Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-927

Appeal M_9600365

Renfrew Police Services Board

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NATURE OF THE APPEAL:

The appellant's son died in a car accident which was investigated by the Renfrew Police Service. Under the Municipal Freedom of Information and Protection of Privacy Act (the Act), the appellant submitted a request for information about the accident to the County of Oxford. This request was forwarded to the Renfrew Police Services Board (the Police) in accordance with section 18(2) of the Act.

In particular, the appellant sought access to:

- the coroner's report
- all police officers' notes and reports
- all witness statements
- all photographs taken
- the accident report
- the hospital's medical report, and
- any other documents and/or measurements related to the accident.

In essence, this is a request for the investigation file compiled by the Police and related officers' notebook entries.

The appellant did not receive a response to this request within the thirty-day period contemplated in the Act. In this situation, section 22(4) indicates that the Police are deemed to have given a notice of refusal to grant access, which gives rise to a right of appeal.

On this basis, the appellant filed an appeal of this "deemed refusal" to grant access. As a result, this office opened Appeal M-9600337. During the processing of that appeal, the Police issued a decision in response to the request. As a result, Appeal M-9600337 was closed.

In their decision, the Police denied access to the requested records. They advised the appellant that he did not qualify to make the request under section 54(a) of the Act (which allows the exercise of a deceased individual's rights or powers under the Act by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate).

The Police went on to indicate that the withheld information is exempt from disclosure under the following sections of the Act:

- invasion of privacy - section 14(1)
- law enforcement - sections 8(1)(a) and (b), section 8(2)(a).

Once he had received this letter, the appellant indicated that he disagreed with the exemptions claimed, and also that additional responsive records should exist. As a result, this office opened the present appeal file (M-9600365). In connection with this appeal, this office sent a Notice of Inquiry to the appellant, the Police and the other driver involved in the accident (who will be referred to throughout this order as "the other driver"). This notice dealt with the issue of

whether the above-noted exemptions apply to the records at issue and whether additional records exist. In response to this notice, the Police and the appellant submitted representations.

In their representations, the Police referred to the exemption provided by section 8(2)(c) of the Act, which they did not mention in their decision letter. In addition, subsequent to the submission of the representations of the Police, the appellant made a complaint under Part VI of the Police Services Act against the officers who investigated the accident. As a result, the Police now claim that the records at issue are outside the scope of the Act because of section 52(3). This section indicates that the Act does not apply to certain records relating to employment and labour relations.

As a result of these developments, this office sent a Supplementary Notice of Inquiry to the appellant and the Police. This notice was not sent to the other driver, because the earlier notice sent to him had been returned by Canada Post. The supplementary notice invited the parties to make submissions on:

(1) whether the Police should be permitted to raise section 8(2)(c) at this stage of the proceedings;

(2) if so, whether section 8(2)(c) applies, and

(3) whether section 52(3) applies to exclude the records from the scope of the Act.

Both the appellant and the Police submitted representations in response to the supplementary notice.

PRELIMINARY ISSUES:

JURISDICTION

The jurisdictional issue in this appeal is whether the records fall within the scope of section 52(3) of the Act. If so, they would be excluded from the scope of the Act unless they are records described in section 52(4), which lists exceptions to the exclusions established in section 52(3).

These sections state:

> (3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution

between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

(4) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment_related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

In their representations, the Police indicate that they rely in particular on section 52(3)1 because the appellant's complaint will require an investigation which could lead to proceedings under the Police Services Act. In order for the records to qualify under this section, the Police must establish that:

1. the record was collected, prepared, maintained or used by the Police or on their behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the Police. [Order M-815]

I have reviewed the records at issue. They consist of pages from a police officer's notebook, five witness statements, a typed Motor Vehicle Collision Report with two supplementary reports, and photographs of the damaged vehicles.

In my view, in assessing the possible application of section 52(3) in this case, it is important to note that the request was essentially directed at the contents of the police investigation file concerning the accident, and any related entries in officers' notebooks. It was not a request for information relating to the allegations against the investigating officers.

It is difficult to imagine any category of records which would be more integral to the basic mandate of a police force than the files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and related entries in officers' notebooks. Moreover, although some of them are prepared by employees of the Police, such records are not, in essence, related to employment or labour relations. Rather, they record the activities and conclusions of the investigating officers and, at times, others who conduct forensic analyses, etc. Generally speaking, such records are subject to the Act.

