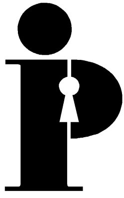

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1297

Appeal MA-990124-1

Elliot Lake Police Services Board

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NATURE OF THE APPEAL:

The appellant submitted a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Elliot Lake Police Services Board (the Police). The request was for access to Police Report 69964/2, relating to a fatal motor vehicle accident involving the appellant's son.

The Police denied access to the records they identified as responsive to the request, claiming the exemptions found in sections 8(1)(l), 8(2)(a), 14, 38(a) and 38(b) of the Act.

The appellant appealed the decision of the Police.

I sent a Notice of Inquiry to the Police, the appellant and five individuals (the affected persons) who had provided statements to the Police during its investigation of the accident. Representations were received from the Police and the appellant. A representative of one of the affected persons telephoned in response to the Notice of Inquiry indicating that the individual consented to the disclosure of the information he provided.

RECORDS:

The records consist of a General Occurrence Report, a Motor Vehicle Collision Report, Supplementary Reports, witness statements, a Motor Vehicle Accident Report, copies of photographs, officers' notes and two videotaped witness statements.

DISCUSSION:

Personal Representative

The appellant is able to exercise the deceased's right to request and be granted access to the deceased's personal information if he can demonstrate: (1) that he is the deceased's "personal representative" and (2) that his request for access to the information "relates to the administration of the deceased's estate".

The term "personal representative" in section 54(a) of the Act means an executor, an administrator, or an administrator with will annexed (Order P-294). The phrase "relates to the administration of the individual's estate" in section 54(a) refers to records relating to financial matters to which the personal representative requires access in order to wind up the estate. (Adams v. Ontario (Information and Privacy Commissioner) (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.), quashing Order P-1027; see also Orders P-294, M-919 and MO-1174).

The appellant has not provided me with any documentation appointing him as an executor, administrator or administrator with will annexed. He simply asserts that he is the father of the deceased, and therefore his personal representative, and states that it is his absolute right to obtain all the pertinent and relevant information concerning the circumstances leading to his son's fatal car accident. Further, he has not explained how his request for information relates to the administration of the deceased's estate.

Accordingly, I find that the appellant does not qualify as the deceased's personal representative, and

section 54(a) does not apply.

Invasion of Privacy

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The records relate to the investigation of the fatal accident involving the appellant's son. However, I do not accept that because the records are related to the accident, and that the deceased is an "identifiable individual", that each and every piece of information within the file necessarily qualifies as their personal information.

In Order M-352, former Inquiry Officer John Higgins reviewed the different procedures for processing requests within the legislative scheme established by the Municipal Freedom of Information and Protection of Privacy Act. In the context of a request for records which contain the requester's own personal information, Inquiry Officer Higgins stated:

> In order to give effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the Commissioner's office has developed an approach for determining whether Part I or Part II of the Act applies. In that approach, the unit of analysis is the **record**, rather than individual paragraphs, sentences or words contained in a record.
>
> This approach has been applied in many past orders, and it is set out in detail in the October 1993 edition of *IPC Practices* entitled "Responding to Requests for Personal Information". That publication states, in part, as follows:
>
>> Generally, an individual seeking access to a record that contains his or her personal information has a greater right of access than if the record does not contain any such information. ... Part II of the municipal Act oblige[s] institutions to **consider** whether records should be released to an individual, regardless of the fact that they may otherwise qualify for exemption under the legislation.
>
> In my view, the record-by-record analysis best reflects the special character of requests for records containing one's own personal information, and it provides a practical, uniform procedure which all institutions can apply in a consistent manner.
>
> It requires institutions to analyze records which are identified as responsive to a request in order to determine whether any of them contain personal information pertaining to the requester. For records which are found to contain the requester's own personal information, the institution's access decision is to be made under Part II of the Act. For records which do not contain the requester's own personal information, the decision would be under Part I.

This approach has been adopted by the Commissioner's office and applied in many past orders. In my view, it is consistent to use the same unit of analysis when considering a request for records which do not contain the appellant's own personal information, but do contain the personal information of others. Accordingly, I have reviewed each record individually and considered whether it contains personal information, and to whom that personal information relates.

Any information in the records provided by a police officer, fire fighter, ambulance attendant or Ministry of Transportation official was provided as part of that person's employment responsibilities and, therefore, this information does not constitute their personal information (Orders 139, P-157, P-257, P-326, P-377, 194, M-82, P-477 and P-470 and Reconsideration Order R-980015).

