provided the statement at issue to the police. The appellant claimed that obtaining a copy of the statement would help her and her family with "the grieving process and closure." The police confirmed they considered the application of the compassionate grounds exception to the personal privacy exemption in section 14(4)(c) of the *Act*. However, the police maintained their decision to deny the appellant access to the records. The police also revised their decision to rely on the discretionary personal privacy exemption in section 38(b) rather than the mandatory personal privacy exemption at section 14(1) because the records contain the appellant's personal information.

[5] The appellant confirmed she does not pursue access to the general occurrence report. Accordingly, only the audio/video statement is at issue.

[6] Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeals process. I am the adjudicator and I sought and received representations from the police and the appellant on the issues in this appeal. The appellant also provided signed consents from her parents for the disclosure of any personal information relating to them in the statement.

[7] In the discussion that follows, I find the statement is exempt under section 38(b). I uphold the police's decision not to disclose it and dismiss the appeal.

RECORD:

[8] The record at issue is an audio/video statement (the statement).

ISSUES

- A. Does the statement contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption for personal privacy at section 38(b) apply to the statement?
- 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 statement contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[9] In order to decide which sections of the *Act* may apply, the IPC must first decide whether the records contain personal information and, if so, to whom it relates. It is important to know whose personal information is in the records. If the records contain the requester’s personal information, the requester’s access rights are greater than if the records do not contain their personal information and access to the records will be considered under Part II of the *Act*.¹ Also, if the records contain the personal information of other identifiable individuals, one of the personal privacy exemptions might apply.² The term *personal information* is defined in section 2(1) as “recorded information about an identifiable individual.”

[10] To qualify as personal information, the information must be about the individual in a personal capacity. Generally, information associated with an individual in a professional, official or business capacity will not be considered to be *about* an individual.³ However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴

[11] Relevant to this appeal, section 2(2) of the *Act* states that personal information does not include information about an individual who has been dead for more than 30 years. Therefore, any personal information relating to the appellant’s deceased brother remains his personal information because he died less than 30 years ago.

[12] The police submit the statement contains the personal information of the appellant’s deceased brother and another affected party. Specifically, the police submit the statement contains the appellant’s brother’s medical history (considered “personal information” under paragraph (b) of the definition in section 2(1)) and his views or opinions (paragraph (e)). The police also submit the statement contains the name and employment history of another affected party (paragraphs (b) and (h)) and the views or opinions of the appellant’s brother as they relate to this individual (paragraph (g)).

[13] The appellant submits the records, including the statement, contain her brother’s personal information as well as her own and her parents’ personal information.

¹ Under sections 36 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.

² See section 14(1) of the *Act*.

³ See sections 2(3) and (4) of the *Act* and Orders P-257, P-427, P-1621, R-98005, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

[14] I have reviewed the record which is an audio/video recording of a statement provided by the appellant's brother to the police. I find the record contains information that qualifies as the appellant's personal information as well as information that qualifies as the personal information of the appellant's deceased brother, their parents, and other identifiable individuals. Specifically, I find the statement contains the appellant's brother's name (paragraph (h)), medical history (paragraph (b)), employment history (paragraph (b)), views or opinions (paragraph (e)), and other information, such as his image and voice, that would fit within the introductory wording of the definition of "personal information" in the *Act*. Upon my review, the statement also contains personal information relating to the appellant, her parents, and other identifiable individuals. Specifically, it contains their names (paragraph (h)) and the views or opinions of the appellant's brother about these individuals (paragraph (g)).

[15] I have considered whether the information relating to the appellant and/or her parents alone can be severed from the record and disclosed to them. I find it cannot because all the information relating to these individuals originated from the appellant's brother and is therefore inextricably intertwined with the appellant's brother's personal information.

[16] Because the record contains personal information relating to the appellant and other identifiable individuals, I will consider whether the application of the discretionary personal privacy exemption in section 38(b) to the record.

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

[17] 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 exemptions from this right.

[18] 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. The police claim the application of section 38(b) to the entire statement, read with the presumption in section 14(3)(b).