It is an established principle of statutory interpretation that an absurd result, or one which contradicts the purpose of the enactment, is not a proper implementation of the Legislature's intention. In Driedger on the Construction of Statutes (3rd ed., Butterworths), by Ruth Sullivan, the author states (at page 89):

> Legislative schemes are supposed to be elegant and coherent and operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme are likely to be labelled absurd.

Applying section 52(3) to the information at issue in this appeal would have the effect of permanently removing certain information maintained by the Police with respect to their basic mandate (i.e. protection of the peace and investigation of possible criminal behaviour which comes to their attention) from the scope of the Act, while most information of this nature would remain subject to the Act. As noted above, this information is not, in essence, related to employment or labour relations, and in my view, broadly speaking, it is to these latter categories of information that section 52(3) is intended to apply. Moreover, applying this section in the context of this appeal would result in the inconsistency that some files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries and related entries in officers' notebooks would be subject to the Act, while others would not be.

In my view, therefore, it would be a manifestly absurd result, and one not intended by the Legislature, if the records at issue were removed from the scope of the Act because they happen to have been reviewed in connection with an investigation of an employee's conduct.

On the other hand, in the context of a request for the file relating to an investigation of a police officer's conduct, where copies of incident reports, etc. from the original investigation formed

part of that file, section 52(3) could apply to that entire file including those particular copies. However, in my view, the main investigation file housing the original incident reports, etc., and related officers' notebook entries, would remain subject to the Act.

Accordingly, in the particular context of this request, I am not satisfied that the records at issue were prepared, collected, used or maintained by the Police, within the meaning of section 52(3)1, in relation to any proceedings or anticipated proceedings arising from the complaint about the handling of the case by the investigating officers. Therefore, requirement 2 has not been met.

Since all three requirements must be established before section 52(3)1 applies, I find that it does not apply.

Although the Police have not relied on it, an argument could also be made that section 52(3)3 applies in this appeal. However, like section 52(3)1, this section also requires that the Police prepared, collected, used or maintained the records in relation to certain matters related to employment or labour relations, and in particular, to meetings, consultations, discussions or communications. In my view, the analysis I have just outlined with respect to section 52(3)1 also applies here. I find that the records were not prepared, collected, used or maintained by the Police in relation to the activities mentioned in section 52(3)3, which therefore does not apply. Accordingly, I have concluded that the records at issue in this appeal are subject to the Act.

SECTION 54(a) OF THE ACT

As discussed later in this order, some of the information in the requested records is personal information pertaining to the appellant's son, who is deceased. In this context, the Police have made several references to section 54(a) of the Act, which states:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate.

The appellant has not argued that he qualifies under section 54(a). However, I would like to comment on the interpretation of this section advanced by the Police in this appeal.

In their decision letter, the Police begin by informing the appellant that the requested information "... can only be accessed per section 54 of the ... Act". In their representations, the Police refer to section 54(a), stating:

> This institution believes that section 54(a) is very relevant and important to this appeal.
>
> The Act provides exact situations when deceased's personal information can and cannot be released:
>
> 1. to a deceased person's personal representative;

2. to administer the individual's estate.

This section states when and only when the personal information of a deceased person can be released. [emphasis added]

I do not agree with this interpretation of section 54(a). This section merely provides that particular individuals may exercise the rights of others under the Act in certain situations. Section 54(a) is **not** an exemption, and it does **not** create an absolute prohibition on access to information about deceased persons by individuals who do not qualify under it.

In a request for the personal information of a deceased person, if section 54(a) applies, it means that the institution applies the standards used where an individual is requesting his or her own personal information. If an exemption is to be applied, it would have to be one of the exemptions in section 38, which may apply in that situation, rather than the exemptions in sections 6 through 15.

On the other hand, where an individual who does not qualify under section 54(a) requests a deceased individual's information, the institution applies the standards used where an individual requests another individual's information, or makes a request for general records. If an exemption is to be applied, it would have to be found in sections 6 though 15.

