



Information and Privacy
Commissioner/Ontario

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

ORDER M-236

Appeal M-9300080

York Regional Police Services Board



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ORDER

BACKGROUND:

The York Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records pertaining to a fatal motor vehicle accident. The requesters are the parents of an individual killed in the accident. The Police gave notice of the request to the driver of the motor vehicle and other individuals named in the records (the affected persons) under section 21 of the Act. Some of the affected persons consented to the disclosure of their personal information while others objected.

The Police disclosed some of the records, in whole or in part, and withheld the remaining records pursuant to exemptions in sections 8(2)(a), 10(1), 11(d) and (e), 12 and 14(1) of the Act. The Police also advised the requesters that there were 15 photographs to which access was granted, and invited them to view the photographs. The requesters were advised that if they wished to have actual reproductions of the photographs, they would be required to pay a fee of \$336.00. The requesters appealed the decision of the Police with respect to both the refusal to give access to the responsive documents, and to the amount of the fee for the reproduction of the photographs.

During mediation the Police provided the requesters with photocopies of the photographs free of charge. The appellants were not satisfied with the photocopies.

The Police granted access to one record to which an affected person had consented and in addition they agreed to disclose to the appellants pages 62 to 99 of the record. As a result, the exemptions in sections 10(1), 11(d) and (e), which were claimed for these pages only, are no longer in issue. The Police also stated that parts of pages 1, 2, 3, 6-10 inclusive, 100 and 112 do not contain any information responsive to the request. I have reviewed these records and I agree with the Police that they contain no responsive information.

Further mediation was not successful, and notice that an inquiry was being conducted to review the Police's decision was sent to the appellants, the Police and the affected persons. Representations were received from the Police only.

The records which remain at issue are pages 19-23, 28-33, 37-39, 41-43, 45, 101, 102 and 112.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies to the records.

- C. Whether the discretionary exemption provided by section 12 of the Act applies to the records.
- D. Whether the discretionary exemption provided by section 8(2)(a) of the Act applies to the records.
- E. Whether the fee for the reproduction of the photographs is in accordance with the terms of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part, 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,

...

Section 2(2) states:

Personal information does not include information about an individual who had been dead for more than thirty years.

I have reviewed all of the records at issue, and in my view, they contain information which fall under one or more of the above-mentioned paragraphs of the definition of personal information. I find that this

information relates to the individual who was killed in the accident, the driver of the motor vehicle who was charged with violation of the Highway Traffic Act and subsequently tried and convicted of careless driving, and other identifiable individuals, other than the appellants.

Because the death of the individual who was killed in the accident occurred within the last 30 years, I find that the provisions of section 2(2) of the Act are not applicable in the circumstances of this appeal.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies to the records.

I have found under Issue A that the information at issue qualifies as "personal information" under the Act. Section 14(1) of the Act prohibits the disclosure of personal information to any person other than to the individual to whom the information relates, except in certain circumstances listed under the section. In my view, the only exception to the section 14(1) mandatory exemption which has potential application in the circumstances of this appeal is section 14(1)(f), which reads as follows:

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

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

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

In determining whether section 14(1)(f) applies, consideration should be given to sections 14(2) and (3) of the Act, which provide guidance in determining whether or not disclosure of personal information would constitute an unjustified invasion of personal privacy, and section 14(4), which lists a number of specific types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

Section 14(3) identifies specific types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

Section 14(3)(b) states:

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

[IPC Order M-236/December 7, 1993]

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;

The personal information for which this exemption has been claimed was compiled by the Police during their investigation into possible violations of the Highway Traffic Act. The records contain information relating to the medical, employment and criminal history of one or more of the affected persons, as well as information about their address, telephone number, age and description. I am satisfied that this personal information was compiled and is identifiable as part of an investigation into a possible violation of law. Accordingly, I find that all of the records contain information which satisfies the requirements of a presumed unjustified invasion of personal privacy under section 14(3)(b).

Once it is determined that the requirements for a presumed unjustified invasion of personal privacy under section 14(3) have been established, I must consider whether any other provisions of the Act come into play to rebut this presumption. The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption (Order M-170).

I have considered section 14(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision. In addition, I have received no argument, and am not of the view, that the public interest override set out in section 16 of the Act applies.

Therefore, it is my view that the disclosure of the personal information contained in the records would constitute an unjustified invasion of the personal privacy of the affected persons and that the records are properly exempt from disclosure under section 14(1) of the Act.

Because of the manner in which I have disposed of Issues A and B, it is not necessary for me to deal with Issues C or D.

ISSUE E: Whether the fee for the reproduction of the photographs is in accordance with the terms of the Act.

During mediation, the Police provided the appellants with photocopies of the photographs free of charge. The appellants were not satisfied with black and white photocopies of the colour photographs and also did not wish to view the originals. They want to be provided with actual prints of the original photographs free of charge.

Section 23(1) of the Act provides that a person who is given access to a record or part of a record shall be

given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature. In this appeal, the Police have not indicated that it is not reasonably practicable to make a copy of the photographs; nor have they contested that photocopies of the photographs can be considered to be "copies" of the photographs, for the purposes of section 23(1) of the Act. In my view, the Police have an obligation under section 23(1) of the Act to provide the appellants with actual colour prints of the photographs in question. In my view, the questions that remain to be answered are whether the Police can charge a fee for providing the appellant with copies of the photographs in question, and if so, what is the appropriate fee.