[19] Sections 14(1) and (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy. 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). I find none of sections 14(1)(a) to (e) apply to the statement at issue.

[20] In applying 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 in determining whether the disclosure of the personal information at issue would be an unjustified invasion of

personal privacy.⁵ The police claimed the application of the presumption in section 14(3)(b). 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[.]

[21] Section 14(4) of the *Act* lists situations that would not be an unjustified invasion of personal privacy. The appellant claims the application of section 14(4)(c) to the statement. If I find that section 14(4)(c) applies to the statement, its disclosure would not be an unjustified invasion of personal privacy and the statement is not exempt under section 38(b). Section 14(4)(c) states,

Despite subsection [14(3)], a disclosure does not constitute an unjustified invasion of personal privacy if it,

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

[22] Based on my review of the statement and the parties' representations, I find it is exempt from disclosure under section 38(b) of the *Act*. I find the presumption in section 14(3)(b) applies to the statement. I also find section 14(4)(c) does not apply to require the disclosure of the statement despite the application of the presumption in section 14(3)(b).

Parties' representations

[23] The police submit the personal privacy exemption at section 38(b) applies to the statement. The police submit they "took careful consideration into balancing the appellant's right to the [statement] for compassionate reasons with the need to protect the personal information and privacy interests of others." The police submit section 14(4)(c) does not apply because the statement was not created in relation to the circumstances surrounding the appellant's brother's death, but in relation to a criminal investigation that allegedly occurred prior to his death. The police also submit the statement does not relate to the appellant's brother's death.

[24] The police submit they conducted the interview as part of an investigation into a possible violation of the law under the *Criminal Code*. As such, the disclosure of the information would constitute an unjustified invasion of personal privacy due to the

⁵ Order MO-2954.

application of the presumption in section 14(3)(b). The police submit the statement was collected as part of their investigation into the appellant's allegation of theft and fraud against her brother and another individual.

[25] The police submit there was a conflict between the appellant, her brother, another individual, and their parents. The police submit that, given these circumstances, the factors weighing against the disclosure of the statement in sections 14(2)(f) and (i) are relevant. 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,

(f) the personal information is highly sensitive;

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

[26] The police submit the information in the statement was collected to ascertain whether criminal charges were warranted. The police submit recorded interviews are confidential and interviewees do not expect the personal information they provide will subsequently be disclosed. The police submit the statement includes information relating to the involvement of another individual which, if disclosed to the appellant, could reasonably result in significant personal distress to this individual.

[27] The police acknowledge the appellant's parents' consent to the disclosure of information relating to them in the statement. The police also acknowledge the statement contains personal information relating to the appellant. However, the police submit the personal information of the appellant and her parents is intertwined with that of other identifiable individuals and cannot be disclosed without resulting in an unjustified invasion of these individuals' personal privacy under section 38(b).

[28] The appellant claims she is entitled to access her personal information pursuant to section 36(1). The appellant submits the factor in section 14(2)(f) should not weigh in favour of non-disclosure because she already knows her brother and the other individual's personal information. Given these circumstances, the appellant submits the information at issue is not sensitive to her brother or this other individual.

[29] The appellant submits the factor in section 14(2)(i) should not apply to the statement. She claims her brother and the other individual "sufficiently damaged their own reputations by virtue of their actions" and does not believe the disclosure of the statement could result in further damage to their reputations. Further, the appellant submits that since her brother is now deceased, the disclosure of the statement could not reasonably result in damage to his reputation or result in significant personal distress to him.

[30] With regard to section 14(4)(c), the appellant submits the disclosure of the statement will offer "much-needed resolution." Referring to Order MO-2245, the appellant submits that as her brother's only living sibling, she is best able to act in her own best interests and determined that reviewing the statement is the only way for her and her parents to complete the grieving process and find closure. The appellant submits she wants to review and hear what her brother told the police to have "answers to [their] many unanswered questions." The appellant submits obtaining access to the statement will help her to "complete the grieving process and find closure." The appellant submits there are compassionate grounds where the disclosure of the information will help a close relative with understanding the events leading up to and surround the death of an individual. The appellant submits she is trying to understand the events in the months prior to her brother's death and obtain some clarification regarding his thoughts or motivations.