In this appeal, the Police have claimed that sections 8 and 14 apply to preclude access. In the circumstances of this appeal, the question to be decided is not whether the appellant qualifies under section 54(a), but whether the claimed exemptions apply to the information at issue.

LATE RAISING OF A DISCRETIONARY EXEMPTION

As noted previously, the Police raised the possible application of section 8(2)(c) in their first set of representations. These were dated February 19, 1997.

The Confirmation of Appeal sent to the Police regarding Appeal M-9600365 contained the following statement:

Please be advised that, if your institution wishes to claim discretionary exemptions in addition to those set out in your decision letter, you are only permitted to do so by January 2, 1997. [original emphasis]

As part of its efforts to expedite the processing of access appeals and in order to sensitize institutions about the prejudice which may accrue to appellants when discretionary exemptions are not applied promptly, the Commissioner's office issued an *IPC Practices* publication in January 1993, entitled "Raising Discretionary Exemptions During an Appeal". This document, which was sent to all provincial and municipal institutions, indicates that:

The IPC has found that institutions frequently raise new discretionary exemptions after the appeal process is underway. When this happens, the appellant must be informed and given the opportunity to comment on the applicability of the new

> exemption claims. This additional step prolongs the appeal process, particularly when new discretionary exemptions are raised at the later stages of an appeal.
>
> Effective March 1, 1993, the IPC will permit institutions to raise new discretionary exemptions only within a limited time frame - up to 35 days after the appeal has been opened. The initial notice sent out by the IPC will specify the deadline for claiming any new discretionary exemptions.

It has been determined in previous orders that the Commissioner has the power to control the process by which the inquiry is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in its original decision letter. In Order P-658, Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption(s) is claimed late in the appeals process, a decision maker has the authority to decline to consider the discretionary exemption(s). In this same order, the Inquiry Officer commented on the policy relating to late claiming of discretionary exemptions, set out in the issue of *IPC Practices* referred to above, as follows:

> [t]he objective of this policy is to provide institutions with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

I agree with these views of Inquiry Officer Fineberg and adopt them for the purposes of this order.

The Police have made submissions in support of their right to claim this exemption when they did. The majority of these particular submissions appear to be aimed at demonstrating that section 8(2)(c) applies. The rationale for claiming the section when they did appears to be that the decision to rely on it arose from the appellant's filing of a complaint against the investigating officers. In this regard, however, I note that the Police referred to section 8(2)(c) in their initial set of representations, while their supplementary representations indicate that the complaint was received **after** the initial representations were submitted. Thus, reliance on the complaint as a basis for claiming section 8(2)(c) appears to be an afterthought.

I am not satisfied that the explanation of the Police provides a sufficient basis for allowing them to claim section 8(2)(c) when they did. Therefore, I will not consider this exemption.

Moreover, if I had decided to consider the exemption, I would have gone on to find that the Police did not provide sufficient evidence to establish a reasonable expectation that the author of any of the records, or other individuals quoted or paraphrased in the records, would be exposed to civil liability by disclosure, and that for this reason, the exemption did not apply.

DISCUSSION:

LAW ENFORCEMENT

Sections 8(1)(a) and (b)

These sections state as follows:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

In order to qualify under these sections, the matter to which the record relates must first satisfy the definition of "law enforcement" in section 2(1) of the Act, which states:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b).

Given that the matter in question was a police investigation, this definition has been satisfied.

Because sections 8(1)(a) and (b) require that disclosure could reasonably be expected to interfere with a law enforcement matter or investigation, previous orders of this office have indicated that the law enforcement matter or investigation must be ongoing (Orders P-324 and P-403).

The Police have not indicated that their investigation or any other police activity relating to the accident is "ongoing". They indicate that if the deceased had survived, he would likely have been charged with failing to yield under the Highway Traffic Act. If anything, this supports the view that the investigation is not ongoing.

Since the Police have not demonstrated that the investigation or any other law enforcement "matter" relating to the accident is ongoing, I find that the application of sections 8(1)(a) and (b) has not been established.

Section 8(2)(a)

This section states as follows:

> A head may refuse to disclose a record,

> that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

In the discussion of sections 8(1)(a) and (b), above, I found that the investigation satisfies the definition of "law enforcement" in section 2(1) of the Act. The appellant argues that materials created after the investigation had concluded would not be "prepared in the course of law enforcement". However, in my view, all of the records at issue were prepared in the course of the investigation. I am also satisfied that the police have the function of enforcing and regulating compliance with various laws, including the Highway Traffic Act.