Section 45(1) of the Act reads:

If no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to a record to pay,

- (a) a search charge for every hour of manual search required in excess of two hours to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record; and
- (d) shipping costs.

Section 6 of Reg. 823, R.R.O. 1990, under the Act (the Regulation), reads as follows:

The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act:

- 1. For photocopies and computer printouts, 20 cents per page.
- 2. For floppy disks, \$10 for each disk.
- 3. For manually searching for a record after two hours have been spent searching, \$7.50 for each fifteen minutes spent by any person.
- 4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each fifteen minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each fifteen minutes spent by any person.
6. For any costs, including computer costs, incurred by the institution in locating, retrieving, processing and copying the record if those costs are specified in an invoice received by the institution.

Where a requester appeals the institution's decision to charge a fee, it is my responsibility under section 45(5) of the Act to ensure that the fee is one that the requester is required to pay under the Act, that the amount is calculated in accordance with the schedule of fees established under the Regulation and that the estimates are reasonable. The burden of establishing that the fee estimate is in accordance with the Act rests with the institution.

In my view, an institution processing a request is only required to charge a fee for the costs that are specifically listed in section 45(1) of the Act, and can only charge the amounts established in the schedule of fees under the Regulation for those costs.

Section 45(1)(c) requires the Police to charge a fee for costs incurred in copying a record and section 6(6) of the Regulation allows the Police to recover any costs for copying of a record if those costs are specified in an invoice received by the Police. The Regulation does not specifically establish a fee for making copies of photographs where the copying is done "in-house" by the Police.

In their representations, the Police state:

The institution has always routinely released photographs of accident scenes for a fee. The fee is charged to recover the cost of reproducing such photographs. The fee charged at the time of this request was \$20 per photograph plus PST and GST.

The Police maintain that a charge of \$20 per photograph is reasonable and state that this fee is for the production of one 5" x 7" or 8" x 10" size copy, or one 8" x 10" "contact sheet" which contains up to twelve 2" x 2" size pictures. They state that this fee takes into account all of the time that any person spent in taking the original pictures of the accident scene, developing the film and printing the photographs from the negatives, as well as the use of all materials and equipment employed in this process. The Police do not provide specific estimates for the portion of the fees that relate to the production of copies of the existing photographs.

Having reviewed the representations of the Police, I find that they do not provide sufficient details to explain the statutory basis for the fee. In my view, the Police have not provided sufficient evidence to establish that

the fee of \$20 per copy is in accordance with the Act and the Regulation.

Because the Police have failed to provide sufficient evidence to demonstrate that the fee is in accordance with the Act, I have considered the following options in disposing of this appeal:

- (1) the Police could be ordered to provide a copy of the photographs free of charge; or
- (2) the Police could be ordered to provide a copy of the photographs and be permitted to recover the actual costs incurred, whether the photographs are processed in-house or by a commercial establishment; or
- (3) the Police could be allowed to calculate the fees under section 6(4) of the Regulation for "preparing a record for disclosure" and recover their cost at a rate of \$7.50 for each fifteen minute spent by any person in copying the photographs.

In the circumstances of this appeal, I feel that the first option is inappropriate, because it would be contrary to the "user pay" principle of the Act which requires institutions to recover some of the actual costs associated with an access request that is not for one's own personal information.

After considering the other two options, in my view, the third option seems to be the most practical and efficient, in the circumstances of this appeal. Though the Act and the Regulation do not explicitly provide for fees for copying of photographs, section 45(1)(b) of the Act requires the Police to charge a fee for preparing a record for disclosure. In my view, the fact that there is no specific rate in the Regulation for the reproduction of photographs does not preclude the Police from charging a fee for this service.

In my view, in the circumstances of this appeal, in-house production of copies of the photographs would fall within the meaning of "preparing a record for disclosure" and therefore, the rate of \$7.50 per 15 minutes established under section 6(4) of the Regulation may be charged. It should be noted, however, that the Police can only charge for the amount of time spent by any person copying the photographs. It is my view that if the Police decide to provide the service themselves, they cannot charge for the time spent taking the original photographs or for the use of material and equipment involved in the process of making copies. It should also be noted that neither the Provincial Sales Tax (PST) nor the Goods and Services Tax (GST) should be added to the fees under the Act.

ORDER:

1. I uphold the decision of the Police not to disclose the records at issue in this appeal.

2. I do not uphold the fee estimate issued by the Police.
3. I order the Police to provide the appellants within 15 days of the date of this order, with a revised fee estimate which sets out the amount of time required to be spent by a person making copies of the photographs. The time must be charged at a rate of \$7.50 per 15 minutes spent by the person. If the appellants accept the revised fee estimate, I order the Police to provide the copies of the photographs to the appellants within 10 days of the appellants' payment of the fee estimate.
4. If after receiving the revised fee estimate the appellants are not satisfied that the estimate is reasonable, they may file a new appeal with this office and request a review of the estimate.
5. In order to verify compliance with the provisions of this order, I order the Police to provide this office with a copy of the estimate which is provided to the appellants under Provision 3 above, **only** upon request.

Original signed by: _____
Asfaw Seife
Inquiry Officer

_____ December 7, 1993