[31] The appellant submits any harm that may result from the disclosure of the statement is "purely speculative", particularly since her brother is deceased. The appellant submits there is no unjustified invasion of privacy and the information is relevant to herself and her parents, only. The appellant also submits "there is nothing sensitive about the information in his statement for [the appellant and her parents]" and the information will not be disseminated widely. The appellant refers to the police's section 14(2)(f) arguments regarding the sensitive nature of the information, but counters that the information is not sensitive because the police did not file criminal charges and she is already familiar with her brother and the other individual identified in the record.

[32] With regard to the application of the presumption at section 14(3)(b), the appellant submits that because she decided not to pursue criminal charges or an investigation into the individual identified in the record's actions, section 14(3)(b) does not apply.

Analysis and findings

[33] I have reviewed the statement and the parties' representations. I find the statement is exempt from disclosure under the personal privacy exemption in section 38(b) of the *Act* as its disclosure would be an unjustified invasion of personal privacy of the appellant's brother and another individual.

Sections 14(2) and (3)

[34] In making this finding, I find the presumption against disclosure in section 14(3)(b) applies to the record. The presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law.⁶ Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. In this case, I accept the police's evidence that the statement was taken as part of an investigation into a possible violation of law. The police claimed they took the appellant's brother's statement

⁶ Orders P-242 and MO-2235.

in their investigation into the appellant's allegation of theft and fraud against her brother and another individual, whose personal information is contained in the record. Fraud and theft are offences under the *Criminal Code* of Canada.⁷ Therefore, while the police decided against filing criminal charges against the appellant's brother and another individual, section 14(3)(b) still applies to the personal information in the statement because it was compiled and is identifiable as part of an investigation into a possible violation of law.

[35] In addition, I find the factor weighing against disclosure in section 14(2)(f) applies to the record. I accept the police's claim that the disclosure of the record could reasonably result in significant personal distress to the individuals whose personal information is contained in the record. The appellant claims the disclosure cannot result in personal distress to the individuals whose personal information is contained in the record because she is already familiar with her brother and the other individual identified in the record. I do not agree. The personal information at issue was collected during a police interview for the purposes of a criminal investigation. The information at issue consists of the appellant's brother's statement regarding the appellant's allegations against him and another individual. Given this context, I find the information is highly sensitive and could reasonably be expected to result in significant personal distress should it be disclosed to the appellant and I give this factor some weight.

[36] I am not satisfied the police have demonstrated that the factor weighing against disclosure in section 14(2)(i) applies. The police did not provide evidence to support their position that any individual's reputation (including the appellant's brother and the other individual identified in the record) would be unfairly damaged by the disclosure of the personal information at issue. In the absence of further representations, I find the police have not established that section 14(2)(i) applies to weigh against disclosure of the statement.

[37] Reviewing the remainder of the factors and presumptions in sections 14(2) and 14(3), I find none apply. Therefore, I find the presumption in section 14(3)(b) and the factor weighing against disclosure in section 14(2)(f) applies to the statement.

[38] I note the appellant is concerned the entire statement was withheld from disclosure under section 38(b). The appellant notes the record contains her and her parent's personal information and the appellant provided signed consents from her parents during the inquiry. However, I reviewed the statement and find the personal information of the appellant and her parents is inextricably intertwined with her brother's. The record is an audio/video recording of the appellant's brother's statement to the police during an investigation into a possible criminal offence. The entire record is, by its very nature, the appellant's brother's personal information. Therefore, while the appellant's brother may have discussed the appellant and their parents, the appellant and her parents' personal information cannot be reasonably severed from the record without

⁷ R.S.C., 1985, c. C-46.

resulting in an unjustified invasion of her brother's personal privacy.

Section 14(4)(c)

[39] The appellant claims the application of section 14(4)(c), arguing the statement should be disclosed to her for compassionate reasons because she is a close relative of her deceased brother's. Specifically, the appellant submits she would like to review her brother's statement to have a better understanding of her brother's frame of mind in the months before his death.