The remaining question to consider under section 8(2)(a) is whether any of the records at issue qualify as a "report".

In Order 200, Commissioner Tom Wright determined that in order to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information and that, generally speaking, results would not include mere observations or recordings of fact. I agree with this analysis and adopt it for the purposes of this appeal.

As noted, the records at issue consist of pages from a police officer's notebook, five witness statements, a typed Motor Vehicle Collision Report with two supplementary reports, and photographs of the damaged vehicles. In my view, the only records in this group which meet the definition of "report" in Order 200 are the Motor Vehicle Collision Report and the two supplementary reports, and I find that they are exempt under section 8(2)(a). The remaining records, which consist of the officer's notebook extracts, the witness statements and the photographs, are "mere observations or recordings of fact" and I find that they are not exempt under this section.

INVASION OF PRIVACY

Having exempted the Motor Vehicle Collision Report and the two supplementary reports under section 8(2)(a), I will not consider them further in this order. My discussion of "invasion of privacy" will only consider the other records at issue, namely, the officer's notebook extracts, the witness statements and the photographs of the damaged vehicles.

Section 2(1) of the Act defines "personal information" as "recorded information about an identifiable individual". It then lists a number of classes of information which would be included in the definition.

Section 2(2) of the Act states that "[p]ersonal information does not include information about an individual who has been dead for more than thirty years." In this case, the appellant's son died in 1996, and section 2(2) has no application.

I find that the photographs of the damaged vehicles do not contain any individual's personal information. Since the section 14(1) exemption can only apply to personal information, I find that the photographs are not exempt under this section. As no remaining discretionary exemptions are at issue with respect to these records, and no mandatory exemption applies, the photographs should be disclosed to the appellant.

I find that the other records contain the personal information of the deceased, the other driver, the witnesses and other individuals.

Section 14(1) of the Act prohibits an institution from disclosing personal information except in the circumstances listed in sections 14(1)(a) through (f). Of these, only sections 14(1)(a) or (f) could apply in this appeal.

Section 14(1)(a) creates an exception to the section 14(1) exemption upon the prior written request or consent of the individual to whom the information relates, if the record is one to which the individual is entitled to have access. In this appeal, six witnesses, some of whom gave statements which are at issue in this appeal, have consented in writing to the disclosure of their personal information. In this context, it is important to note that the other driver gave one of the witness statements which are at issue in this appeal, but he did not consent to disclosure.

Section 14(1)(f) creates an exception to the section 14(1) exemption "if the disclosure does not constitute an unjustified invasion of personal privacy."

Disclosing the types of personal information listed in section 14(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can disclose the personal information only if it falls under section 14(4) or if section 16 applies to it.

If none of the presumptions in section 14(3) apply, the institution must consider the factors listed in section 14(2), as well as all other relevant circumstances.

As noted above, six of the witnesses have consented in writing to the disclosure of their personal information. In my view, this consent is sufficient to trigger the application of section 14(1)(a). However, consents under section 14(1)(a) can only apply to the personal information of the consenting individuals, and not to the personal information of others, such as the appellant's son or the other driver. Therefore, in accordance with the section 14(1)(a) exception to the section 14(1) exemption, I find that the parts of the records which disclose **only** the personal information of these witnesses are not exempt under this section. As no remaining discretionary exemptions are at issue with respect to this information, and no mandatory exemption applies, it should be disclosed to the appellant. This finding pertains to information in the police officer's notes and the witnesses' statements (but not to the statement of the other driver, who did not consent, and whose statement contains no information relating to the consenting parties). I have highlighted this information on a copy of these records which are being sent to the Freedom of Information and Privacy Co-ordinator for the Police with a copy of this order.

I will now consider whether the disclosure of the remaining personal information in the records would constitute an unjustified invasion of privacy, in connection with section 14(1)(f).