There are 57 photographs at issue in this appeal. The 37 photographs on Records 33-42 contain images of the vehicle only, and do not contain the personal information of any identifiable individual. Similarly, the diagram of the scene on Record 13 does not contain the personal information of any identifiable individual.

The 16 photographs on Records 43-47 contain images of the deceased, which I find to qualify as his personal information. Because the copies I have are photocopies of photographs, it is not abundantly clear whether the 4 remaining photographs on Record 32 contain the images of the deceased and/or witnesses. However, because it appears that these pictures capture the administration of first aid and/or attempts to extract the appellant's son from the vehicle, I find that they contain the personal information of the deceased.

The two videotaped statements contain the personal information of the witnesses giving the statements and the deceased. The second statement includes personal information of other identifiable individuals as well.

The affected person who provided the second videotaped statement consented to the disclosure of the information he provided. However, after he provided his name, address, telephone number and date of birth, the rest of his statement contains the personal information of other identifiable individuals who have not provided their consent, as well as the personal information of the deceased.

Section 4(2) of the Act obliges the institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, in these circumstances, I find that it would not be practical to order the Police to edit that part of the tape in order to disclose small disconnected snippets of the statement. Accordingly, I find that the section 14(1)(a) exception to the section 14 exemption only applies to the affected person's name, address, telephone number and date of birth, because he has consented to the disclosure of his personal information to the appellant.

The remaining information qualifies as the personal information of the deceased and other identifiable individuals. Records 2, 4 and 19 also contain the personal information of the appellant.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 14(1) of the Act prohibits an institution from releasing this information.

In both these situations, sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767]. 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 16 exemption.

The Police submit that the section 14(3)(b) presumption applies to the personal information in the records. This section 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;

I am satisfied that the personal information in the records was compiled and is identifiable as part of the police investigation into a possible violation of law, specifically the Criminal Code. Accordingly, I find that the requirements of the section 14(3)(b) presumption have been met. This presumption still applies, even if, as in the present case, the investigation is not continued and no charges are laid (Orders P-223, P-237, P-1225, PO-1715 and MO-1197).

The appellant submits that the anguish felt by himself, his wife and his family as a result of his son's death will be greatly reduced and/or alleviated once he gains access to all the evidence surrounding his son's fatal car accident. While I sympathize with the appellant's desire to better understand the circumstances of his son's death, I must uphold the decision of the Police in this appeal. Even if I were to find that the appellant's

arguments raised a relevant consideration under section 14(2) in balancing his rights to the personal information in the records against that of other individuals in the circumstances of this appeal, the Divisional Court's decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767 held that the factors and considerations in section 14(2) cannot be used to rebut the presumptions in section 14(3).

As I previously indicated, a presumption in section 14(3) may only be overcome by the application of section 14(4) or section 16 of the Act. The information does not fall within the types of information listed in section 14(4). The appellant has not raised the possible application of section 16, and I find that it does not apply.

Because the presumption in section 14(3)(b) applies, the exception in section 14(1)(f) has not been established for the personal information of individuals other than the appellant, and I find that it is exempt under section 14(1). Similarly, for those records which do contain the appellant's personal information, the application of this presumption means that disclosure would be an unjustified invasion of personal privacy, and these records are exempt under section 38(b).

Law Enforcement

The Police did not make representations respecting the application of section 8(1)(l). Having reviewed the records, I find that the application of this exemption has not been established.

In order for a record to qualify for exemption under section 8(2)(a) of the Act, the Police must satisfy each part of the following three-part test:

1. the record must be a report; **and**

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[See Order 200 and Order P-324]

The word "report" is not defined in the Act. However, in order for a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

The records in this appeal do not qualify either individually or as a whole as a report. The final results of the investigation are not included, and the records simply document the facts and the officer's observations. Accordingly, the first requirement of the section 8(2)(a) test has not been met, and the exemption does not apply.

ORDER:

1. I order the Police to disclose Record 13, the copies of the photographs on Records 33-42, and the part of the videotaped statement which contains the name, address, telephone number and date of birth of the affected person who provided the second statement on the tape to the appellant by sending him copies of the records and photographs no later than **June 7, 2000** but no earlier than **May 31, 2000**.

2. I uphold the decision of the Police not to disclose the remaining information in the record.
3. In order to verify compliance with the terms 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: May 2, 2000
Holly Big Canoe
Adjudicator