[40] Section 14(4)(c) is an exception to the personal privacy exemption and states a disclosure of personal information about a deceased individual to their close relative is not an unjustified invasion of personal privacy if the institution is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons. The application of section 14(4)(c) requires the 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?⁸

[41] The statement contains the personal information of the appellant's deceased brother. The appellant, as the deceased's sister, is a "close relative" of the deceased individual.⁹ Therefore, the first two requirements for the application of section 14(4)(c) are satisfied and what is left to decide is whether the disclosure of the appellant's brother's personal information in the form of the statement is desirable for compassionate reasons in the circumstances of the request.

[42] With respect to the third requirement for section 14(4)(c), the appellant submits she seeks access to her brother's statement to better understand his frame of mind in the months before his death. The appellant also appears to hope disclosure will provide her with some resolution regarding her relationship with her brother, seeking access to his thoughts and motivations in the last months of his life in relation to certain decisions he made in that period. The police claim section 14(4)(c) does not apply to the record because the statement was created not in relation to the circumstances surrounding the appellant's brother's death, but in relation to a criminal investigation that allegedly occurred prior to his death. The police further submit the statement does not relate to the death of the appellant's brother.

[43] There have been several IPC orders dealing with the application of the

⁸ Orders MO-2237 and MO-2245.

⁹ See definition of "close relative" in section 2(1) of the *Act* which explicitly includes "sister."

compassionate grounds in section 14(4)(c). In Order MO-2245, the adjudicator stated that section 14(4)(c) "was designed to allow families to have the records they feel they require in order to grieve in the way they choose." The IPC has recognized for surviving family members, greater knowledge of the circumstances of their loved one's death is, by its very nature, compassionate.¹⁰

[44] The statement was made by the appellant's brother during the police's investigation into the appellant's allegation of theft and fraud against him and another individual. The statement was taken months prior to the appellant's brother's death. As such, I do not accept that the statement offers any details or a greater understanding about the circumstances of the appellant's brother's death. While I acknowledge the appellant and her parents' grief at having lost their brother and son, I find the statement does not offer greater knowledge regarding the death of the appellant's brother.

[45] The appellant claims she seeks access to the statement for a better understanding regarding her brother's thoughts and motivations in the last months of his life. However, this type of information is not generally considered to be subject to the section 14(4)(c) exception to the personal privacy exemption. Generally, the IPC has found section 14(4)(c) to apply to records directly related to the circumstances surrounding the deceased individual's death. For example, in Order MO-2245, the adjudicator found section 14(4)(c) applied to a video and photographs of the scene at which a deceased individual was found, including the individual's body and items found in that vicinity. In this decision, the adjudicator found the video and photographs would provide the deceased's mother with the opportunity to view the deceased in the state in which he was found and bring closure to any questions she may have regarding this part of his death. More recently, Order PO-4519, found the provincial equivalent to section 14(4)(c)¹¹ applied to an audio recording of a witness statement because it offered an individual's observations of the moments that led to a collision that resulted in the death of the deceased individuals.

[46] I have reviewed the statement and considered the context in which it was created. Upon this review, I am unable to conclude that disclosure of the statement, which is not related to the appellant's brother's death, is desirable for compassionate reasons. I find the record does not contain details regarding the appellant's brother's death. In fact, most of the record relates to the appellant's brother's life, relationships, and his opinions regarding the appellant's allegations against him. Furthermore, the statement contains personal information relating to another individual and none of the information relating to this individual could reasonably be subject to the compassionate grounds exception to the personal privacy exemption.

¹⁰ Order MO-2237.

¹¹ Section 21(4)(d) in the provincial *Act*.