Section 14(3)(b) of the Act indicates that disclosure of personal information which "... was compiled and is identifiable as part of an investigation into a possible violation of law ..." is presumed to be an unjustified invasion of personal privacy. In the circumstances of this case, it is clear that the Police were investigating possible violations of the Highway Traffic Act, as evidenced by their statement that they would have charged the appellant's son under that statute,

had he survived the accident. I find that the section 14(3)(b) presumption applies to all of the remaining information at issue. I also find that section 14(4) does not apply to this information.

The appellant has argued that the so-called "public interest override" in section 16 of the Act applies to this information. Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

The appellant cites Order P-270, in which Commissioner Tom Wright indicated that he would have applied the equivalent of section 16 in the provincial Freedom of Information and Protection of Privacy Act if he had found that one of the claimed exemptions applied. The basis of this conclusion was a public interest in safety issues relating to nuclear power facilities. The appellant argues that disclosure in this case may help prevent similar tragedies and ensure that appropriate police procedures are followed in motor vehicle accident investigations.

He also makes an argument based on the recommendations of the Standing Committee on the Legislative Assembly after its review of the Act, in favour of greater access to personal information about deceased relatives or friends.

In my view, the appellant's reasons for seeking access to this information are of a private, rather than public, nature. On this basis, I find that there is no compelling public interest in its disclosure. Although there may be a public interest in an amendment to permit greater access to information about deceased relatives (a topic on which I am not expressing an opinion), such an interest, if it exists, is distinct from a particular individual's interest in particular information, which in my view must be characterized as a private interest.

Therefore, since the presumption in section 14(3)(b) applies to all of the information remaining at issue, except the personal information of the consenting parties, and sections 14(4) and 16 do not apply, I find that this information is exempt under section 14(1). In connection with the information I have found to be exempt, I have considered the appellant's argument that it could be disclosed with personal identifiers removed. In my view, however, even with personal identifiers removed, the information I have decided to exempt would still relate to identifiable individuals (in particular, the appellant's son), and disclosure even in that form would be an unjustified invasion of personal privacy.

One result of my findings in this case is that the appellant will not receive access to the personal information about his deceased son in the records. I sympathize with the appellant's desire to obtain more information about his son's death. Unfortunately, where sections 14(4) and 16 do not apply, this result is dictated by the findings of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, which indicated that those sections are the only way to rebut a presumption under section 14(3).

EXISTENCE OF ADDITIONAL RECORDS

Where a requester provides sufficient details about the records which he is seeking and the Police indicate that further records do not exist, it my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Police must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

In this case, the appellant has explained his reasons for thinking that particular additional records may exist. He indicates that he has a copy of the Motor Vehicle Accident Report prepared by the officer who conducted the witness interviews, which the Police gave him before he made his formal request. However, he states that, in discussions with Police, he was advised of the existence of at least one additional Motor Vehicle Accident Report, prepared by another officer. He also refers to the possible existence of a Technical Traffic Collision Report or Technical Accident Investigation Report.

On this basis, I will order the Police to conduct a further search to determine whether they have these records in their custody or control.

ORDER:

1. I uphold the decision of the Police not to disclose the Motor Vehicle Collision Report and two supplementary reports, as well as the statement given by the other driver, in their entirety, and the parts of the police officer's notebook and the other witness statements which are **not** highlighted on the copy of these records which is being sent to the Freedom of Information and Privacy Co-ordinator for the Police.

2. I order the Police to disclose to the appellant, in their entirety, the photographs of the damaged vehicles, and those parts of the police officer's notebook and the other witness statements which **are** highlighted on the copy of these records which is being sent to the Freedom of Information and Privacy Co-ordinator for the Police, by sending a copy of the records to the appellant by **May 7, 1997**.

3. I order the Police to conduct a further search for any additional Motor Vehicle Accident Reports pertaining to the accident, and for any Technical Traffic Collision Report or Technical Accident Investigation Report which may have been prepared in connection with the accident, and to advise the appellant of the results of this search in writing by letter to be sent to the appellant on or before **May 7, 1997**. In addition, if any new records are located as a result of this search, I order the Police to send the appellant a decision letter regarding access to these records by **May 7, 1997**.

4. I order the Police to send me a copy of the correspondence referred to in Provision 3 at the same time it is sent to the appellant.

5. In order to verify compliance with Provision 2 of this order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: April 16, 1997
John Higgins
Inquiry Officer