Absurd Result

[47] The appellant raises the absurd result principle in her representations. Specifically, the appellant submits that some of the information at issue is publicly available or she provided personal information about her brother and another individual in the incident reports she filed with the police. Given this context, the appellant submits some of the information in the record was or is clearly within her knowledge. The appellant also submits she “is aware of the general content of the video already, through several conversations” with the police. The appellant also submits that her brother’s personal information is “intimately known” by her and her parents due to their close family relationship. The appellant also submits there is “nothing in the video” she does not already know or had provided to the police about her brother and the other individual identified in the record, given their relationship with her family, email correspondence, information already available online,¹² and other recorded conversations.

[48] Based on my review, I find the absurd result principle has no application to the record at issue. The IPC has applied the absurd result principle when the requester sought access to their own witness statement,¹³ the requester was present when the information was provided to the institution,¹⁴ and the information was or is clearly within the requester’s knowledge.¹⁵ In this case, the appellant is not seeking access to information she provided to the police; she is seeking access to the statement her brother made to the police. The appellant was also not present when her brother made his statement to the police. I agree that certain information in the record relating to the appellant, her parents, and her brother, are within her knowledge. However, there is no evidence that all the information in the record is within her knowledge and is therefore subject to the absurd result principle. I agree certain information relating to the appellant’s brother and the other individual identified in the record may be publicly available or have been provided by the appellant to the police. However, there is no evidence to suggest the appellant is aware of what her brother said in his statement to the police. Accordingly, I find the absurd result principle does not apply to the statement.

[49] In conclusion, I find section 14(4)(c) does not apply to the statement. I also find the absurd result does not apply to the statement. I find the presumption in section 14(3)(b) and the factor weighing against disclosure in section 14(2)(f) apply to the statement. Therefore, I find the statement is exempt under section 38(b), subject to my review of the police’s exercise of discretion below.

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

[50] Section 38(b) is a discretionary exemption and permits an institution to disclose

¹² The appellant refers to Go Fund Me pages and LinkedIn profiles.

¹³ Orders M-444 and M-451.

¹⁴ Orders M-444 and P-1414.

¹⁵ Orders MO-1196, PO-1679 and MO-1755.

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. The IPC may find an 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 fails to take into account relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ The IPC may not, however, substitute its own discretion for that of the institution.¹⁷

[51] The police submit they exercised their discretion properly in applying section 38(b). The police submit they considered the nature of the information at issue and the application of the exemption to the statement. They submit the information at issue is highly sensitive personal information relating to the appellant's brother and another party. The police also submit they exercised their discretion in good faith.

[52] The appellant submits the police did not exercise their discretion properly in deciding to withhold the statement from disclosure. The appellant refers to the "historic practice" of the police with respect to similar information to favour disclosure.¹⁸ The appellant submits the police did not properly consider what her brother's thoughts would be regarding the disclosure of the record. The appellant further submits the police never asked her brother for his thoughts on potential disclosure of the statement when he was alive. The appellant also submits that, given the length of time her brother has been deceased, "the rights of the living carry more weight in favouring disclosure." The appellant submits disclosure of the statement will increase public confidence in the operations of the police. The appellant notes that none of her personal information was disclosed to her, despite the principle that exemptions from the right of access should be limited and specific.

[53] I have found the statement is exempt from disclosure under section 38(b). Based on my review of the parties' representations and the statement, I find 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. Specifically, I find the police balanced the privacy rights of the deceased and the other individual identified in the record with the appellant's right of access to the information at issue. I find there was no obligation on the part of the police to consult the appellant's brother on his position regarding the potential disclosure of the statement in the future. Further, the appellant has not demonstrated how the disclosure of the statement would increase public confidence in the police's operations. I agree with the appellant that exemptions from the right of access should be limited and specific. Unfortunately, given the nature of the record, there is no reasonable way to sever information relating to her and her

¹⁶ Order MO-1573.

¹⁷ Section 43(2).

¹⁸ The appellant does not offer any support for this claim and I will not consider it further. There is no evidence before me to suggest the police have historically disclosed similar information to requesters through the FOI process.

parents from that of her brother and the other individual identified in the record.

[54] In conclusion, I uphold the police's decision to withhold the statement under section 38(b) of the *Act*.

ORDER:

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

Original signed by: _____

Justine Wai
Adjudicator

_____ June 27, 2024